

Ref: CommHR/DM/sf 034-2021

Rt Hon Brandon LEWIS MP
Secretary of State for Northern Ireland

Strasbourg, 13 September 2021

Dear Secretary of State,

I am writing to share my observations on the proposals contained in the command paper *Addressing the legacy of Northern Ireland's past* of 14 July 2021. These follow from the work done by my Office on transitional justice over the last two decades, including in relation to Northern Ireland, discussions with several stakeholders in Northern Ireland, and a recent meeting with victims. They address in particular the proposed statute of limitations and its compliance with the United Kingdom's international obligations; the pitting of criminal justice against truth and reconciliation; the ongoing delays in implementing commitments on legacy issues; and the lack of a victim-centred approach.

The proposed statute of limitations and compliance with the UK's international obligations

In the command paper, you propose to introduce a statute of limitations for all Troubles-related crimes, which would put an end to all ongoing and any future attempts at prosecution. This is accompanied by a statutory bar on the Police Service of Northern Ireland (PSNI) and Police Ombudsman to investigate Troubles-related incidents, as well as further steps to end all judicial activity in this area with regard to current and future criminal and civil cases and inquests. I am concerned about these proposals, which might bring the United Kingdom into conflict with its international obligations, notably the European Convention on Human Rights (ECHR).

Articles 2 (the right to life) and 3 (the prohibition of torture or inhuman or degrading treatment or punishment) of the ECHR impose several obligations on member states. As clarified by the European Court of Human Rights (the Court), these include obligations to conduct effective investigations into killings or credible claims that a person has been tortured or seriously ill-treated. Such obligations are also reiterated in the Council of Europe [Guidelines](#) on Eradicating impunity for serious human rights violations, adopted by the Committee of Ministers in March 2011. To be effective, such investigations must, at a minimum, meet the requirements of independence, adequacy, promptness and public scrutiny and participation of next of kin. As regards adequacy, while there is no clear right to obtain prosecution or conviction, investigations must nevertheless be capable of leading to the identification and punishment of those responsible. The fulfilment by the United Kingdom of this requirement is particularly endangered by the proposed shutting down of the above-mentioned avenues, and their replacement with an information recovery body with limited investigatory powers that would fall short of the requirements under the ECHR, and which would mainly carry out investigations on request of next of kin.

As highlighted in a recent [statement](#) by two UN Special Rapporteurs, the proposals appear indistinguishable from a broad-based and unconditional amnesty for those not yet convicted. In this regard, I recall that the Court has previously recognised a growing tendency in international law to view the granting of amnesties in respect of grave breaches of human rights as unacceptable. It has further found that amnesties, pardons and statutes of limitations should not apply to criminal cases involving torture, especially in view of states' obligations under international law to prosecute those who have committed this act. The Court's case-law also affirms that granting an amnesty in respect of the killing and ill-treatment of civilians would run contrary to the state's obligations under Article 2 ECHR, since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible. The blanket, unconditional nature of the amnesty in your proposal effectively means that none of those involved in any serious violations will be held to account, leading to impunity. Beyond the impact on justice for victims and their families, which I will address later, this is also deeply problematic from the perspective of access to justice and the rule of law more generally, especially in view of the several

impunity-related matters which I have [raised](#) in the recent past with the UK government. As such, I cannot come to any other conclusion than that this proposed amnesty (regardless of the label attached to it in the command paper), which creates impunity, is being justified on problematic assumptions, and fails to meet victims' needs, would be incompatible with the United Kingdom's international obligations.

Criminal justice activities as an integral part of truth and reconciliation

I have taken note of your argument that a shift from 'retributive' to 'restorative' justice is the only way forward in dealing with the past, which informs the proposals described above. I am concerned that this approach is based on a false dichotomy between investigations and prosecutions on the one hand, and truth and reconciliation on the other, as well as on problematic assumptions about how these interact. In addition to being an international legal obligation, fighting impunity through criminal justice is one of the well-established pillars of transitional justice. Virtually every effective transitional justice effort to date has relied on elements of both criminal justice and truth and reconciliation. Conversely, impunity and the absence of justice can be a major impediment to achieving lasting peace and reconciliation.

The interaction between criminal justice and truth and reconciliation mechanisms in the Northern Ireland setting has been recognised, for example, in the [report](#) of the former UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence following his 2015 visit to the United Kingdom. Some criminal investigations, even if they have not led to prosecutions, have had important consequences for truth recovery. And truth seeking efforts, not related to criminal justice as such, were sometimes instrumental in uncovering information that gave rise to further attempts to trigger criminal investigations. Importantly, whereas the command paper seems to suggest that information recovery cannot be effective without an end to criminal justice activities, the reverse may well be true: giving perpetrators unconditional guarantees against criminal prosecution may weaken incentives to participate in truth seeking. And the impunity this creates may undermine the trust necessary for truth and reconciliation efforts to be effective. As the command paper puts such a premium on truth seeking, to the detriment of criminal justice activities, oversimplifications of their relationship must be avoided.

