

WORKING DRAFT

Forum Commentary on the Study "The Protection of Human Rights in the Context of Peace and Reconciliation in Ireland" by Professor Kevin Boyle, Dr. Colm Campbell and Professor Tom Hadden

Introduction

1. On 7 April 1995, the Forum commissioned a study on the protection of fundamental rights and freedoms from a consortium consisting of Professor Kevin Boyle, Director of the Human Rights Centre of the University of Essex, Dr Colm Campbell, Director of the Centre for Comparative and International Human Rights Law of the Queen's University Belfast and Professor Tom Hadden of the Faculty of Law of the Queen's University Belfast. The study is complementary to that prepared for the Forum by Dr Asbjorn Eide, Director of the Norwegian Institute of Human Rights, on group accommodation and minority protection in divided or multi-cultural societies which has been published as Forum Consultancy Study Number.....
2. The Boyle/Campbell/Hadden study was presented to the Forum on 10 November 1995, and has been examined by the Forum Sub-Committee on Fundamental Rights and Freedoms under the Chairmanship of the Secretary-General, Mr Walter Kirwan. The Sub-Committee prepared this commentary which was endorsed by the Forum at its session on

General Observations

3. The Forum shares the consultants' view that there is a general perception that human rights and international humanitarian standards have been systematically abused during the conflict in Northern Ireland. At times such abuse has been described as both the cause and effect of violence. On the one hand, it has been argued that derogations from international norms are required in the emergency situation that has arisen from violent conflict. On the other hand, it has been argued that denial of basic human rights and suppression of dissent produce the divisions and alienation that can lead to violence. Now that the ceasefires are in effect, the Forum believes that all parties must seize the

opportunity to shatter this negative cycle by securing the widest possible agreement on the nature of the rights that will be protected and the on manner in which this can best be done.

4. It is clear, however, that a divided society cannot be transformed overnight or by any single measure. The years of division and bitterness will take time to overcome. Time will also be needed to restore confidence in institutions and to convince different communities that there will be an equivalence of rights in the future. In this respect the Forum finds particularly valuable the recommendation of the consultants regarding the creation of a general human rights culture in the formal and informal structures of government at every level and of sustaining this culture by the active involvement of non-governmental organisations and civil society in general.
5. It is equally clear that efforts to develop a general human rights culture will require an agreed framework in which that culture can first be created and then nurtured. That framework will most likely emerge only at the conclusion of the peace process and it would be difficult at this stage to foresee the precise outcome. The study provides a number of possible scenarios of potential constitutional regimes which might emerge from the negotiating process and suggestions as to the most appropriate form of human rights protection under each.

Nature of Human Rights to be Protected

6. The Forum accepts the consultants' view that the substance of fundamental human rights is now determined by international consensus and that there is an obligation on all states to protect those rights. The study provides a concise yet comprehensive list of the three categories of these rights as follows:

- civil and political rights
- economic and social rights
- group or communal rights

The details of the different treatment of each of these categories in various international conventions is helpful in focusing attention on the aspects which may require an element of judgement and decision by the parties to the peace process.

7. With regard to the main civil and political rights, the study highlights

the right to life and the right to freedom from discrimination as being of particular significance. The Forum would agree with this assessment. While not wishing to introduce any general concept of a hierarchy of rights, the Forum believes that the right to life is of primary importance since it is the necessary precondition for the enjoyment of all other rights. As regards the right to freedom from discrimination, the Forum agrees that appropriate care should be taken in order that such provision does not exclude positive or affirmative action to remedy the effects of past discrimination or to enable effective equality to be achieved.

8. The Forum notes the distinction between civil and political rights and social and economic rights viz that States are required only to use their best endeavours within the resources available to them to achieve the realisation of the latter. The Forum appreciates the difficulty in regarding this category as rights for which provision can be made for enforcement by individual action in the courts. It does not accept, however, that this means that those rights can be relegated to a position of secondary importance. The KPMG study on the economic consequences of peace and reconstruction, published separately as Forum Consultancy Study Number One, argues forcefully for the need to target economic benefits of the peace to those sections of society which have suffered most from violence. It is no less important to safeguard the social and economic rights of all parts of the community in the future in order to overcome the sense of alienation and resentment which have militated against efforts to foster reconciliation in the past.
9. The scope of group or communal rights has particular relevance to communities in divided societies and the study presents a useful survey of an area of international law which has been developing in recent years. More detailed treatment of this aspect can be found in the study by Dr. Eide. The Forum agrees that it is important that communal rights in all the respects covered in international conventions should be guaranteed and entrenched in the same way as individual rights and that the development of a concept of parity of esteem would make a major contribution to the maintenance of peace and stability. The Forum believes that a general entrenched provision guaranteeing parity of treatment and esteem would be useful both in symbolic terms and as a means of ensuring that all governmental programmes can be effectively challenged as either directly or indirectly discriminating in their purpose and effect. The Forum accepts that in framing provisions to give recognition to communal or group rights there is a need to provide also for a right to pluralism for those members of society who do not wish

to be identified with any particular group or tradition.

10. The study rightly highlights the right of self determination as one of the most important group rights. The right of self-determination is also one of the core issues in the peace process. The consultants make clear that the right of self-determination under the ICCPR is effectively non-justiciable in that the Human Rights Committee will not rule on a complaint about any alleged violation. The consultants conclude that the absence of any clear rules of international law on how the right of self-determination is to be exercised and the essentially political nature of decisions on the issue means that any resolution must remain a matter for political negotiation between the two States directly involved and other parties to the peace process.

