



## **Advice of the Northern Ireland Human Rights Commission on the House of Common's Defence Committee report on 'Investigations in fatalities in Northern Ireland involving British military personnel'**

### **Summary**

The NIHRC provides the following advice to the NI Office in relation to the options put forward by the House of Common's Defence Committee Report on 'Investigations in fatalities in Northern Ireland involving British military personnel'.

#### Option 1:

The NIHRC advises that a statute of limitation restricting the prosecution of state actors would amount to an amnesty. If such an amnesty were to be held to excuse acts constituting gross human rights violations and abuses (including the right to life and the prohibition on torture or other cruel, inhuman or degrading treatment or punishment) this would be incompatible with human rights law. (paragraph 34)

#### Option 2:

The NIHRC continues to recommend that the Stormont House Agreement is implemented in line with the recommendations of the UN Human Rights Committee and Council of Europe. (paragraph 40)

#### Option 3:

Noting that the lack of certainty regarding the general application of the Sentences (NI) Act 1998 and concerns about its application to members of the police service and armed forces the NIHRC recommends a review, and if necessary amendment, to ensure the legislation is applied equally and fairly to all perpetrators of conflict-related offences. (paragraph 52)

#### Option 4:

The NIHRC recommends against this option, as it would put the UK government in breach of its international human rights obligations to conduct an effective official investigation under the right to life and prohibition of torture, inhuman and degrading treatment. (paragraph 57)



## **Advice of the Northern Ireland Human Rights Commission on the House of Common's Defence Committee report on 'Investigations in fatalities in Northern Ireland involving British military personnel'**

### **Introduction**

1. The Northern Ireland Human Rights Commission (NIHRC), pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights. The NIHRC also has a role, under Section 69(3), to advise the Secretary of State and the Executive Committee of the Assembly of legislative and other measures which ought to be taken to protect human rights. In accordance with these functions, the following advice is submitted to the Northern Ireland Office in response to the House of Common's Defence Committee report on 'Investigations in fatalities in Northern Ireland involving British military personnel'.
  
2. The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. The relevant international treaties in this context include:
  - the International Covenant on Civil and Political Rights (ICCPR)<sup>1</sup>
  - the Convention against Torture (CAT)<sup>2</sup>
  - EU Charter on Fundamental Rights (CFR)<sup>3</sup>

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<sup>1</sup> Ratified by the UK in 1976.

<sup>2</sup> Ratified by the UK in 1988.

<sup>3</sup> Ratified by the UK in 2000.

3. The UK Government is subject to the obligations contained within these international treaties by virtue of its ratification of these instruments.<sup>4</sup>
4. In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the UN and the CoE. These declarations and principles are non-binding but provide further guidance in respect of specific areas of human rights law. The relevant standards in this context include:
  - CoE Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations<sup>5</sup>
  - UN OHCHR, Rule-of-law Tools for Post-conflict States, Amnesties (2009)
  - UN Principles on the Effective Prevention and Investigation on Extra-legal, Arbitrary and Summary Executions<sup>6</sup>

## **Relevant human rights standards**

### Procedural obligations

5. The right to life is protected by Article 2 ECHR and Article 6 of the ICCPR. The right to freedom from torture, inhuman and degrading treatment is protected by Article 3 ECHR and Article 7 of the ICCPR as well as by the CAT. In addition to these substantive rights, human rights law requires that allegations covering the right to life be thoroughly investigated. This is the procedural limb of the rights and a failure to conduct such an investigation can amount to a violation in its own right.
6. The ECHR requires an effective official investigation in respect of allegations under Articles 2 and 3.<sup>7</sup> The European Court of

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<sup>4</sup> The UK Mission at Geneva has stated, 'The UK's approach to signing international treaties is that we only give our signature where we are fully prepared to follow up with ratification in a short time thereafter.' See, UK Mission at Geneva, 'Universal Periodic Review Mid-term Progress Update by the United Kingdom on its Implementation of Recommendations agreed in June 2008' (March 2010) on recommendation 22 (France).

