

BREXIT Conference 28<sup>th</sup> January 2016

The Repeal of the Human Rights Act: Implications for victims of conflict

Thank you to Martina, Joanne and all of the Sinn Féin Euro team for the invitation to speak this morning at this very important event.

There is nowhere more fitting to speak to the matter of the remedy of human rights abuses than in West Belfast, which has witnessed the most egregious of violations during our conflict.

Human Rights law is only meaningful when it touches and reaches to those most desperate and in need. Those most isolated and dispossessed. Human Rights Law is not about the majority.

Human Rights law came into its own after the 2<sup>nd</sup> World War when the world saw what would happen when a state decided to violate the rights of minorities in the most vile and criminal of ways. This is Holocaust Memorial week. It is the experience of the Holocaust that informs the foundations of human rights laws.

So it never needed to be popular it just needed to be relied on and valued.

It is always brought into sharp relief in contested situations, and where conflict exists. That is the point!

So I want to tell you about a woman I know.

Her brother was killed in the early 1990s by the British army. He was an IRA volunteer on active service and she is very proud of him. She was just turning 20 when he was killed and his death has defined her life since that day.

At first no one expected any investigation into his death. But her parents were adamant to tell the world, it is not right that a state who talks about upholding the law pre-plans the killing of its citizens when they pose no danger and safe effective arrests can be made.

It was a very unpopular message, and remains so.

Apart from the close tight knit community she lived in, and of course her own family, her natural grieving was dismissed and not given the dignity it deserved. Even the day of the funeral was a scene of conflict.

Andrée Murphy, Relatives for Justice

In the years that have followed the woman has found that the disruption of her grief is something that has been difficult to manage. How do you deal with the most life changing events with resilience and cope when the authorities told you in the worst moment of your life that you were not entitled to the natural dignity of mourning?

But she finished her education and her parents were so proud when she got her degree and she got married and had children.

She has been afraid for her children every single day since they were born. Her face turns to stone when she describes her actions as being only short of suffocating them to keep them safe.

She is really close to her mummy. She describes her mummy changing the day her brother was killed. A part of her died too. She wants to protect her mummy. But all her mummy wants is someone to acknowledge that her son should not have been killed. Had he been arrested he would have been release after the Good Friday Agreement. They would have had nearly 20 years with him. Her mummy is getting old.

She has been to every single one of the 50+ preliminary inquests. She has left sick children at home, she has taken days unpaid from work, she has had really difficult conversations with her husband who is really supportive but can't understand why she needs to travel to Belfast for five minutes of lawyers saying how no progress has been made.

She has to come back and explain it to her parents. She has tried to make sure she has every note and she will be cross-examined.

Sometimes her parents come too. She feels guilty that this annoys her but getting a parking space, so they can walk to the court and then getting them picked up afterwards can just seem so difficult when it is always difficult. She always feels guilty.

Her sister can't come. She was only eight the day her brother was killed when the British army kicked in their door raiding their house and screamed at their mother than her brother was lying face down dead. Her mother's cries haunt them all. That cruelty and trauma has affected her sister physically and emotionally in ways that they cannot share openly.

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One day the lawyer gave her the photographs of her brother's autopsy. She has never shown them to anyone else. They haunt her. She gave them to an NGO who have them locked away in their office. But it is like they are alive and speak to her.

Her children and teenagers and they understand that there is this thing called an inquest that has been as regular in their lives as Christmas. Except that it is no fun at all.

Trauma, hope, cynicism, anger, expectation, disappointment. They are all mixed together.

A life changed and an experience that most of us in this room have thankfully never experienced.

A version of that story is being played out for 96 families in the Belfast Inquest Court over the past 2 weeks. The only agency afforded to these families who walk our shared streets in Belfast is the Convention on Human Rights.

The European Convention of Human Rights was signed in 1950 and came into force in 1953.<sup>1</sup> Britain first ratified the Convention in 1951, Ireland in 1953. Making both states two of the first signatories to the Convention. So far so good.

The task of the Convention and the bodies it establishes is to "ensure that the standards of the Convention and its Protocols are observed by the administrations of the States concerned".<sup>2</sup>

In Ireland, in the decades that followed 1969, we experienced the worst human rights violations in Western Europe. State and non-state agencies were engaged in a conflict that lasted almost 30 years.<sup>3</sup> It saw summary state executions,<sup>4</sup> the state establishment of murderous pseudo gangs,<sup>5</sup> the use of torture by both state and non-state actors,<sup>6</sup> state use of sexual violence and

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<sup>1</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

<sup>2</sup> Brownlee, *Documents on Human Rights*, 6<sup>th</sup> edn, Oxford University Press, 2010 681

<sup>3</sup> C Campbell and I Connolly, "The Sharp End: Armed Opposition Groups, Transitional Justice and the Rechtsstaat" *IJTJ* (2012) 6 (1): 11-39 2012

<sup>4</sup> See Murray, R, *The SAS in Ireland* Mercier Press 1990

<sup>5</sup> See Relatives for Justice, *Collusion* 2002

<sup>6</sup> Supra 3

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in the prisons,<sup>7</sup> disappearances by non-state agencies,<sup>8</sup> and systematic social, cultural and economic violations whose impact will be felt for at least another generation.

