



THIRD WORLD APPROACHES to INTERNATIONAL LAW *Review*



MATHEUS GOBBATO LEICHTWEIS ~ *Bob Marley and the TWAILers*

S. ALI MALIK ~ *Making the New Developmental State*

JANE EZIRIGWE ~ *TWAIL As A Scholarly Approach To Teaching IEL*

CONRAD BRYAN ~ *The Pursuit of Justice for Children of African Irish Descent*

QLÁOLÚWA ÒNI ~ *Nigeria's Settler-Colonial Present*

CHRISTIANA ESSIE SAGAY ~ *Transnational Labour Mobility and Issue-Linkages*

KAMARI M. CLARKE ~ *El imperio del derecho a través de la economía de las apariencias*

USHA NATARAJAN Y KISHAN KHODAY ~ *Situando la naturaleza*

TWAILReview

05

Issue 5/2024



THIRD WORLD APPROACHES to INTERNATIONAL LAW *Review*

Published under a Creative Commons [licence](#).



TWAIL Review ~ Issue 5 (2024) 73-97

The Pursuit of Justice for Children of African Irish Descent: Can International Law provide a pathway to justice?

Conrad Bryan*

Abstract

In recent decades, there has been an increasing demand for reparatory justice for the historical enslavement and trafficking of Africans across the Atlantic, as well as for the associated colonisation and racial segregation. This article highlights a similar call for reparatory justice from an unusual quarter: Ireland. This country is not always regarded as having a historical role in the enslavement and trafficking of Africans. However, in 2023, a group of children of African descent (now adults) born in Ireland initiated a case at the UN Committee on the Elimination of Racial Discrimination, seeking reparations for racial discrimination in childcare institutions between the 1940s and 1990s. The article covers this journey and provides an overview of the historical and colonial context for racism in Ireland. It also provides insights into the domestic and international legal challenges and the political campaign and praxis relating to this ongoing case.

Keywords

reparations; racism; people of African descent; Ireland; CERD.

* Conrad Bryan is a graduate of the National University of Ireland, Galway, where he gained a 1st class master's degree in International Human Rights Law in 2022 at the Irish Centre for Human Rights. In 2021, he gained a place on the United Nations Fellowship Programme for People of African Descent and subsequently went on to file a successful complaint with the UN Working Group of Experts on People of African Descent to raise awareness about human rights violations of children of African and Irish descent in Irish childcare institutions.

1 Introduction

The aims of this article are to shine a light on the systemic racism and racial discrimination that children of African Irish descent were subjected to in Irish childcare institutions in the 20th century and to highlight the failure of the State's domestic legal system to provide adequate remedies. It breaks new ground in situating these human rights violations in Ireland within the context of the legacy of European colonialism. The article provides some historical background on how African Irish children appeared in Ireland in the last century, which also draws on my own experience as an African Irish child unjustly detained for years in these institutions.

The Irish State set up two statutory commissions of investigation to examine child abuses in Irish childcare institutions: the 'Ryan Commission' was set up in 1999 to investigate Industrial Schools (final report: 2009)² and the 'MBH Commission' was set up in 2015 to investigate Mother and Baby Institutions (final report: 2020).³ Although the final reports of these commissions revealed extensive evidence of systemic racism, racial discrimination and segregation, none of these commissions made any recommendations for specific reparations for racial discrimination. The article addresses these failures in the domestic legal and political system. It refutes the summary conclusion in the final report of the Commission of Investigation into Mother and Baby Institutions ('MBH report'), which stated that there was no evidence of racial discrimination in adoption decisions.⁴ I also discuss how our struggle to seek reparations has now turned to international law and the human rights mechanisms at the United Nations.

2 Background: The Irish Racial Justice Forum

The campaign for justice in Ireland emerged because of the failure of the State to provide adequate remedies for racism in the State's redress scheme set up for those placed in Industrial schools, which ignored racial discrimination and racial abuses.⁵ Many of these children, like myself, left Ireland after leaving the institutions to seek a better life. In 2013, I met a group of mixed-race people⁶ in London who had

² . Justice Sean Ryan, 'Final Report of the Commission to Inquire in Child Abuse' (20 May 2009) http://childabusecommission.ie/?page_id=241 (accessed 27 January 2024).

³ 'Mother and Baby Homes Commission of Investigation Final Report' (MBH Report), (30 October 2020) <https://www.gov.ie/en/publication/d4b3d-final-report-of-the-commission-of-investigation-into-mother-and-baby-homes/> (accessed on 4 February 2024).