<sup>5</sup> Guidelines adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies, H/Inf (2011) 7 (2011)

<sup>6</sup> Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, UN Doc. E/1989/65 (1989) Annex

<sup>7</sup> Although these principles were established in Article 2 cases, the ECt.HR has confirmed that these apply to Article 3 cases: *Assenov and Others v. Bulgaria*, Application No. 90/1997/874/1086 (28 October 1998) para 102; *Mocanu and Others v. Romania*, Application Nos. 10865/09, 45886/07 and 32431/08 (17 September 2014) paras 319-325

Human Rights (ECt.HR) has set out that such an investigation must include the following elements: (1) the investigation must be independent; (2) the investigation must be capable of leading to the identification of those responsible; (3) the investigation must be prompt; (4) there must be public scrutiny of the investigation or its results; and (5) the next-of-kin or the victim must be involved to the extent necessary to safeguard their interests.<sup>8</sup>

7. The ECt.HR has highlighted that the obligation to ensure effective investigations extends to circumstances in which the perpetrator is a private individual. In the case of *Angelova and Ilev v. Bulgaria*, the ECt.HR commented:

“However, the absence of any direct State responsibility for the death of the applicants' relative does not exclude the applicability of Article 2 of the Convention.....The Court reiterates that in the circumstances of the present case this obligation requires that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances. The investigation must be capable of establishing the cause of the injuries and the identification of those responsible with a view to their punishment. Where death results, as in the present case, the investigation assumes even greater importance, having regard to the fact that the essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life.”<sup>9</sup>

8. The general procedural obligations under the ICCPR also requires the State to “investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.”<sup>10</sup> CAT requires a “prompt and impartial investigation, wherever there is reasonable ground to believe that an act of

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<sup>8</sup> *Jordan v. the United Kingdom*, Application No. 24746/94 (04 August 2001) paras 106-9

<sup>9</sup> *Angelova and Ilev v. Bulgaria*, Application no. 55523/00 (26 July 2007) paras 93-4

<sup>10</sup> UN HRC, General Comment 31, Nature of the General Legal Obligations on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) para 15; UN, Comments and General Recommendations Adopted by Human Rights Treaty Bodies, General Comment 6 on Article 6 (Sixteenth session, 1982) contained within UN Doc. HRI/GEN/1/Rev.1 at 6 (1994) para 4

torture has been committed”,<sup>11</sup> and the UN Principles on the Effective Prevention and Investigation on Extra-legal, Arbitrary and Summary Executions requires a “thorough, prompt and impartial investigation” in all cases where complaints are made suggesting an unnatural death.<sup>12</sup>

9. The ECt.HR has found procedural violations under Article 2 ECHR in respect of the failure to conduct effective investigations into conflict-related deaths in NI. In the McKerr group of cases the ECt.HR found a number of violations, including: lack of independence of investigating police officers, lack of public scrutiny and information to victims' families on reasons for decisions not to prosecute, defects in the police investigation, limitations on the role and scope of the inquest procedure, absence of legal aid for the representation of the victims' families and delays in inquest proceedings.<sup>13</sup>
  
10. In respect of the framework for the investigation of Article 2 deaths in NI, the CoE's Committee of Ministers continues to supervise the execution of the McKerr group of cases. Whilst the UK Government has introduced a number of general measures to address this issue, the CoE does not consider the judgments findings have been fully implemented. In June 2016, the Committee of Ministers:

“called upon the authorities to take all necessary measures to ensure the Historical Investigations Unit can be established and start its work without any further delay, particularly in light of the length of time that has already passed since these judgments became final and the failure of previous initiatives to achieve effective, expeditious investigations.”<sup>14</sup>

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<sup>11</sup> Article 12 CAT

<sup>12</sup>UN CESCR, Principles on the Effective Prevention and Investigation on Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, UN Doc. E/1989/65 (1989) Annex, Principle 9

<sup>13</sup> The McKerr group of cases includes: McKerr v. the United Kingdom, Application No. 28883/95; Shanaghan v. the United Kingdom; Application No. 37715/95; Jordan v. the United Kingdom, Application 24746; Kelly and Others v. the United Kingdom, Application No. 30054; McShane v. the United Kingdom, Application No. 43290/98 and Finucane v. the United Kingdom, Application 29178/95

<sup>14</sup> Committee of Ministers, 1259th meeting (7-8 June 2016) Item H46-42 McKerr group v. the United Kingdom (Application No. 28883/95) Supervision of the execution of the Court's judgments

