A RESPONSE TO THE BRITISH GOVERNMENT BILL ON DEALING WITH THE PAST

Families' Right to Truth vs the British State "National Security"?

Abstract

In October 2015 the British Government submitted a draft Bill of implementation of the Stormont House Agreement. This Bill has drawn heavy criticism for the Government's denial of open transparent truth recovery in favour of the primacy of "national security". This short paper explores some of these issues and the international principles surrounding this debate.

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Disclosure, the right to freedom of expression and "national security"

The Stormont House Agreement[1] is a local political response to the rights and needs of victims in our transitional society. This is a societal promise to those who suffered the worst of our conflict and whose needs have not been met in a comprehensive fashion through previous agreements. The document suggests a four stranded approach to the past. An Historical Investigations Unit, an Independent Commission for Information Retrieval, An Oral History Archive and an Implementation and Reconciliation Group.

This framework document however is not just a political agreement, it should also been seen as a legal response to British state obligations to remedy long outstanding human rights violations.[2] As such the development of the mechanisms to implement the Agreement should be cognisant of the international human rights obligations that have developed to ensure that victims' rights are delivered in the most expeditious fashion.

On 3rd October 2015 the media leaked a draft bill which was under consideration at the multi-party negotiations for the implementation of the Stormont House Agreement. The draft legislation which had been presented by the British Government to the Implementation Talks concerning the measures to deal with the past, have raised significant concerns regarding the emphasis on state national security as a limitation on disclosure to victims of conflict.[3] The legislation presented has been described as an act of bad faith by the British Government and as a self-serving piece of national security legislation.[4] The legislation brings into sharp relief the significant tension that exists between victims of state and state sponsored violence access and right to disclosure surrounding the circumstances of the killings of their loved ones and on the other hand the British state's national security interest

This short paper examines the international standards on Freedom of Expression and the right to receive information and the right of states in matters of national security.

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[1] Stormont House Agreement 23/12/2014
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf>

[2] House of Commons Human Rights Joint Committee 11/03/2015
<http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/13009.htm>

[3] Communication from a NGO (Relatives for Justice) (08/10/2015) in the McKerr group of cases against the United Kingdom (Application No. 28883/95) and reply from the authorities (15/10/2015) - Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (Anglais uniquement) <
https://wcd.coe.int/ViewDoc.jsp?id=2370625&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

[4] Relatives for Justice 06/10/2015 < http://relativesforjustice.com/proposed-british-legislation-on-past-unacceptable-for-families/
Pat Finucane Centre 06/10/2015

General Comments

In 2011, in establishing a specific mandate to monitor the promotion of truth, justice, reparation and guarantees of non-recurrence, the **Human Rights Council** emphasized the importance of a comprehensive approach incorporating the full range of judicial and non-judicial measures in order to, among other things, ensure accountability, serve justice, provide remedies to victims, and promote healing and reconciliation (Human Rights Council resolution 18/7).[5]

In his report to the United Nations General Assembly on the relationship between the right to freedom of expression and victims' right to truth then UN Special Rapporteur for Freedom of Expression stated in 2013 that:

"At the national level, the right to truth can be characterized as the right to know, to be informed or to freedom of information. In resolution 12/12[6], its most recent on the right to truth, the Human Rights Council emphasized that the public and individuals were entitled to have access, to the fullest extent practicable, to information regarding the actions and decision-making processes of their Government."[7]

Relevant Legal Principles

Universal Declaration of Human Rights Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers

Article 10 of the European Convention on Human Rights is devoted to freedom of expression and freedom of information.

The European Court of Human Rights has also recognized the importance of the right of victims and families to know the truth, in particular with regard to circumstances or events relating to serious violations of fundamental rights, such as the right to life.4

The European Court has described the Right to Freedom of Expression as "one of the corner stones" of democracy.[8]

It reads as follows:

> *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*
>
> *This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the*

[5] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. United Nations General Assembly A/68/362 04/09/2013 p5
[6] Human Rights Council Resolution 12/12 A/HRC/RES/12/12 **01/10/2009**
[7] Supra n5 p5
[8] Handyside v. the United Kingdom, judgment of 7 December 1976, Series A No. 24 § 49.

protection of the reputation of the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary

Clearly the article recognises national security and places a duty and responsibility on the freedom in relation to this (*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety)*

Freedom vs Security?

However this *recognition* does not give national security greater weight than the freedom itself.