⁴ Ibid para 261 <https://www.gov.ie/en/publication/d4b3d-final-report-of-the-commission-of-investigation-into-mother-and-baby-homes/> (accessed on 4 February 2024).

⁵ Fiona Gartland, 'Mixed Race Irish in State Care Subjected to Colour Specific Abuse, Oireachtas Told', *Irish Times* (23 October 2014) <https://www.irishtimes.com/news/politics/oireachtas/mixed-race-irish-in-state-care-subjected-to-colour-specific-abuse-oireachtas-told-1.1973416> (accessed 27 January 2024).

⁶ In the context of the situation discussed in this article, the term mixed-race refers to those whose parents are mixed African and Irish (eg, the father is African and the mother is Irish). Hence, the term 'mixed-race' and 'African Irish' (or 'African Irish descent') are both used to refer to this group in this article.

formed a Mixed-Race Irish group and put out a call to action for members to campaign for justice.⁷ In 2016 the Association of Mixed-Race Irish (AMRI) was then formally set up as a support and campaign group for our members resident in Ireland and Britain. By the end of 2019, AMRI had submitted its first Shadow Report⁸ to the Committee on the Elimination of Racial Discrimination (CERD/ the Committee). In 2021, I set up the Irish Racial Justice Forum (IRJF)⁹ with a group of lawyers and legal academics to strengthen our campaign. The IRJF brought together legal scholars, practitioners and activists engaging in praxis and evoking Third World Approaches to International Law (TWAIL) in a bid to try and 'reconcile international law's promise of justice with the proliferation of injustice in the world'¹⁰ by linking theory with lived experience.

Other similar campaign groups have emerged recently in Europe to respond to analogous abuses against mixed-race children. In Belgium, the 'Association of Belgium Métis' represents mixed-race people born in Africa in the 1940s and 1950s. They were taken from their black African mothers and transported, by Catholic religious congregations, from Congo, Rwanda and Burundi (Belgium colonial territories) to Belgium, where they were institutionalised or fostered/adopted.¹¹ Similarly, in France, there is another Métis group called 'L'Enfant de la Creuse' who were forcibly transported as children from La Réunion to La Creuse, a region in central France. Between 1963 and 1982, around 1600 children were taken, without their parent's consent, and placed in foster families to work on farms and as slave labour in depopulated areas of France. The Federation of Uprooted Children, a group in France, has been campaigning for justice for the loss of identity and family separation.¹² Although apologies have been made in Belgium and France, no reparations have been offered for the racial discrimination and the harm caused. In Belgium, a group of five people brought

⁷ Marie O'Halloran, 'Campaign Highlights Abuse of Mixed-Race Irish in Institutional Care', *Irish Times* (18 November 2013) <https://www.irishtimes.com/news/politics/oireachtas/campaign-highlights-abuse-of-mixed-race-irish-in-institutional-care-1.1598162> (accessed 27 January 2024).

⁸ See AMRI Shadow Report here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCERD%2FNGO%2FIRL%2F37383&Lang=en.

⁹ See details of the members of the Irish Racial Justice Forum here: <https://www.mixedraceirish.ie/irish-racial-justice-forum.php>.

¹⁰ Usha Natarajan and others, 'Introduction: TWAIL - on Praxis and the Intellectual' in *Third World Approaches To International Law* (Routledge 2018), at 4.

¹¹ Annette Ekin, 'The Children Colonial Belgium Stole from African Mothers', *Aljazeera* (3 February 2021) <https://www.aljazeera.com/features/2021/2/3/the-children-colonial-belgium-stole-from-africa> (accessed 26 January 2024).

¹² See details here: <https://www.reunionnaisdumonde.com/membre/federation-des-enfants-deracines-des-drom/>.

their case to the Civil Court,¹³ alleging that crimes against humanity were committed against them by the State, but unfortunately, they lost their case.¹⁴

3 African Origins

In 1957, my father managed to escape South Africa's racist apartheid system by taking a ship to England. He was one of those rare black medical students in South Africa at the time whose family held the freehold title in their family house. He always had a dream to become a medical doctor one day but knew that the oppression that black people faced under the racist regime would make this dream almost impossible to realise. Not long after he left his country, his parents were forcibly removed from their own home and transferred to the new Southwestern Township ('Soweto') for black people, as their home was located in what was euphemistically called a 'black spot in a white area'. He made his way to Dublin to continue his medical studies, and after some years there, he had a relationship with an Irish woman, which resulted in my birth. As Ireland was a predominantly and repressively Catholic society, having a child born outside marriage at that time was considered a serious sin and shame. Many of the so-called 'illegitimate children' were born in Mother and Baby Institutions to single mothers and then adopted. However, many mixed-race children left in these institutions would go on to experience systemic racism, not unlike elements seen in apartheid South Africa. Like my father, many other Africans travelled to Ireland from the African continent for education during the decolonisation of Africa in the 20th century.