11. In a visit to NI in 2014, the CoE Commissioner for Human Rights, Nils Muižnieks:

“urge[d] the UK government and other parties concerned to return to negotiations on mechanisms for dealing with the past in the Stormont House Agreement, including setting up the Historical Investigations Unit, as soon as possible.”<sup>15</sup>

12. More recently, the Commissioner has also stated:

“I'm concerned. I think far too long a period has passed before people have received justice and information about the fate of their loved ones and about the fate of these cases ... It is clear that budgetary cuts should not be used as an excuse to hamper the work of those working for justice. Westminster cannot say 'well we will let the Northern Irish Assembly deal with this, this is under their jurisdiction. The UK government cannot wash its hands of the investigations, including funding of the investigations. These are the most serious human rights violations. Until now, there has been virtual impunity for the state actors involved and I think the government has a responsibility to uphold its obligations under the European Convention to fund investigations and to get the results. The issue of impunity is a very, very serious one and the UK government has a responsibility to uphold the rule of law. This is not just an issue of dealing with the past; it has to do with upholding the law in general.”<sup>16</sup>

13. In the most recent concluding observations on the UK, the UN CAT Committee recommended that:

“the State party develop a comprehensive framework for transitional justice in Northern Ireland and ensure that

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<sup>15</sup> Commissioner for Human Rights, Council of Europe, Visit to United Kingdom: Forthcoming reforms to human rights law must not weaken protection, London (22 January 2016)

<sup>16</sup> BBC News, NI UK must pay for Troubles killings investigations says European official (6 November 2014)

prompt, thorough and independent investigations are conducted to establish the truth and identify, prosecute and punish perpetrators.”<sup>17</sup>

14. In 2015, the UN Human Rights Committee again focused its attention on NI, recommending that the UK, including the NI Executive:

“(a) Ensure, as a matter of particular urgency, that independent, impartial, prompt and effective investigations, including those proposed under the Stormont House Agreement, are conducted to ensure a full, transparent and credible account of the circumstances surrounding events in NI with a view to identifying, prosecuting and punishing perpetrators of human rights violations, in particular the right to life, and providing appropriate remedies for victims;

(b) Ensure, given the passage of time, the sufficient funding to enable the effective investigation of all outstanding cases and ensure its access to all documentation and material relevant for its investigations.”<sup>18</sup>

15. In March 2017, the UN Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence, presented a report on his mission to the UK from 9 to 18 November 2015 to the UN Human Rights Council. In his report, the Special Rapporteur set out a number of suggestions for ensuring the effective implementation of the Stormont House Agreement and stated that:

“There is a noticeable difference between the approaches taken for non-recurrence and those to address the legacy of the past: the former stemmed

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<sup>17</sup> Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, adopted by the Committee at its fiftieth session (6-31 May 2013) CAT/C/GBR/CO/5 (24 June 2013)

<sup>18</sup> UN Human Rights Committee, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/7 (July 2015) para 11(b)

from initiatives that were comprehensive in scope and pursued with few restraints; the latter are halting and reticent, open to charges of obfuscation more than transparency (for example, the redefinition of “collusion”, the use of “national security” considerations, discussions over the definition of “victim”, or ambiguities in the classification of the conflict). It is not surprising that the two types of measures have found such radically different degrees of success. Reticence and indirectness have involved costs not just for victims, but also for the broader project of a society genuinely able to move forward together – obviously, since the two are linked.”<sup>19</sup>

16. In its response to the Special Rapporteur’s Report the UK government outlined that it:

“emphatically does not accept the equivalence inferred, whether intentionally or not, by the SR between terrorist organisations and the security forces that served Northern Ireland in extremely difficult circumstances upholding democracy and the rule of law.”<sup>20</sup>

17. The UK government acknowledged the recommendations contained in the Special Rapporteur’s Report and noted that progress towards many of the recommendations can best be

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<sup>19</sup> 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, A/HRC/34/62/Add.1, UN Human Rights Council (17 November 2016) para 114; See further paragraph 15, “Truth, justice, reparations and guarantees of non-recurrence understood as components of a comprehensive policy to redress legacies of violations and abuse can afford recognition to victims, promote civic trust, strengthen the rule of law and contribute to reconciliation or social integration. Such measures should not, however, be used as instruments of “turn-taking”, tools of patronage or a guarantee of control over a particular constituency. Nothing undermines the socially integrative potential of justice measures more than the fact or the perception that their design or implementation is partial. Ultimately, truth, justice, reparation and guarantees of non-recurrence will be effective only if the violation of fundamental rights is the sole consideration triggering access to these measures.”