All of this raged while the European Convention of Human Rights was in force.

For those affected by conflict violations who knew there would never be anything resembling state investigation let alone accountability for the killing and injury of their loved ones, the European Court was often spoken about in terms of remedy, but Strasbourg seemed very far away indeed from the streets that surround us. There were two exceptions to this.

The inter-state case taken by the Irish Government in 1971 on the use of torture in British holding centres following the introduction of internment which is now seeking further remedy make it the most ground breaking of all ground breaking of cases.<sup>9</sup>

Another ground breaking judgment, was that of the families of 3 IRA volunteers killed by the British army's SAS in Gibraltar in March 1988 taken against the British Government on the grounds of a breach of Article 2 the right to life.<sup>10</sup>

The fact that over 3,500 people were killed, tens of thousands injured and multiples of that arrested and imprisoned in a regime of systematic torture, and there were only two successful applications to the European Court of Human Rights should tell us a fair story of the distance of Convention application. However notwithstanding that the Convention's actual existence also gave hope to those who had suffered violation that Britain – in all of its colonial impunity - could be held to account in some international framework.

The armed conflict was for the most part over in 1998 when the Human Rights Act<sup>11</sup> was introduced.

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<sup>7</sup> L. Moore and P. Scraton, *The Incarceration of Women: Punishing Bodies, Breaking Spirits* Palgrave MacMillan (2014)

<sup>8</sup> See <[www.iclvr.ie/en/ICLVR/Pages/TheDisappeared](http://www.iclvr.ie/en/ICLVR/Pages/TheDisappeared)>

<sup>9</sup> ECtHR "Ireland v. the United Kingdom" (Case No. 5310/71) 1978

<sup>10</sup> ECtHR McCann and Others vs the United Kingdom (18984/91) 1995

<sup>11</sup> The Human Rights Act 1998

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But the conflict that rages between the perpetuation of impunity and the establishment of the primacy of human rights was very much still ongoing. With families bereaved by conflict beginning to come to terms with their experience, the application of the Convention through the local courts was to prove integral to their transitional search for truth and justice.

The past fortnight is illustrative of what this difference means.

Today we gather on the last day of two weeks of inquest hearings to which the circumstances of 96 families' loved ones' deaths have been aired and discussions held about how inquests will proceed. In Belfast's inquest court representatives of the Policing Service of Northern Ireland, the Ministry of Defense and Security Service have lined up against the representatives of the families. They have debated the scope of hearings and most critically the processes of disclosure of information from state agencies – or lack of.

The Human Rights Act is completely tied to what has been happening in those courts.

The 96 families include families who have never had an inquest into the killing of their loved ones. Why have inquests not been heard before now? Because a group of families affected by direct state killings and collusion secured a judgment in Strasbourg in 2001 that said all parts of investigations must be Article 2 of the Convention – the right to Life - compliant. These families had refused to accept the perfunctory system that had perpetuated impunity. Before this critical judgment and everything that flowed from it, families had lived with the trauma of the killing of their loved ones, strong evidence of state wrongdoing and state involvement in killings by non-state actors, the subsequent lack of any form of effective investigations, perfunctory inquests that opened and shut without sometimes next of kin even knowing it occurred, disinformation about loved ones and all of the compounded trauma caused by deliberate cover up.

But their courage and tenacity changed that. Along with Relatives for Justice and their lawyers in the CAJ and Madden and Finucane a submission to the European Court was made highlighting an investigation system that protected wrongdoing. And the European court agreed with them - that investigations and inquests must be thorough, independent, have family representation and be transparent, and that the system was not meeting those

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standards. So in 2001 the McKerr and others judgment<sup>12</sup> meant that every sham or inadequate investigation that had gone before, including inquests, were turned on their legal head.

What that independence, thoroughness and transparency might look like has been established in law following the ruling in 2001 and that has for the most part been a result of the application of the human rights act in local and London courts.<sup>13</sup> The decision in the London Supreme Court in McCaughey which declared the Convention a living document frames so much of how we now understand dealing with the past. It is hard to overstate just how different an experience now is, compared to what has gone before.

In the context of the current attrition in the inquest courts this progress could well be forgotten.

However the transformation in process as a result of the ruling in Strasbourg and the subsequent developments in local courts has meant that families have a degree of agency comparatively different to the long years of conflict and these families' early years of trauma.

Families can now receive legal aid, engage legal representation and make application to courts they can attend. They can compel those with responsibility to attend courts. They can seek disclosure and any redactions must be justified. Full facts and circumstances of killings may be examined including planning and strategic context.

I have to say not one piece of that has been granted easily. And I know there are people sitting here now very justifiably going BUT to everything I have just said. Every single bit of it has come through constant reverting to courts, constant judicial review and an incredible tenacity from families not to accept what has gone before. It is as hard a struggle as anyone here can imagine, however at least those families have a fair playing field with the law when before the law was used as part of the armoury of the state.