The origins of children of African descent in Irish childcare institutions between the 1940s and 1970s are different from that of other European countries, as Ireland was not a separate colonial power and, therefore, had no direct colonies itself. However, Ireland's historical connection with the African continent through its religious missionaries is well known. Ireland's position as one of Britain's former colonies itself endeared it to many Africans who visited the country. The story of children of African descent in Ireland is just one among the many categories of people who lived in these childcare institutions, including single mothers, children illegally adopted, and children 'boarded out' as unpaid labour. There is no intention here to minimise their own widespread and varied experiences of severe abuse in any way. The narrative and analysis of this article simply focuses on a small and particular ethnic minority group of children of black African fathers and white Irish mothers.

¹³ Maïthé Chini, 'Metis Women Sue Belgian State for Kidnapping', *The Brussels Times* (11 October 2021) <https://www.brusselstimes.com/188855/metis-women-sue-belgian-state-for-kidnapping> (accessed 26 January 2024).

¹⁴ 'Belgium: Mixed-Race Women Lose Crime against Humanity Suit', *The Associated Press* (9 December 2021) <https://apnews.com/article/europe-religion-race-and-ethnicity-belgium-brussels-37cef7edaeb089ad97bc0a4382ee5bcf> (accessed 26 January 2024).

4 Colonial Context

Ireland is typically viewed as a country colonised by the British Empire, rather than being part of an imperial and colonising empire. In fact, however, many of the colonial administrators and military personnel originated from Ireland and were 'part of the history Western colonialism'.¹⁵ Colonel Edward Marcus Despard from County Laois in Ireland fought alongside Horatio Nelson as a young man in the San Juan raid in 1780 against the Spanish in Central America (currently Nicaragua).¹⁶ Despard would go on to become superintendent of the Bay of Honduras Settlement (later called Belize). Similarly, Charles MacCarthy (1764-1824), a Cork man of Irish and French descent, was a British army officer who was appointed in 1812 as a governor of British territories in West Africa.¹⁷ MacCarthy concluded treaties with local chiefs and rulers as part of the expansion of the British empire and confiscation of territories in West Africa.¹⁸ In 1814, after MacCarthy's appointment as Governor-General of Sierra Leone, the colony expanded with the support of the Church Missionary Society, which helped in the administration of the colony, ensuring the social integration of 'Liberated Africans'.¹⁹ Under MacCarthy's rule, alliances were forged with the Church Missionary Society to administer the colony as part of a 'civilising mission'.²⁰

The European civilising mission is significant in the context of colonial domination.²¹ Anghie examines the relationship between colonialism and international law in the 19th century by focusing on the civilising mission, which justified colonial domination, and argues that, in the field of international law, colonialism was 'animated by...the question of 'cultural difference''.²² Under the notion of cultural difference, the world was separated into two spheres: the European states, which were regarded as equal and sovereign, and the non-European societies, which were characterised as 'backward', 'uncivilised' and 'primitive'. This characterisation legitimised the European conquest and control of non-European states, which were viewed as non-sovereign.

¹⁵ Bryan Fanning, *Racism and Social Change in the Republic of Ireland* (Manchester University Press, 2012) 14.

¹⁶ Mike Jay, *The Unfortunate Colonel Despard*, (Clays Ltd Elcograf S.p.A. Great Britain, 2019) 56.

¹⁷ D Daly, 'Brigadier-General Sir Charles MacCarthy, Kt. 1764-1824' (1931) 10 *Journal of the Society for Army Historical Research* 143 <http://www.jstor.org/stable/44227812> (accessed 29 January 2024).

¹⁸ Inge Van Hulle, *Britain and International Law in West Africa: The Practice of Empire* (Oxford University Press, Oxford, 2020) 51.

¹⁹ *Ibid* 49.

²⁰ David Olusoga, *Black and British. A Forgotten History* (Macmillan, 2016) 316–20.