<sup>20</sup> 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, Comments by the State, A/HRC/34/62/Add.2 (18 November 2016) para

achieved through implementation of the Stormont House Agreement.<sup>21</sup>

### Equality and non-discrimination

18. Under the ICCPR, Article 26 protects the rights to equality before the law and equal protection of the law. Neither the ICCPR nor the UN Human Rights Committee has defined these terms but Manfred Nowak has described 'equality before the law' as meaning that the law must be applied in the same manner to all.<sup>22</sup> Joseph et al. explain that it guarantees equality and fairness with regard to the enforcement and administration of the law.<sup>23</sup>
19. Article 26 ICCPR also prohibits discrimination and guarantees effective protections against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
20. The UN Human Rights Committee, in its general comment on non-discrimination, has emphasised that Article 26 "prohibits discrimination in law or in fact in any field regulated and protected by public authorities."<sup>24</sup>
21. In the case of *Vos v. Netherlands*, two Committee members appended an individual opinion in which they stated:

"Article 26 of the Covenant has been interpreted as providing protection against discrimination whenever laws differentiating among groups or categories of individuals do not correspond to objective criteria. It has also been interpreted in the sense that whenever a difference in treatment does not affect a group of people but only separate individuals, a provision cannot be deemed discriminatory as such; negative

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<sup>21</sup> 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, Comments by the State, A/HRC/34/62/Add.2 (18 November 2016) para 5

<sup>22</sup> Nowak, M. (1993) UN Covenant on Civil and Political Rights: CCPR Commentary (NP Engel, Kehl)

<sup>23</sup> Joseph, S. et al. (2004) The International Covenant on Civil and Political Rights: Cases, Materials and Commentary (2nd ed.) para 23.105

<sup>24</sup> UN Human Rights Committee (1989) General Comment No. 18 on Non-discrimination, para 12

effects on one individual cannot then be considered to be discrimination within the scope of article 26.”<sup>25</sup>

22. The UN Human Rights Committee has not issued a detailed consensus comment on the meaning of ‘any other status’ within the Article 26 and instead have addressed the matter on a case by case basis. Some examples of issues found to fall within the scope of ‘other status’ include: difference between students at private and public schools;<sup>26</sup> difference between employed and unemployed;<sup>27</sup> distinction between foster and natural children;<sup>28</sup> performance of national service in a military and non-military capacity.<sup>29</sup>

### **The Defence Committee Report**

23. The NIHRC has analysed the options set out in the Defence Committee’s report for compliance with the UK’s human rights obligations.

#### Option 1: A Statute of Limitations

24. The first option presented by the Defence Committee is a proposal to introduce a statute of limitations. Sir Jeffrey Donaldson MP originally raised the proposal in a Commons debate:

“The time has come for the Government finally to do something to protect the men and women who served our country. They were not provided for in the 1998 agreement, while the terrorists were. Special provision was made for the terrorists in 1998, in the form of the early release scheme, and other concessions have been made since, as I

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<sup>25</sup>Hendrika S. Vos v. The Netherlands, Communication No. 218/1986, UN doc. CCPR/C/35/D/218/1986 (1989). Individual opinion: submitted by Messrs. Francisco Aguilar Urbina and Bertil Wennergren pursuant to rule 94. paragraph 3. of the Committee’s provisional rules of procedure, concerning the views of the Committee on communication No. 218/1986, Vos v. the Netherlands

<sup>26</sup> Blom v. Sweden, Communication No. 191/1985, U.N. Doc. CCPR/C/OP/2

<sup>27</sup> Cavalcanti Araujo-Jongens v. Netherlands, Communication No. 418/90, UN doc. CCPR/C/49/D/418/1990

<sup>28</sup> Oulajin & Kaiss v Netherlands, Communications Nos. 406/1990 and 426/1990, UN doc. CCPR/C/46/D/406/1990 and 426/1990

<sup>29</sup> Jarvinen v. Finland, Communication No. 295/1988, UN doc. CCPR/C/39/D/295/1988

outlined earlier, but nothing has been done for those who served the Crown. That is wrong and needs to be addressed. 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 be 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.”<sup>30</sup>

25. This is the option that the Defence Committee has chosen to recommend, “the enactment of a statute of limitations, covering all Troubles-related incidents, up to the signing of the 1998 Belfast Agreement, which involved former members of the Armed Forces”.<sup>31</sup> This formulation differs slightly to the comments made by Sir Jeffrey Donaldson as noted above; however, the Defence Committee recommendation appears to relate to a statute of limitations involving former members of the Armed forces and does not seem to include the qualification of having been the subject of prior police investigations.