This does not imply that truth seeking is not important. On the contrary, the victims I recently met also vibrantly stressed how important it is for them to know the truth about the serious violations they and their loved ones suffered. But truth seeking must operate side by side with other elements, such as fighting impunity, reparations to the victims including official apologies, guarantees of non-repetition, and memorialisation efforts. I note that a multi-pronged approach, involving both criminal justice and truth and reconciliation options, is also part of the Stormont House Agreement. On the basis of my experience of transitional justice across Europe, I do not see any compelling reasons in the command paper to abandon this approach. Furthermore, as regards the information recovery mechanism, I observe that the proposals, in addition to the broader ECHR compliance issues raised above, would need much more elaboration especially as regards the safeguarding of its independence, and overcoming long-standing existing barriers to disclosure of information, especially the withholding of information based on national security grounds, which may deprive victims of full knowledge of the truth.

Delays in delivering on legacy issues

I fully agree with your assertion that the people of Northern Ireland have waited far too long for progress in dealing with legacy issues. In that sense, you are right to point out that "time is not on our side". This, I heard from victims, is a major source of anguish. However, I sincerely doubt that the proposals put forward will provide genuine progress in this area. As noted, their apparent lack of compliance with the United Kingdom's obligations would no doubt lead to many drawn-out legal challenges if they were to be implemented, which would only mean further delays in dealing with the past effectively.

Furthermore, in putting forward the argument that time is running out to justify measures with far-reaching implications for human rights and the pursuit of justice for victims, it would have been appropriate for the command paper to at least reflect on the responsibility of the UK government in creating this situation. While I acknowledge that the process of dealing with the past is complex, it is difficult to ignore that successive UK governments have failed to deliver on making progress, and have sometimes put barriers to such progress. In this context, failures to legislate despite promises, delays

in providing funding for mechanisms dealing with legacy cases, refusals to set up public inquiries in certain cases, and other actions or omissions have all contributed to legacy issues remaining unresolved in Northern Ireland. In this respect, I note that the non-execution of judgments of the Court pertaining to legacy issues in Northern Ireland is an increasing source of concern, with general measures in key judgments remaining unimplemented for more than two decades. While this is ultimately for the Committee of Ministers to decide, I am strongly convinced that your recent attempts at setting out a different approach are unlikely to meet the requirements of this process, and will thus further remove the prospect of full implementation of these judgments, rather than bringing it closer. Such long-term non-implementation of the mechanisms agreed at Stormont House and the package of measures, without providing realistic, timely and human rights compliant alternatives, do not only pose a serious challenge to the rule-based order to which the United Kingdom has committed. Importantly, it again leaves victims and their families across communities without any realistic prospect of justice.

Lack of a victim-centred approach

This brings me to a final, but crucially important point. This is the lack of a victim-centred approach in your proposals. In my interactions with stakeholders in Northern Ireland, and my meeting with victims, the lack of consultation ahead of the publication of the command paper setting out such a radical shift away from earlier approaches, and the unilateral steps by the UK government in this respect, were repeatedly identified as a major source of concern. This risks dealing a major blow to already fragile trust in the government's handling of legacy issues. I therefore urge you to ensure that victims' concerns are heard and taken on board as a matter of urgency. Their involvement is also central to the necessary further elaboration of proposals on other elements of transitional justice, such as reparations, acknowledgment, apologies and memorialisation.

The command paper asserts the current criminal justice approaches are "not working for anyone". But my recent meeting with victims showed that the pursuit of justice, including through investigations and prosecutions, is central to the efforts of many victims and their families in coming to terms with the past. The prospect of facing yet more delays or an abrupt end to their search for justice is clearly devastating for them. While the command paper rightly states that not all victims' needs are the same, taking the option of investigations and prosecutions off the table unilaterally undoubtedly fails to meet the wishes of at least a significant group of victims. This is particularly problematic since the UK government does not do this from a neutral position, given that efforts to pursue criminal justice outcomes are also directed at agents of the state. Rather than delivering for victims, the proposals will deprive them, including those already engaged in ongoing proceedings, of remedies and access to justice. By barring their recourse to well-established judicial mechanisms, the proposals would also put victims of Troubles-related crimes in a disadvantageous position as compared to victims of human rights violations that have occurred in other contexts in Northern Ireland, and in the rest of the United Kingdom more generally.

In conclusion, I am concerned that key elements of the command paper would not bring progress on legacy issues, but would rather represent significant steps backward. Crucially, an approach that would undermine human rights protections and would cut off avenues to justice for victims and their families, thus leading to impunity, cannot be the foundation on which transitional justice is built. Rather than upending previously agreed approaches, I urge your government to focus on taking concrete action to remove barriers to a human rights compliant implementation of such approaches, with a view to delivering justice across all communities without further delay.

I look forward to continuing our constructive dialogue on this important issue.

Sincerely,



Dunja Mijatović