This legal development of the application of Article 2 of the Convention coincided with the transitional debate on how we deal with our past. Our peace process following the signing of

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<sup>12</sup> ECtHR McKerr vs the United Kingdom (2888395) 2001

<sup>13</sup> See London Supreme Court Judgment In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland) [2011] UKSC 20

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the Good Friday Agreement has been entirely interlinked with the application of the Human Rights Act – and so has the development of the debate regarding outstanding violations.

So it has not only been in inquests where the Convention, oversight by the Committee of Ministers and the Human Rights Act has made significant difference to agency of victims of gross human rights violations. Most importantly for all families affected by conflict bereavement and where there had been systemic failings in investigations, independent re-investigation was possible and required.

As new investigation mechanisms were developed as part of the outworkings of the Good Friday Agreement, such as the Police Ombudsman's remit to look at retrospective cases involving police wrong doing – or any investigation of conflict related harms – they were all tested by whether they were compliant with the Convention. And that has been done domestically. Application of the Human Rights Act has made that possible. Families do not have to wait years to get heard in Strasbourg – they initiate judicial review and are heard reasonably expeditiously. And oversight by the Committee of Ministers with its associated international accountability has made it living and robust.

The accountability of the disgraceful conduct of the Historical Enquiries Team, and its subsequent disbandment before it caused any more harm, was entirely frameworked by our understanding of how effective and investigations should be conducted under Article 2 of the Convention.

Of course there has been a significant back lash to this by the British state. Their lack of compliance and deliberate obstruction in all areas displays a systematic and authorized disregard for the rule of law and the rights of victims. There has been a reliance on an argument that there are not enough resources to meet the obligations of the state to victims and survivors. An unreasonable smokescreen to perpetuate impunity.<sup>14</sup>

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<sup>14</sup> Thompson, M. "Same Old RUC/PSNI Roadblocks to Truth" < <http://relativesforjustice.com/wp-admin/post.php?post=2527&action=edit>> January 2016

And I could cite hundreds of heart breaking examples of how this heartless continual breach of human rights impacts on families. But what I want to convey is that while the battle is on the battle field is made just that bit less one sided by the application of the Convention through the Human Rights Act. So the landscape for families is not perfect, far, far from it. However it is transformed from 20 years ago. Still deeply imperfect, but developing.

Victims and survivors have not yet secured truth and justice. The governments and parties have yet to deliver a proper human rights compliant investigation or accountability mechanism. But that this is the subject of intense inter-party and inter-governmental negotiations at all is a result of membership and being a signatory to the Convention. That the debate is framed by human rights<sup>15</sup> and whether the state is meeting its obligations and victims' rights are being met, is where those of us engaged in the debate take most heart.

I need to say that there has, from necessity, been a focus on Right to Life violations – but we must recognize that there is so much work still to be done on the range of conflict violations that have been experienced. And that is something which requires significant work which will need a gender lens. Something we have not managed to do to date.<sup>16</sup> But again the Convention and the HRA support the potential to deliver this in an appropriate and compliant fashion.

Because the violations occurred while the British state was a signatory, it is established that retrospective application for conflict related violations can and should be pursued in the present day and that that accountability should take the form of human rights compliance which pays due regard to the rights of victims. That applies even if the British Government leaves. The violations happened under the Convention – they will retain responsibility.<sup>17</sup>

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<sup>15</sup> Stormont House Agreement

*“21. As part of the transition to long-term peace and stability the participants agree that an approach to dealing with the past is necessary which respects the following principles: o promoting reconciliation; o upholding the rule of law; o acknowledging and addressing the suffering of victims and survivors; o facilitating the pursuit of justice and information recovery; o is human rights compliant; and o is balanced, proportionate, transparent, fair and equitable”* 5 December 2015

<sup>16</sup> Relatives for Justice “Dealing with the Past: Where Are the Women?” 2015

<sup>17</sup> Comments of EU Human Rights Commissioner Nils Muznieks quoted in The Detail “UK Government Cannot Wash its Hands of Legacy of the Troubles” <http://www.thedetail.tv/articles/uk-government-cannot-wash-its-hands-of-legacy-of-the-troubles>> 06/11/2014 “Regarding the possibility of delegating Article 2 responsibilities, I

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It is impossible to imagine where victims would be without the Convention, oversight of the European Court or the domestic application of the Convention in our local courts. But whatever might be imagined it will involve the bleak diminishing of us all.

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*think it's quite clear that if a country were to do this...it would be quite a disaster. I think with regard to the UK, as far as I am aware, the violations that took place during the Troubles took place primarily during a period of Direct Rule from Westminster. I don't think that the UK government can divest itself of investigatory responsibility or funding responsibility for investigations. Of course this must take place in conjunction with the devolved authorities, but I don't think Westminster can wash its hands altogether."*

Andrée Murphy, Relatives for Justice