26. The UN OHCHR explains that an amnesty can include:

“a failure to enact laws prohibiting crimes that should, under international law, be punished; [a] failure to bring criminal prosecutions against those responsible for human rights violations even when their laws present no barriers to punishment; [a] failure to provide prosecutors the resources they need to ensure effective prosecution; and intimidation of witnesses whose testimony is needed to ensure a full legal reckoning.”<sup>32</sup>

27. The NIHRC recognises that amnesties can take many forms, often exempting “criminal prosecution and, possibly, civil action

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<sup>30</sup> Sir Jeffrey Donaldson, HC Deb (Hansard) 23 February 2017, cols 1190-92

<sup>31</sup> Defence Committee report, para 52

<sup>32</sup> UN OHCHR, Rule-of-law Tools for Post-conflict States, Amnesties, (2009) p6

... typically limited to conduct occurring during a specific period and/or involving a specified event or circumstance".<sup>33</sup> Furthermore, amnesties "commonly specify a category or categories of beneficiaries, such as members of rebel forces, State agents or political exiles. Amnesties often and increasingly specify particular crimes or circumstances for which criminal prosecution and/or civil actions are barred."<sup>34</sup>

28. The UN OHCHR recognises blanket amnesties<sup>35</sup>, disguised amnesties<sup>36</sup> and conditional amnesties<sup>37</sup> and that these can occur de jure or de facto. A statute of limitation, although not expressly called an amnesty, can amount to a disguised amnesty if it ultimately prevents alleged human rights violations and abuses from being addressed.
29. The UN OHCHR has noted that "[i]nternational law and United Nations policy are not opposed to amnesties per se, but set limits on their permissible scope."<sup>38</sup> The UN Secretary-General has stated that UN policy is "to reject any endorsement of amnesty for genocide, crimes against humanity, or gross violations of human rights".<sup>39</sup>
30. The NIHRC recalls that adjectives including serious, gross, grave, systemic, and severe are used, sometimes interchangeably and without uniformity, to describe the gravity of human rights violations and abuses, and violations of other international laws. The UN OHCHR has noted that:

"gross violations of human rights have been widely recognized to include extrajudicial, summary or arbitrary executions; torture and similar cruel, inhuman or degrading treatment; slavery; and enforced disappearance, including gender-specific instances of these offences. Although the phrase "gross violations of human rights" is used widely in

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<sup>33</sup> UN OHCHR, Rule-of-law Tools for Post-conflict States, Amnesties, (2009) p6

<sup>34</sup> Ibid, p7

<sup>35</sup> Ibid, p8

<sup>36</sup> Ibid, p8

<sup>37</sup> Ibid, p7

<sup>38</sup> Ibid, p44

<sup>39</sup> UN SC, The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, UN Doc. S/2011/634 (2011) para 12

human rights law, it has not been formally defined."<sup>40</sup>

31. The CoE Guidelines for Eradicating Impunity for Serious Human Rights Violations also state that 'serious' human rights violations may include: extra-judicial killings; negligence leading to serious risk to life or health; torture or inhuman or degrading treatment by security forces, prison officers or other public officials; enforced disappearances; kidnapping; slavery, forced labour or human trafficking; rape or sexual abuse; serious physical assault, including in the context of domestic violence; and the intentional destruction of homes or property.<sup>41</sup>
32. The ECt.HR has used the term 'serious' in relation to individual violations of the right to life, and the prohibition on torture or other cruel, inhuman or degrading treatment or punishment, originating from both the substantive and procedural limbs of Articles 2 and 3 ECHR.<sup>42</sup> The ECt.HR has also found serious violations of further rights, including the right to a private and family life under Article 8 ECHR.<sup>43</sup>
33. The ECt.HR has not ruled directly on amnesties,<sup>44</sup> but recently highlighted "a growing tendency in international law is to see