²¹ Tendayi E Achiume, 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance' (21 August 2019) UN Doc. A/74/321 para 18.

²² Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2007) 3.

In examining the doctrine of sovereignty, contrary to the argument by some eminent scholars that sovereignty was being denied to non-European states, Anghie argues that the concepts in international law were 'far from neutral, that they are racialised and contain within them the discrimination that non-European people have attempted to contest'.²³ This underpinned the Berlin Conference in 1884-5, at which 'civilised' European states carved up Africa amongst themselves.

The African states were excluded from decisions made at the Berlin conference as they were regarded as non-sovereign under racialised international law and jurisprudence at that time. Article 6 of the General Act of the Berlin Conference states that all powers bind themselves 'to watch over the preservation of the native tribes' and instruct 'the natives and bringing home to them the blessings of civilisation'.²⁴ In relation to Africa, the civilising mission to be applied to 'native tribes' was now explicitly codified in international law,²⁵ following the earlier Declaration on the Abolition of the Slave Trade in 1815, which regarded 'civilised countries' as both European and Christian.²⁶ The mindset and ideas of 'civilisation' justified free trade and the 'new juridical discipline, namely colonial law'.²⁷ This created racial hierarchies and administrative systems, such as protectorates, outside legal and parliamentary scrutiny, which perpetuated the subordination of racial groups in colonial territories, which were, as Nuzzo notes, 'condemned to pre-modernity'.²⁸

Ireland was not immune from this mindset and the ideas of civilising Indigenous populations. Many Irish missionaries travelled to Africa as part of the colonial expansion in the 19th and 20th centuries. Fanning notes that they were 'part of an expansion of Christianity within the empires of Europe...and they convinced indigenous populations to abandon their cultural systems and to embrace those of the conquering peoples'.²⁹ We see glimpses of this mindset in Irish newspaper reports of their work in Africa, such as in the comments of the Bishop of Galway to the Africa Missions Society in 1956, when he decried

²³ Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1, 70.

²⁴ 'General Act of the Berlin Conference on West Africa, 26 February 1885' (1885) <https://loveman.sdsu.edu/docs/1885GeneralActBerlinConference.pdf> (accessed 30 January 2024).

²⁵ Liliana Obregón, 'The Civilized and the Uncivilized' in *Oxford Handbook on the History of International Law* (Oxford University Press 2012) 925.

²⁶ *Ibid* 922.

²⁷ Luigi Nuzzo, 'A Dark Side of the West Legal Modernity. The Colonial Law and Its Subject' (2011) 33 *Zeitschrift für neue Rechtsgeschichte* 205, 209.

²⁸ *Ibid*.

²⁹ Fanning (2012) 15.

the intense hostility of the most evil and depraved form of paganism with its hideous cruelty and human sacrifices, its dark and evil fetish tyranny. In no other part of the world did a missionary meet such terrible savagery.³⁰

The founding of Irish missions to train priests for 'foreign missions', such as the first Irish seminary set up in Dublin in 1842, called All Hallows, 'became an integral part of Irish life and identity'.³¹ The ideas underpinning the Catholic civilising mission were promoted in Irish society initially by the Association of the Propagating of the Faith, founded in 1838. In 1841, its journal, aimed at Catholics, sold 12,000 copies and by 1930 reached sales of 130,000.³²

The long-term impact of Irish missionary magazines on the Irish imagination was significant. They depicted the missions as part of the life of the nation before and after independence from Britain in 1922. They contributed towards the construction of a national identity in terms of spiritual and racial superiority.³³ Fanning notes that after the Irish Civil War, 'fighting the battle for Christ in Africa and Asia' was portrayed as uniting Irishmen. He further notes that as recent as 1998, a magazine in an Irish primary school still described refugee children as 'black babies', and the author of the magazine article commented that 'all over the country the nuns who spent years collecting for the little black babies have finally saved up enough to get some'.³⁴ Fanning further noted that 'such comments suggest an ongoing legacy of racism and paternalism rooted in the collective Irish imagination, which impacts upon black people in Irish society'.³⁵ It is for this reason that, in order to fully understand the experiences of children of African descent in Ireland, it is important to frame it in the context of colonialism from which many of the negative attitudes and stereotypes of African people originated.

