



NORTHERN
I R E L A N D
HUMAN
RIGHTS
COMMISSION

Sir Nigel Rodley
Human Rights Committee
Human Rights Treaties Division
UN High Commissioner for Human Rights
Palais Wilson - 52, rue des Pâquis
CH-1201 Geneva (Switzerland)

10 July 2015

Dear Sir Nigel

RE: General Comment No. 36 - Article 6: Right to life

I am writing in advance of the Committee's half day of General Discussion on the preparation for a General Comment on Article 6 (Right to Life) and will specifically address the duty to investigate.

The Northern Ireland Human Rights Commission has played an active role in promoting and upholding the right to life in Northern Ireland. Through this work the Commission has had a role in the development of European human rights standards setting out the procedural obligations emerging from the right to life.

The experience in Northern Ireland has demonstrated the enduring damage that can be caused to the rule of law and to society generally by the failure to ensure that investigation and prosecutorial bodies act in a manner that is compliant with the principles established by international human rights law. In this short submission I would like to set out for the Committee a number of judgements by the European Court of Human Rights (ECtHR) relating to the deaths during the conflict in Northern Ireland which have influenced standards at the regional level and had a practical effect in Northern Ireland on how investigations into conflict related deaths are carried out.

In the case of *McCann and Others v United Kingdom* the applicants, whose relative had been killed by agents of the State, argued, *inter alia*, that the State must provide an effective *ex post facto* procedure for establishing the facts surrounding a killing by agents of the State through an independent judicial process to which relatives must have full access.¹ In its judgement the Court noted:

*"that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State".*²

Following on from this judgement on 4 May 2001 the ECt.HR gave judgement in four cases relating to deaths in Northern Ireland, known collectively as the McKerr group. In all cases the ECt.HR ruled that the UK Government had failed to satisfy the 'procedural' aspects of Article 2.³

In the judgements the ECt.HR ruled on the essential elements of an effective official investigation when individuals have been killed as a result of the use of force. Such an investigation must be initiated by the State and should not be reliant on on the next of kin of the deceased lodging a complaint.⁴

In its judgements the ECt.HR elaborated on the essential elements of an effective investigation, these are:

- the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence'.⁵

¹ 21 ECHR 97 GC 27 September 1995

² *Ibid* para 161

³ *McCerr v UK App No 28883/95*, Judgment 4 May 2001, *Jordan v UK App No 24746/94*, Judgment 4 May 2001, *Finucane v UK App No 29178/95*, Judgment 1 July 2003, *Shanaghan v UK App No 37715/97*, Judgment 4 May 2001, *Kelly v UK App No 30054/96*, 4 May 2001, and *McShane v UK App No 43290/98*, Judgment 28 May 2002

⁴ *Jordan v. The United Kingdom*, Application No. 24746/94, 04 August 2001 para 105

⁵ *Jordan v. The United Kingdom*, Application No. 24746/94, 04 August 2001, para 106; in respect of torture see *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39690/09, 13 December 2012, para 184

- an investigation 'should be capable of leading to the identification and punishment of those responsible',⁶ and as a result States 'must have taken the reasonable steps available to them to secure the evidence concerning the incident';⁷
- '[a] requirement of promptness and reasonable expedition is implicit',⁸
- 'there must be a sufficient element of public scrutiny of the investigation or its results';⁹
- 'the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests',¹⁰

These principles have informed subsequent judgements of the ECt.HR and have proved of immense value to the Commission and to the jurisdiction of Northern Ireland as it considers and develops mechanisms for ensuring effective investigations into conflict related deaths. The Commission made an intervention to the ECt.HR during its consideration of the McKerr group of cases. The Commission's submission was largely based on the standards concerning the right to life contained in the case law of the Inter-American Court of Human Rights and the findings of the Committee. This submission was influential in the Court's judgement.¹¹

The ECtHR has stated that the form of the investigation 'may vary in different circumstances' as the responsibility for the form lies with the State.¹² The ECtHR has noted that 'whatever form the investigation takes, the available legal remedies, taken together, must amount to legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress.'¹³ The fact that an investigation may end 'without concrete, or with only limited results is not indicative of any failings as such.'¹⁴

