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**TO THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE:**

**SUBMISSION FOR 1-3 SEPTEMBER 2020 MEETING**

11 August 2020

I write on behalf of the Belfast-based NGO, Malone House Group, in relation to the execution of judgments from the European Court of Human Rights in the ‘McKerr Group’ of cases. These are due to be further discussed at the Committee of Ministers at the 1377bis (Human Rights) meeting of the Ministers' Deputies on 1-3 September 2020 which was in part postponed from 4 June 2020.

The link is at <https://www.coe.int/en/web/cm/-/1377bis-human-rights-meeting-of-the-ministers-deputies-1-3-september-2020->

These cases concern the Troubles in Northern Ireland which ended, in large part in 1998, with the Belfast Agreement, and are titled Finucane, Hemsworth, Jordan, Kelly, McCaughey, McKerr (No. 28883/95), McShane and Shanaghan respectively. We are concerned here with the implementation of the measures set out in the action plan and continuing issues.

1. The Group previously, in May 2020, submitted a legal opinion, *In the matter of the European Convention on Human Rights Article 2 Procedural in Northern Ireland* by barrister, Dr Austen Morgan who was asked to advise on the Article 2 substantive right to life and its relationship to the implied procedural right to an effective investigation.
2. I am now attaching, as I indicated in my letter of 27 May 2020, a further legal opinion, this time by barrister Peter Smyth CBE QC and Belfast solicitor Neil Faris. In brief, they suggest that the legacy proposals for Northern Ireland proposed in the Stormont House Agreement (SHA) of 23 December 2014 are legally defective while the Northern Ireland Office (NIO) draft Bill of May 2018 intended to implement the SHA proposals, itself contains yet further legal defects. Together they are also liable to breach Articles 6 and 8 of the ECHR. A different path is therefore recommended and sought.
3. As you will know, recent developments in Northern Ireland include the UK Government making a statement on 18 March on its intentions in relation to legacy legislation. This suggested a narrowing of its earlier proposals and has been welcomed by many. At the same time it introduced a Bill to Parliament on the matter of veterans’ rights, entitled the Overseas Operations (Service Personnel and Veterans) Bill. It has yet to be debated and as yet excludes Northern Ireland. The Covid-19 coronavirus pandemic has obviously slowed down all the parliamentary processes.
4. Cost is plainly an issue for the Government, one accentuated by the Covid crisis. The House of Commons Northern Ireland Affairs Committee has now commenced a second inquiry, ‘Addressing the Legacy of Northern Ireland’s past: The UK Government's New Proposals’. After seeking written evidence and receiving some 30 submissions it commenced oral hearings in July 2020. Witnesses to date include victims’ groups with differing opinions, army veterans and retired police officers. These hearings are to continue in the autumn. The Malone House Group itself submitted evidence: <https://committees.parliament.uk/work/282/addressing-the-legacy-of-northern-irelands-past-the-uk-governments-new-proposals/publications/written-evidence>

*Malone House Group background*

1. The Malone House Group is a Belfast-based NGO dealing with the legacy issues arising from the Northern Ireland conflict. Its object is to find the best means to address the Past while preventing a re-occurrence of violence between the two communities in Northern Ireland.
2. We came into being after a ‘Legacy Legislation’ conference at that venue in Barnett’s Demesne in south Belfast on 3 March 2018. The proceedings of the conference were published later that year in book form under the title *Legacy: What to do about the Past in Northern Ireland*. It was launched in the House of Commons in July 2018 by Kate Hoey MP and its text was submitted to the Committee of Ministers earlier.
3. Over the three years, since the conference, many linked articles and opinions, both individually and as a group, have been published. In pursuit of our objectives, we have also held regular meetings with government officials, both in Northern Ireland and London, and submitted responses to the consultation of the NIO on its 2018 draft legacy Bill and to the inquiries of the Northern Ireland Affairs Committee at the House of Commons. We have also held discussions with British parliamentarians and the Republic’s Department for Foreign Affairs as well as spoken at consultation meetings on the NIO’s draft Bill.
4. The Group grew to some extent out of, and because of, the 2013 Haass talks on Flags, Parades and the Past. The unagreed Haass Report became in many ways the source document for the Stormont House Agreement (SHA) of December 2014. It in turn became a foundation for the NIO’s silently expanded draft Bill of 2018.
5. We share a deep concern over the one-sided academic output around addressing the Past in Northern Ireland. Our views differ considerably from those expressed by other NGOs and our universities’ law departments.