In addition to the racialisation of Africans by the Catholic church, it is also important to look at the structural racism of the State and how it racialised certain minority populations in the 20th century. There is academic literature, mainly by sociologists, on the racism in Ireland and its conception as a racial state or even a racist state.³⁶ Processes of racialisation in Ireland have been complex and varied. Rebecca King-O'Riain notes that there is no 'consistent logic' in the State's racial projects and that it is 're-racialising itself in different and sometimes contradictory

³⁰ 'Africa Needs Teachers to Aid Missionaries, Centenary of African Missions Society', *Connacht Tribune* (23 April 1956).

³¹ Fanning (2012).

³² *Ibid.*

³³ *Ibid.* 16.

³⁴ *Ibid.* 17.

³⁵ *Ibid.*

³⁶ Alana Lentin and Ronit Lentin (eds), *Race and State* (Cambridge Scholars Press, 2006). See chapter nine 'From racial state to racist state? Racism and immigration in twenty first century Ireland'.

ways'.³⁷ Structural racism and racialisation are probably best understood by looking at the context in which certain groups are excluded from society. This has varied as the State evolved after independence. The 'Irish-Ireland' project of modernisation was articulated within Catholic nationalism prior to independence,³⁸ but, as nation-building progressed post-independence, minority groups such as Jews, Travellers and Protestants were displaced and excluded from society through a process of 'social closure'.³⁹ For example, travellers were linked to colonial racialisations of Gypsies and Irish and were marginalised from Catholic nationalism. By the 1960s, the State pursued overt policies of assimilation of the nomadic traveller community, thus ensuring spatial exclusion.⁴⁰ Jews were depicted as enemies of both the 'nation' and Catholicism,⁴¹ and from the 1930s, explicit antisemitic immigration policies sought to prevent the enlargement of the Jewish community.⁴² As Fanning argues, this hegemonic construction of a national identity in post-independent Ireland acted as an ideological justification for the spatial, political and material exclusion of minority communities.⁴³ The exclusionary national identity of the newly independent Irish State and the manifestations of racial and religious discrimination set the scene for black Africans and those who would arrive as immigrants and students in larger numbers after the 1940s. As Rodolfo Stavenhagen has noted, the 'new' racism emerging in Europe in this period is rooted in European national and colonial history, but what is new is that it is 'exercised on immigrant populations and their descendants rather than the more traditional territorial and religious minorities'.⁴⁴

The decolonisation process of African nations resulted in many young African students arriving in Ireland in the middle of the 20th century. In 1964, it was reported in parliament that in '1962/3 there were 1,100 students from developing countries at the National University, Trinity College Dublin, and the College of Surgeons out of a total student population of 11,000' (i.e.10% of the student population in Ireland).⁴⁵ The newly independent African nations required

³⁷ Rebecca King-O'Riain, 'Re-Racialising the Irish State through the Census, Citizenship, and Language' in *Race and State* (Cambridge Scholars Press, 2006) 275.

³⁸ Fanning (2012) 52.

³⁹ Ibid.

⁴⁰ Ibid 46–49; Ronit Lentin, 'From Racial State To Racist State? Racism and Immigration in Twenty First Century Ireland' in *Race and State* (Cambridge Scholars Press, 2006) 96. Ronit Lentin and Robbie McVeigh, *After Optimism? Ireland, Racism and Globalisation* (Metro Éireann, 2006) 133–34.

⁴¹ Fanning (2012) 41–46; Lentin and McVeigh (2006) 117.

⁴² Fanning (2012) 52.

⁴³ Ibid 53.

⁴⁴ Rodolfo Stavenhagen, *The Ethnic Question Conflicts, Development, and Human Rights* (United Nations University Press, 1990) 128.

⁴⁵ Minister for External Affairs, Mr Aiken, Parliamentary Debate on 27 February 1964, 207:13 https://www.oireachtas.ie/en/debates/debate/dail/1964-02-27/8/#spk_11 (accessed 12 February 2024).

educated citizens to fill government administration roles and in the specialised professional fields of law and medicine in particular.⁴⁶ Research into the lives and experiences of about 70 mixed-race children who were placed in Irish institutions⁴⁷ shows that it was through encounters in Ireland that several young white Irish women met with African students and bore children outside wedlock. Because of the stigma attached to having an 'illegitimate' child with a black father, some women went abroad to Britain to give birth and returned only to hand their children to the care of the State in institutions run by religious orders. Others went straight into mother-and-baby institutions and subsequently handed their children up for adoption or fostering. A few women refused to sign away their children for adoption and managed to bring up their children but with difficulties. Fathers risked being expelled from educational institutions if found to have fathered an illegitimate child. Some Irish girls simply returned from Britain pregnant or with mixed-race children born there.⁴⁸