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<sup>40</sup> UN OHCHR, Rule-of-law Tools for Post-conflict States, Amnesties (2009) p21; see also UN Commission on Human Rights, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8 (1993) para 13

<sup>41</sup> CoE, Eradicating impunity for serious human rights violations, Guidelines and reference texts, H/Inf(2011)7, p23; also see Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 30; also see UN OHCHR, The Corporate Responsibility to Respect Human Rights, An Interpretive Guide HR/PUB/12/02 (2012) p6

<sup>42</sup> Velikova v. Bulgaria, Application No. 41488/98 (4 October 2000) para 82; Kuzmenko v. Russia, Application No. 18541/04 (20 June 2011) para 58; El-Masri v. The Former Yugoslav Republic of Macedonia, Application No. 39690/09 (13 December 2012) para 269; Eremiášová and Pechová v. The Czech Republic, Application No. 23944/04 (16 May 2012) paras 132 and 168; Ghimp and Others v. The Republic of Moldova, Application No. 32520/09 (3 January 2013) para 68; Timus and Tarus v. The Republic of Moldova, Application No. 70077/11 (15 January 2014) para 68; Husayn (Abu Zubaydah) v. Poland, Application No. 7511/13 (16 February 2015) para 566; Al Nashiri v. Poland, Application No. 28761/11 (16 February 2015) para 592-595

<sup>43</sup> Moldovan and Others v. Romania (No.2), Applications Nos 41138/98 and 64320/01 (30 November 2005) para 109

<sup>44</sup> In 2012 the ECt.HR stated that "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." Tarbuk v. Croatia, Application No. 31360/10 (29 April 2013) para 50. However this can be contrasted against the comment in Association "21

such amnesties [for acts which amounted to grave breaches of fundamental human rights] as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental rights.”<sup>45</sup>

34. **The NIHRC advises that a statute of limitation restricting the prosecution of state actors would amount to an amnesty. If such an amnesty were to be held to excuse acts constituting gross human rights violations and abuses (including the right to life and the prohibition on torture or other cruel, inhuman or degrading treatment or punishment) this would be incompatible with human rights law.**

#### Option 2: Implement the Stormont House Agreement

35. The second option put forward by the Defence Committee is for the Government to continue investigating and prosecuting cases under the terms of the Stormont House Agreement.<sup>46</sup>
36. The NIHRC provided advice to the NIO on the implementation of the Stormont House Agreement (SHA) in 2015. The NIHRC welcomed the SHA and the commitment of the participants to deal with ‘the Past’, recognising that the SHA has the potential to fulfil human rights obligations.
37. The SHA proposed the creation of an independent statutory body, the Historical Investigations Unit (HIU), to “take forward investigations into outstanding Troubles-related deaths”.<sup>47</sup> In its advice, the NIHRC noted that although it has the potential to be human rights compliant, the implementation of the HIU must

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December 1989” and *Others v. Romania*, Application No. 33810/07 (24 May 2011) para 106. On ECHR, Article 3, the Ect.HR has similarly not ruled directly on the legality of amnesties, but in 2004 stated that “the granting of an amnesty or pardon should not be permissible.” *Abdulsamet Yaman v. Turkey*, Application No. 32446/96 (2 February 2005) para 55, and stated in 2009 that “the [Ect.HR] considers that an amnesty is generally incompatible with the duty incumbent on the States to investigate [violations or abuses or the ECHR, Article 3]”; *Ould Dah v. France*, Application No. 13113/03 (17 March 2009) (French)

<sup>45</sup> *Marguš v. Croatia*, Application No. 4455/10 (27 May 2014) paras 139; see also para 130

<sup>46</sup> Defence Report, para 43

<sup>47</sup> Stormont House Agreement 2014, para 30

fully comply with the procedural obligations under Article 2 ECHR and identified a number of concerns.<sup>48</sup>