*Stormont House Agreement (SHA)*

1. It is important to note that, despite statements to the contrary, SHA was not agreed by all the major parties, any more than the Haass report was. We have assiduously opposed its implementation in the form proposed, not least on human rights grounds with its potential for destroying reputations without fair procedures. In particular we are opposed to the creation of a parallel police of the past, the Historical Investigations Unit (HIU), with its suggested powers to investigate non-crimes i.e. historic police misconduct. The COE Secretariat in its most recent analysis seems to have taken as read that the HIU is both efficacious and necessary in human rights terms. It is noteworthy that Article 2 alone is taken into consideration and not Articles 6 and 8. This is addressed in this legal opinion. That view of the HIU is not widely shared, nor has it cross community support in Northern Ireland. It seems it may however be abandoned in the Government’s final legislative iteration.
2. The Group is united in the view that the past should not become our future which it is in danger of doing. This common sense position is reflected in much public opinion and expressed by many senior figures in Northern Ireland from all sides of the community.
3. I instance here the contributions of these prominent individuals who have called into question, in different ways, how government has proposed to address the past and sought to draw a line in some form, whether on prosecutions alone, or on the whole legal and investigative process: John Larkin, until recently the NI Attorney General, Barra McGrory the former DPP, Peter Sheridan a former Deputy Chief Constable of the RUC, Dennis Bradley co-author of the Eames Bradley Report, and the late and highly esteemed civil servant Maurice Hayes. Any informed and fair observer of Northern Ireland affairs will agree that none of these people can be reasonably described as of the unionist community. Those involved in Malone House are also drawn from both communities.
4. The Malone House Group’s participants and contributors range over the academic, legal, journalistic and political worlds as well as representatives of victims and bereaved individuals themselves. Key current participants are myself, Jeffrey Dudgeon MBE, a former Ulster Unionist Party Belfast City councillor, author and human rights activist, Belfast solicitor Neil Faris, Ulster University political scientist Professor Arthur Aughey, expert in government administration Bill Smith, and William Matchett a former RUC officer and author of *Secret Victory: The Intelligence War That Beat the IRA.*

*Purpose of this Submission*

1. In brief summary, we feel that the Council of Europe Committee of Minsters should review the value and purpose of these unsettled Article 2 investigations and assess what they can still achieve after now some 20 years. The opportunity for closure comes with the government’s new proposals, difficult though they may be. It is a significant fact that most other countries found in breach of Article 2 on the taking of life, and not just ineffective investigation, are not required to effect such extensive and costly reopened operations. The evidence for beneficial results both in terms of reopened investigations as well as improved systems and lower numbers of contested killings is not obviously available and needs researched.
2. These questions then need considered:

* Is continuance dividing communities in Northern Ireland rather than reconciling them?
* Are the open cases one-sided, with no non-state actors under investigation?
* Can further investigation be effective given the passage of time and the context of a fierce and ongoing terrorist campaign from 1970 to 1998, let alone achieving the identification and punishment of those responsible for some 3,000 murders?
* Should not regard to cost be reasonably taken into account in any re-examinations, bearing in mind the entirely disproportionate expenditure envisaged – only in Northern Ireland – with legacy enquiry costs in the region of £2 billion and rising?
* If the outcome adds little or no value and fails to effect truth, justice or reconciliation should the process not be drawn to a close?
* Can the fact that the UK Supreme Court has maintained a position that Article 2 retrospectivity does not bite before 2000 be now taken into account?
* Would such processes in any way be helpful in every other conflicted European country, not least in the Balkans?
* Would a dogmatic, doctrinaire imposition of Article 2 (as contended for in McKerr) and its unclear time limits lead the Court and Committee inevitably into investigation of Soviet-era crimes, or indeed beyond?
* Is the context of the times, in particular in the 1970s and 1980s, really understood e.g. there were over a hundred killings in one month in July 1972 in a province of 1.5 million people?

1. We believe that the decision at the 1369th meeting of the Committee of Ministers, calling on the authorities of the United Kingdom “to submit by 31 March 2020, concrete information on how they intend to conduct an Article 2-compliant investigation into Mr Finucane’s death in light of the findings of the Supreme Court judgment of 27 February 2019” takes no account of the full judgement of the court which (as the Secretariat wrote) left it to the government to decide “what form of investigation if indeed any is now feasible, is required to meet [the procedural requirement] under Article 2”.
2. Past enquiry costings tell us that would need some £200 million which is not now a reasonable, fair or proportionate outcome. Broader political and financial issues, let alone the need for reconciliation must surely enter into the decision making process at this supranational level.
3. Are we now seeing the Past being unwritten without regard to context as happens in too many legal actions, or rewritten to provide equivalence between terrorist and state actions? To many, this can only be discriminatory against the state, given they alone kept records. Confidence in the European Convention in the UK is consequently eroded, especially as no end to process is ever seen.
4. In the light of our submissions and the accompanying legal opinions, we believe that the UK has taken all reasonable, necessary and proportionate measures within its resources to abide by the judgements, and ask that the Committee of Ministers adopts a resolution concluding that its functions under Article 46, paragraph 2, or Article 39 paragraph 4, of the Convention have now been exercised.
5. In the other thousands of cases, the likely outcome of the NIO’s current intended legislation policy will not only not satisfy many claimants but will see calls for the UK to reverse or revise its position. The Committee has it within its power however to accept that unceasing demands for re-investigation have the potential for unsettling the relative peace between our communities, and trust in the UK’s good faith in its proposals over decades to address legacy matters. Otherwise this will become a political dispute.

*Article 2*

1. Meeting the Strasbourg Court’s varied and developing judgements on Article 2 may simply be unattainable at this stage. There has to be an end point and proportionality. It is worth reminding ourselves what Article 2 says, and ask if the jurisprudence on effective investigation of deaths has not overtaken the very purpose of protecting life?

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Yours sincerely

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