In the same speech referenced above UN Special Rapporteur Frank La Rue explained

"The Special Rapporteur wishes to recall that, whenever a State imposes restrictions on the exercise of the right to freedom of expression, such restrictions may not put in jeopardy the right itself, much less when the information requested relates to human rights violations. Restrictions must be defined by law that is accessible, concrete, clear and unambiguous, and compatible with the State's international human rights obligations. They must also strictly conform to tests of necessity and proportionality.

"For a restriction to be necessary, it must be based on one of the grounds for limitations recognized by the International Covenant on Civil and Political Rights and address a pressing public or social need. Any restriction must also be proportionate to the aim invoked and must not be more restrictive than is required for the achievement of the desired purpose or protected right."[9]

In June 2013 **The Tshwane Principles** were to consider the very matter at hand. These international principles are most useful and should become part of the conversation on the implementation of the Stormont House Agreement.

The Principles are based on international and national law, standards, good practices, and the writings of experts. Several sets of principles developed by civil society actors have, over the past three decades, influenced national and international laws and policies. Impact tends to be based on two factors: the extent to which the principles are (1) based on actual practice, international and comparative law and emerging international norms; and (2) endorsed by relevant institutions and individuals.

Based on those factors, these Principles are likely to be highly persuasive. The Principles have been drafted by 17 organizations and five academic centres throughout Africa, the Americas, Europe and Asia based on conversations and information provided by more than 500 experts from more than 70 countries, including government and former government officials and military officers, at meetings around the world over a two-year period. There is broad consensus that the Principles are practical.

[9] Supra n5 p12

And, the Principles have been welcomed by all three of the special experts on freedom of expression – for the UN, OAS and AU, as well as the OSCE's expert on freedom of the media.[10]

In March 2014 the European Parliament endorsed the Tshwane Principles for guidance both on transparency as a component of democratic oversight in the field of intelligence and on protection for unauthorized disclosures of national security information.[11]

Of particular importance and relevance are the references made to the disclosure of information on violations of human rights and humanitarian law, stipulated in section A of principle 10 of the Tshwane Principles, namely:

> *(a) There is an overriding public interest in disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to personal liberty and security. Such information may not be withheld on national security grounds in any circumstances;*
>
> *(b) Information regarding other violations of human rights or humanitarian law is subject to a high presumption of disclosure, and in any event may not be withheld on national security grounds in a manner that would prevent accountability for the violations or deprive a victim of access to an effective remedy;*
>
> *(c) When a State is undergoing a process of transitional justice, during which the State is especially required to ensure truth, justice, reparation and guarantees of non-recurrence, there is an overriding public interest in disclosure to society as a whole of information regarding human rights violations committed under the past regime. A successor government should immediately protect and preserve the integrity of, and release without delay, any records that contain such information that were concealed by a prior government.*

It is notable that Lord Alex Carlile – a trusted appointee of the British Government in recent times when examining paramilitary activity said of the Tshwane Principles:

> **Lord Alex Carlile, Q.C.,** the United Kingdom's first Independent Reviewer of Terrorism Legislation (2001-11), and one of the experts involved in the consultations, said:
> "In my opinion the Principles provide an excellent international template. I hope that governments around the world will examine the Principles and adopt them, as a standard that is both aspirational and achievable."[12]

The blanket approach of the British Government to national security regarding the implementation of the SHA is clearly at variance with these principles which are based on international law. Of course in our context there has not been regime change – but there has been transformation, this

[10] "Understanding the Tshwane Principles" Open Society Network 13/06/2013 < https://www.opensocietyfoundations.org/briefing-papers/understanding-tshwane-principles>
[11] European Parliament Resolution 12/03/2014 <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0230&language=EN&ring=A7-2014-0139>
[12] New Global Principles on the Right to Information Launched" ITCJ 12/06/2013 <http://www.icj.org/new-global-principles-on-the-right-to-information-launched/>

SHA should reflect that transitional context and, as key actor to the conflict, the British Government must be subject to that process rather than directing it.

Conclusion

Negotiations on the implementation of the Stormont House Agreement should result in a reaffirmation of the promise to victims and survivors that their needs following egregious violation will be paramount. In particular the rights of families to disclosure and remedy should be enshrined in any legislation.

To mitigate any reasonable and legitimate matters of concern regarding national security both governments and all parties should ensure an integration of the Tshwane Principles into the development of the legislation for implementation of the Stormont House Agreement.