The hidden stories about these children of African Irish descent, who were left in childcare institutions and orphanages and the human rights abuses they experienced have only recently emerged. A study by Philomena Mullen shows that the racialisation of 16 mixed Black Irish women while growing up in Irish childcare institutions alienated them from their black identities and had a harmful impact on their identity construction by being 'denied Irishness due to phenotypic blackness'.⁴⁹ The narratives revealed in her study also suggest that 'black mixed-race were placed as babies and infants in these institutions because of phenotype' and that they were denigrated by nuns, staff, and other children because of racial differences.⁵⁰ This recent research reinforces the idea that, for black immigrants and African Irish children born in Ireland, the Catholic nationalist identity of the new Irish State was exclusionary, also for those who were institutionalised and segregated from society.⁵¹ This reality was also revealed by the 2004 citizenship referendum, which further racialised Irish nationality by removing the birthright to

⁴⁶ For example, it was reported in the Sligo Champion newspaper that Dr. Kenneth Kaunda, leader of the United National Independent Party of Northern Rhodesia, foresaw a 'serious shortage of trained administrators when his country gains its independence'. A training scheme was agreed with the Irish Government in 1963 at Kaunda's request. 'From Northern Rhodesia to Sligo. To Study Public Administration', *Sligo Champion* (14 December 1963) 3.

⁴⁷ Conrad Bryan, 'MRI Research and Position Paper' (14 October 2014) submitted to the Joint Committee on Justice, Defence and Equality in the Irish Parliament (unpublished, with author).

⁴⁸ Ibid.

⁴⁹ Philomena Mullen, 'Defying the Exclusionary Homogeneity of Irish Whiteness: Mixed-Race Children in Irish Industrial Schools in the Twentieth Century' (2022) 46 *Ethnic and Racial Studies* 1456, 1464.

⁵⁰ Ibid 1468.

⁵¹ Ryan, 'Final Report of the Commission to Inquire in Child Abuse' (n 1) para 9.23-9.24 Note: for details on the policy of racial segregation of mixed-race children in childcare institutions see chapter 9.

citizenship (*jus sanguine*) from the Irish-born children of immigrants, which, as Lentin argues, reconfigured citizenship 'primarily as ethnos rather than demos'.⁵²

5 Child Abuse in Irish Childcare Institutions

The first televised story of the horrific abuses of children in Irish Industrial Schools to emerge was the TV drama-documentary, *Dear Daughter*,⁵³ produced by Louis Lentin in 1996. In this documentary, Christine Buckley recounted the abuses she was subjected to and the atrocities in St. Vincent's Industrial School in Goldenbridge, Dublin, run by the Sisters of Mercy religious order. Her father was a Nigerian medical student, and her mother was a white Irish woman. In 1999, Mary Raftery produced a TV documentary called *States of Fear*,⁵⁴ which looked at a wider number of institutions to identify the systemic nature and extent of the abuses. These public exposures of widespread and systemic abuses generated national outrage, which led to the establishment of a Commission to Inquire into Child Abuse (CICA / Ryan Commission), a full State Apology from the Irish Prime Minister and the 2009 Final Report⁵⁵ by Justice Sean Ryan ('Ryan report').

Industrial and Reformatory Schools

The Ryan report revealed widespread cases of child abuse, including racial abuse and racial slurs experienced by mixed-race children. In the section called 'Record of abuses (male witnesses),' a victim testified that 'one nun locked me in a closet, beat the hell out of me with a leather strap. She didn't like blacks, she called me Baluba, every time the Irish soldiers were attacked in the Congo she attacked me'.⁵⁶ The Luba was an African tribe in the Katanga region of the Congo, often termed 'Balubas'. Members of a Luba militia ambushed and killed nine Irish UN peacekeepers on 8 November 1960⁵⁷ (having mistakenly taken them to be European mercenaries working with Katangese secessionist forces). This was widely reported in Ireland at the time and is one example of how colonial encounters still cast their shadow within this story.

Racial segregation in the Irish residential institutions was also reported, whereby mixed-race children were placed in remote locations on the west coast of

⁵² Ibid.

⁵³ Available at: <https://ifiarchiveplayer.ie/dear-daughter/> (accessed 12 February 2024).