11. **Note to members:**

[It is proposed that there should follow a paragraph succinctly setting out the Forum's position on self-determination. However, as the issue is currently being closely considered in the Drafting Committee, it is proposed that a final decision on the nature of this paragraph be postponed to enable greater account to be taken of progress on the issue in the Drafting Committee.]

Entrenchment of Human Rights

12. The Forum accepts that much of the difficulty in ensuring effective human rights protection in all three jurisdictions, Ireland, Northern Ireland and the United Kingdom as a whole, derives from the fact that international human rights norms are not enforceable in national law. It will be necessary, therefore, to incorporate the substance of those norms into national law and as the study points out this may be achieved through a number of different legal techniques.
13. The Forum agrees that the concept of a joint declaration by the British and Irish Governments of their commitment to the protection of human rights throughout Ireland is not, in itself, sufficient to ensure legal certainty as to safeguarding those rights. Nevertheless, as the consultants point out, it could be a useful interim step and confidence building measure. Such a declaration might also serve as a precursor to a more formal Anglo-Irish guarantee which could complement and underpin agreed arrangements for the protection of human rights which might emerge from the peace process.

14. The study presents a convincing case for incorporation of the express terms of the relevant international conventions into national law and the Forum accepts that this would have the advantage both of removing potential conflict between national and international obligations and of enabling relevant issues to be argued and decided in national courts, even if the outcome is subject to final appeal to an international body such as the European Court at Strasbourg. The study points out that this form of protection runs counter to the doctrine of absolute sovereignty of the Westminster Parliament but the consultants offer some interesting avenues which could be explored to tackle this difficulty.
15. The Forum notes that both entrenched constitutional protection and protection by ordinary legislation are subject to subsequent amendments or appeal and that additional confidence in the mechanisms could be developed by means of bilateral or multilateral treaties with other States mutually guaranteeing the maintenance of agreed internal structures for the protection of human rights under national law. The consultants' suggestions of possible roles for the Council of Europe, the European Union or the OSCE or for individual States in Europe or elsewhere as guarantors of a new Anglo-Irish Treaty are, in the view of the Forum, worthy of further exploration.

Monitoring and Enforcement

16. The Forum endorses the view of the consultants that the creation of effective structures for monitoring and enforcement of fundamental human rights may be as important as the enactment of the rights themselves. It is crucial that all sections of the population have and are seen to have adequate redress in the event of human rights violations. To that end the Forum welcomes the proposals for one or more human rights commissions to monitor and assist in the enforcement of the full range of fundamental rights and the requirement that judicial institutions and procedures for the selection of judges should command public confidence.
17. With regard to human rights commissions, the study sets out the essential criteria to ensure their effective operation. These include independence from government, the representative nature of their membership, adequate resources, powers of investigation and reporting and the capacity to initiate legal proceedings either in their own right or on behalf of individuals and groups. There is also clear scope for an international dimension in monitoring observance of human rights

norms whether at the European level or more globally through bodies of the United Nations.

18. Independent judicial adjudication on alleged human rights violations is essential and the Forum agrees that this is likely to involve the establishment of one or more human rights or constitutional courts. Such courts must be constituted and operate in such a way that decisions will be generally accepted on all sides and will actually be implemented. The study correctly identifies the perceived balance of representation on the court as an important element in general public acceptance of its legitimacy and the Forum welcomes the suggestions as to how this might be achieved. In particular, the Forum accepts the need for involvement of judges from other jurisdictions.
19. The consultants place particular emphasis on the development of a human rights culture which pervades all the institutions of government and of civil society. This is a valuable contribution to the ethos of any society but acquires a special importance where there are deep divisions. As the consultants point out there have been many in Ireland who have had scant regard for the fundamental rights of others if that stood in the way of the pursuit of their own communal interests. The Forum acknowledges the need for training of all governmental officials in the obligations imposed on them by human rights conventions but recognises also the valuable contribution that can be made by non-governmental organisations which have done and continue to do vital voluntary work within and between the two main communities. It is clear that the development of a human rights culture can be set in motion on the initiative of the government but that its realisation is the task of all members of society.

Derogations Under Emergency Regimes

20. The Forum is grateful for the examination by the consultants of the options that are available with regard to the provision for derogations under possible future emergency regimes. It is recognised that this is a highly sensitive area and that the recent history of conflict in Northern Ireland will make it difficult for some to take a purely objective position on the matter.
21. The Forum believes, however, that it would be valuable to address the issue in the context of efforts to reach a political settlement and proceeds from the view that it cannot be in the public interest as a whole for governments to adopt emergency measures which have

inadequate safeguards and are prone to abuse. Such a possibility in the future could only serve to undermine current efforts to build confidence in agreed structures and to create the human rights culture referred to earlier. At the same time it would be unrealistic to expect any State to formally renounce the possibility of taking appropriate measures to deal with emergency situations which might arise in the future and to avail of derogations to which it was entitled when it signed and ratified the different international conventions.

22. The Forum is of the view that it would be best to make advance provision for safeguards in order to avoid abuses arising from the invoking of emergency powers at some future time. Recent international examples in Canada and South Africa are cited by the consultants and provide helpful guidelines on the types of limitations and safeguards that might be envisaged.