38. The NIHRC also identified that the limitation of the HIU to 'Troubles-related deaths' did not recognise the State's obligations under Article 3 ECHR. The NIHRC recommended similar provision to be made to cover allegations beyond the right to life such as those falling under the prohibition on torture, inhuman and degrading treatment or enforced disappearance.<sup>49</sup>
39. As set out in the earlier section, the UN Human Rights Committee and CoE have called for implementation of the Stormont House Agreement as a vehicle to ensure compliance with outstanding cases and recommendations.
40. **The NIHRC continues to recommend that the Stormont House Agreement is implemented in line with the recommendations of the UN Human Rights Committee and Council of Europe.**

#### Option 3: Implement the SHA and review the Northern Ireland (Sentences) Act 1998

41. The third option suggested by the Defence Committee is full implementation of the terms of the SHA, as with option 2, and a review the terms of the Northern Ireland (Sentences) Act 1998.
42. The Northern Ireland (Sentences) Act 1998 (the 1998 Act) made provision for the early release of prisoners following a commitment in the Belfast (Good Friday) Agreement 1998. The 1998 Act also established the Sentence Review Commission, which is responsible for deciding on eligibility for release.
43. In order to be eligible for release a prisoner must fulfil a number of conditions, set out by the 1998 Act. These include:
  - The sentence must be for a qualifying offence committed which has attracted a sentence of more than 5 years;<sup>50</sup>

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<sup>48</sup> NIHRC, Technical Analysis of the Section Dealing with 'The Past' within the Stormont House Agreement (2015) para 70

<sup>49</sup> Ibid, paras 52, 54

<sup>50</sup> Northern Ireland (Sentences) Act 1998, Section 3(3)

- The prisoner must not be a member of a specified organisation;<sup>51</sup>
- The prisoner, if released immediately, would not be likely to become a supporter of a specified organisation or become concerned in the commission, preparation or instigation of acts of terrorism;<sup>52</sup>
- The prisoner, if released immediately, would not be a danger to the public.<sup>53</sup>

44. The 1998 Act defines a qualifying offence as one which:

“(a) was committed before 10th April 1998; (b) was when committed a scheduled offence within the meaning of the Northern Ireland (Emergency Provisions) Act 1973, 1978, 1991 or 1996, and (c) was not the subject of a certificate of the Attorney General for Northern Ireland that it was not to be treated as a scheduled offence in the case concerned.”<sup>54</sup>

45. Offences committed prior to the commencement of the Northern Ireland (Emergency Provisions) Act 1973 will not satisfy the requirement to be ‘scheduled’. Therefore, an individual (state or non-state actor) seeking early release for an offence committed prior to this point would not be able to access early release through the 1998 Act.

46. The Defence Committee report also notes the potential for reforming sentencing procedures to allow factors such as age, health, time elapsed and the cooperation of the individual with the Independent Commission on Information Retrieval<sup>55</sup> (ICIR) to be taken into consideration.<sup>56</sup>

47. The NIHRC notes that the 1998 Act itself does not explicitly prevent its application in respect of an individual who was a member of the police service or armed forces. However, such

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<sup>51</sup> Ibid, Section 3(4)

<sup>52</sup> Ibid, Section 3(5)

<sup>53</sup> Ibid, Section 3(6)

<sup>54</sup> Ibid, Section 3(7)

<sup>55</sup> Stormont House Agreement, para 41

<sup>56</sup> Defence Report, para 45

circumstances do not appear to have been specifically considered in the context in which the legislation was brought forward.

48. The Court of Appeal, in the case of *Terence McGeough*, noted that there have been a number of exceptional cases or “anomalies” where “prisoners were accepted to have fallen within the spirit, though not the letter, of the Sentences Act.”<sup>57</sup> This is developed upon in *Rodger’s Application*<sup>58</sup>, whereby evidence was presented of ‘the fourfold categorisation’ of cases where the Royal Prerogative of Mercy (RPM) or other method was used to release individuals. This included “to release prisoners who would have been eligible to be released under the Belfast Agreement had their offences (which subsequently became scheduled offences) been scheduled at the time they were committed”.<sup>59</sup> Lord Williams also confirmed this category in a written answer to the House of Commons in May 2002, identifying that eight persons had benefitted in this regard.<sup>60</sup>
49. Therefore, individuals who fall within the spirit but not the letter of the 1998 Act have previously benefited from the RPM or other method to secure release. The RPM is a method of “mitigating or removing the consequences that follow conviction for an offence.”<sup>61</sup> It has been described by the Northern Ireland Court of Appeal, as a “residual mechanism which can only be exercised in circumstances where the legal process may be unable to resolve an apparent injustice.”<sup>62</sup>
50. The existence of the Royal Prerogative of Mercy (RPM) as an alternative mechanism does not fully alleviate the anomalies within the 1998 Act. Individuals convicted of conflict related offences who do not fall within the scope of the 1998 Act would not have access to the statutory system, or safeguards, overseen by the Sentence Review Commission and would be reliant on a discretionary power which does not have a clear policy for application. This raises concerns over the lack of legal