⁵⁴ See interview with Mary Raftery at: <https://www.rte.ie/archives/2019/0424/1045440-mary-raftery-states-of-fear/> (accessed 27 April 2023).

⁵⁵ Ryan, 'Final Report of the Commission to Inquire in Child Abuse' (n 1) http://childabusecommission.ie/?page_id=241 (accessed 12 February 2024).

⁵⁶ Ibid vol 3 chp 7 para 7.236.

⁵⁷ Ronan McGreevy, '60 Years on: Why Irish Soldiers Who Died in Niamba Did Not Get Medals', *Irish Times* (7 November 2020) <https://www.irishtimes.com/news/ireland/irish-news/60-years-on-why-irish-soldiers-who-died-in-niamba-did-not-get-medals-1.4402428> (accessed 7 May 2023).

Ireland to be kept 'out of sight out of mind'.⁵⁸ An inspector from the Department of Education who visited an institution in County Galway in the west of Ireland in the 1970s stated that '[T]his policy in his opinion was applied especially to children of different racial backgrounds'.⁵⁹ Segregation of children in this manner and in remote Industrial Schools and orphanages restricted opportunities for family placements, such as fostering or adoption, as children were primarily placed for adoption from the mother and baby institutions.

The Ryan Commission missed an opportunity to investigate systemic racism in the Industrial Schools thoroughly. The Terms of References for the investigation, as agreed by the Irish Parliament, did not place an obligation on the Commission to inquire into systemic racism and its impact on children of different racial backgrounds. Many adults today who provided testimony and evidence of harms at the Redress Board⁶⁰ hearings (set up in 2002 to provide compensation to victims), say they were not asked or queried directly on racial discrimination. Furthermore, victims had normalized their experiences of racism as children could not have fully processed what was happening to them at the time nor recognize that their rights were being violated. This resulted in individuals entering a judicial process at the Redress Board without an equality of arms. As a consequence, they were not offered remedies for being subjected to racial discrimination and systemic racism. While the racial abuse and racial slurs were classified in the report as 'denigration of family origin' under the heading Emotional Abuse,⁶¹ this characterisation minimized the gravity of systemic racism and racial discrimination across a range of human rights, such as the right to a family life and development.

Mother and Baby Institutions

In 2015 the Irish parliament established another Commission of Investigation ('MBH Commission') following the discovery of a mass grave of the remains of about 800 children within a sewerage system at a Mother and Baby Institution in a town called Tuam in County Galway. Catherine Corless, a local historian, had previously 'found death certificates for nearly 800 children who were residents at the facility but burial records for only two', leading her to surmise that '[e]verything

⁵⁸ Ibid chp 9 para 9.23-9.24 There was also a high concentration of mixed-race children sent to industrial schools in Sligo and Ballaghaderreen.

⁵⁹ Ibid para 9.24.

⁶⁰ 'Residential Institutions Redress Board' (*Residential Institutions Act*, 10 April 2002) <https://www.rirb.ie/resact.asp> (accessed 12 February 2024).

⁶¹ Residential Institutions Redress Act, 2002 sec 1(1)(d), as amended by the section 3 of the 2005 Act (Ireland) Defined as 'Defined as: 'Any other act or omission towards the child which results, or could reasonably be expected to result, in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare.'

pointed to this area being a mass grave'.⁶² The investigations and excavations that followed proved this to be the case. This institution was owned by Galway County Council but run by the Bon Secours religious order of nuns.

Mother and Baby Institutions were State-owned, religious-run institutions, set up for unmarried mothers and their 'illegitimate' children. Due to the stigma associated with 'illegitimacy', single mothers had no option but to give up their children for adoption, and in many cases the children were forcibly taken and illegally adopted. For African Irish children the stigma was doubly worse; not only was the child 'illegitimate' as a legal status, but also racialised as 'coloured'. A significant number of these children spent their first four years of life in these homes and were not offered up for adoption. Instead, they were sent to other institutions, such as Industrial Schools. Following extensive lobbying, the new Commission of Investigation was required by law to investigate systemic racism and to 'identify...the extent to which any group of residents may have systematically been treated differently on any grounds [religion, race, traveller identity or disability]'.⁶³ The State also decided to take a transitional justice approach⁶⁴ to these historic wrongs and in 2018 the government set up a Collaborative Forum to represent survivors under the theme of 'nothing about us without us'.⁶⁵