⁶ Jordan v. The United Kingdom, Application No. 24746/94, 04 August 2001, para 107

⁷ Jordan v. The United Kingdom, Application No. 24746/94, 04 August 2001, para 107; Aksoy v. Turkey, Application No. 21987/93, 18 December 1996, para 98; El-Masri v. The Former Yugoslav Republic of Macedonia, Application No. 39690/09, 13 December 2012, para 182-3

⁸ Jordan v. The United Kingdom, Application No. 24746/94, 04 August 2001, para 108

⁹ Jordan v. The United Kingdom, Application No. 24746/94, 04 August 2001, para 109

¹⁰ Jordan v. the United Kingdom, Application No. 24746/94, 4 August 2011, para 109

¹¹ See Brice Dickson 'The European Convention on Human Rights and the conflict in Northern Ireland' Oxford University Press 2010 pg 270

¹² McShane v. The United Kingdom, Application No. 43290/98, 28 May 2002 para 94 and Jordan v. The United Kingdom, para 105

¹³ Ciobanu v. The Republic of Moldova, Application No. 62578/09, 24 February 2015, para 33

¹⁴ Brecknell v. The United Kingdom, Application No. 32457/04, 27 February 2008 para 66. Also see McCartney v. The United Kingdom, Application No. 34575/04, 27 February 2008; McGrath v. The United Kingdom, Application No. 34651/04, 27 February 2008; O'Dowd v. The United Kingdom, Application No. 34622/04, 27 February 2008; Reavey v. The United Kingdom Application No. 34640/04, 27 February 2008.

The Commission suggests that in developing a new General Comment on the right to life that the Committee give detailed consideration to the value of the obligation to investigate. The Commission notes that the Committee has highlighted the 'general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies'¹⁵ and has found that the failure to initiate an independent investigation into allegations of threats to life or bodily integrity constitutes a violation of ICCPR, Article 9(1).¹⁶ The General Comment provides the Committee an opportunity to elaborate further on the essential elements of a thorough and effective investigation.

The Commission notes that commentators have recorded that: "Despite early dicta to the contrary, it now appears that the obligation to investigate is not confined to cases where it can be established that the death was caused by agents of the State, but arises wherever life has been lost in circumstances potentially engaging the responsibility of the State."¹⁷ In support of this view, the case of *Menson and others v UK* is cited, a case involving a racially motivated murder.¹⁸ The Commission suggests the Committee give consideration to clarifying the obligations on a State to carry out an investigation outside of circumstances where the death has been caused by agents of the State.

The Commission looks forward to reviewing the Committee's draft General Comment and I hope you find this contribution helpful to your deliberations.

Yours sincerely,



Les Allamby
Chief Commissioner

¹⁵ Human Rights Committee, 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; Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 6 (1994), para 4

¹⁶ UN Human Rights Committee, *Rodger Chongwe v. Zambia*, Communication No. 821/1998, UN Doc. CCPR/C/70/D/821/1998 (2000) para 5.3; UN Human Rights Committee, *Jayawardena v. Sri Lanka*, Communication No. 916/2000, UN Doc. A/57/40 at 234 (2002) para 7.3; UN Human Rights Committee, *Rajapakse v. Sri Lanka*, Communication No. 1250/2004, UN Doc. CCPR/C/87/D/1250/2004 (2006) para 9.7; UN Human Rights Commission, *Njaru v. Cameroon*, Communication No. 1353/2005, UN Doc. CCPR/C/89/D/1353/2005 (2007) para 6.3; UN Human Rights Committee, *Gunaratna v. Sri Lanka*, Communication No. 1432/2005, UN Doc. CCPR/C/95/D/1432/2005 (2009) para 8.4;

¹⁷ Clare Ovey & Robin White 'The European Convention on Human Rights' 4th Edition

¹⁸ *Menson and Others v UK*, (App. 47916/99), admissibility decision of 6 May 2003.