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<sup>57</sup> *Ibid*, at 16

<sup>58</sup> *Rodger’s (Robert James Shaw) Application* [2014] NIQB 79

<sup>59</sup> *Ibid*, para 33(b)

<sup>60</sup> The Lord Privy Seal (Lord Williams of Mostyn), 29 May 2002 : Column WA161

<sup>61</sup> Ministry of Justice, *The Governance of Britain, Review of the Executive Royal Prerogative Powers: Final Report* (2009) pp15-18

<sup>62</sup> *Terence McGeough’s Application for Judicial Review* [2012] NICA 28, at 19

certainty for those individuals who would be seeking access to the RPM due to not being able to access the 1998 Act.

51. The NIHRC notes that there were 948 conflict-related deaths in Northern Ireland during the period 1969 to 1973.<sup>63</sup> Therefore, as historic investigations continue, it may be possible for prosecutions and convictions for offences that fall outside the scope of the 1998 Act. This may mean that there are a number of both state and non-state actors, who may be prosecuted and convicted at a future date, who would not be able to apply for the early release provisions of the 1998 Act. The Government should assure itself that the 1998 Act will apply equitably to all categories of individuals responsible for conflict-related offences.
52. **Noting that the lack of certainty regarding the general application of the Sentences (NI) Act 1998 and concerns about its application to members of the police service and armed forces the NIHRC recommends a review, and if necessary amendment, to ensure the legislation is applied equally and fairly to all perpetrators of conflict-related offences.**

#### Option 4: Cease investigations

53. The final option identified by the Defence Committee is to cease investigations into former service personnel. The report recognises that this would be in breach of the UK's Article 2 ECHR obligations and cites the UK government response to *Hirst v. the United Kingdom*<sup>64</sup> as precedent for such action.<sup>65</sup>
54. The Defence Committee recognises that the UK could be open to litigation before the European Court of Human Rights, which following judgments against the State lead to awards for just satisfaction (financial compensation) to the applicants for breach of the ECHR.<sup>66</sup> The report also identifies further sanctions, such

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<sup>63</sup> Malcolm Sutton (1994) *Bear in mind these dead ... An Index of Deaths from the Conflict in Ireland 1969-1993*, Belfast: Beyond the Pale Publications (available at: [www.cain.ulst.ac.uk/sutton/book](http://www.cain.ulst.ac.uk/sutton/book))

<sup>64</sup> *Hirst v. the United Kingdom*, (No. 2) Application no. 74025/01 (6 October 2005)

<sup>65</sup> Defence Report, para 49

<sup>66</sup> Defence Report para 50

as suspension or expulsion from the CoE or the Parliamentary Assembly of the CoE.<sup>67</sup>

55. The UK government was one of the authors and original signatories of the ECHR, integrating it into domestic law following the signing of the Belfast (Good Friday) Agreement in 1998. In addition to the ECHR, the UK has also ratified the ICCPR and the Charter of Fundamental Rights of the European Union, both of which protect the right to life.<sup>68</sup>
56. This option would undoubtedly result in strong criticism from the CoE and relevant UN Treaty bodies. Furthermore it would damage the reputation of the UK internationally and undermine its standing to comment on human rights violations and abuses committed in other states.
57. **The NIHRC recommends against this option, as it would put the UK government in breach of its international human rights obligations to conduct an effective official investigation under the right to life and prohibition of torture, inhuman and degrading treatment.**

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**Northern Ireland Human Rights Commission  
39 North Street  
Belfast  
BT1 1NA**

**Tel: 02890 243978  
Website: [www.nihrc.org](http://www.nihrc.org)**

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<sup>67</sup> Defence Report para 50

<sup>68</sup> Article 6(1) ICCPR; Article 2(1) CFR