The MBH Commission's final report was completed in October 2020 and published in January 2021. Unfortunately,

the Commission concluded that there was no evidence of discrimination in relation to decisions made about fostering or adoption of mixed-race children ... However, the decisions that were made with respect to placing these children took account of race.⁶⁶

The conclusion also stated that only 56% of mixed-race children were placed for adoption, while the detailed findings reveal that during the 1960's 'virtually all 'illegitimate' children born in Ireland were adopted'.⁶⁷ If only just over half of

⁶² Jamie Grierson, 'Mass Grave of Babies and Children Found at Tuam Care Home in Ireland', *The Guardian* (3 March 2017) <https://www.theguardian.com/world/2017/mar/03/mass-grave-of-babies-and-children-found-at-tuam-orphanage-in-ireland> (accessed 25 January 2024).

⁶³ 'Terms of Reference: S.I. No. 57/2015 - Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Order 2015' (Statutes, *Irish Statute Book*, 20 February 2015) s 1. VIII <https://www.irishstatutebook.ie/eli/2015/si/57/made/en/print> (accessed 20 March 2022).

⁶⁴ Elaine Loughlin, 'Katherine Zappone: 'We Will Find the Truth and Achieve Reconciliation'', *The Irish Examiner* (10 March 2017) <https://www.irishexaminer.com/news/arid-20444866.html> (accessed 12 February 2024).

⁶⁵ Government of Ireland, 'Charter for a Collaborative Forum of Former Residents of Mother and Baby Homes and Related Institutions' (*Gov.ie*, 17 August 2019) <https://www.gov.ie/en/publication/02ad3b-charter-for-a-collaborative-forum-of-former-residents-of-mother-and-/> (accessed 4 May 2023).

⁶⁶ 'MBH Report' (2020) para 261 Available at <https://www.gov.ie/en/publication/d4b3d-final-report-of-the-commission-of-investigation-into-mother-and-baby-homes/> (accessed 12 February 2024).

⁶⁷ *Ibid* para 32.27.

mixed-race children were adopted at this time in contrast to virtually all of their white counterparts, then it is evident from this data that systemic racism and racial discrimination was at play. Furthermore, the report also states that 'the question whether race...of the mother and/or the child affected the outcome for the child, especially if it prevented adoption or fostering, can be answered in the affirmative',⁶⁸ but goes on to say that there does not appear to be systemic discrimination. This conclusion is contradictory and inconclusive and needed to be challenged. Surprisingly, in its State Apology on 13 January 2021 the government went further than the MBH Commission when it acknowledged:

...the additional impact which a lack of knowledge and understanding had on the treatment and outcomes of mothers and children with different racial and cultural heritage...discriminatory attitudes exacerbated the shame and stigma felt by some of our most vulnerable citizens, especially where opportunities for non-institutional placement of children were restricted by an unjust belief that they were unsuitable for placement with families.⁶⁹

The MBH Commission's conclusion was to have serious implications for seeking redress in court for racial discrimination in Irish childcare institutions. The government decided to introduce the Mother and Baby Institutions Payment Scheme Bill in 2022 (Scheme) which offered a time-based General Payment (redress payment) to any person who resided in a Mother and Baby Institution as a child for 6 months or more, up to a limit of 10 years. It was argued that this scheme was designed to avoid re-traumatising victims by putting victims through an adversarial approach, such as a court process.⁷⁰ In 2021, over 600 survivors participated in a government commissioned public consultation held by Oak Consulting. Its findings show that survivors stated that key criteria such as, among others, forced family separation, vaccine experiments and racial discrimination, 'should be used in assessing the amount of financial recognition'.⁷¹ Numerous other bodies such as the UN Human Rights Committee, the Oireachtas Children's Committee (in the Irish parliament) and the UN Working Group of Experts on People of African Descent called for the scheme to be extended to cover specific

⁶⁸ Ibid para 31.171.

⁶⁹ Micheál Martin, 'Report of the Commission of Investigation into Mother and Baby Homes: Statements' (Dáil Éireann, *Oireachtas*, 13 January 2021) <https://www.oireachtas.ie/en/debates/debate/dail/2021-01-13/10/> (accessed 10 April 2022).

⁷⁰ Orla Ryan, 'Mother and Baby Homes: Survivors Say Redress Scheme Ignores the Trauma of Family Separation', *The Journal* (11 October 2022) <https://www.thejournal.ie/mother-and-baby-home-redress-agreed-by-cabinet-5890180-Oct2022/> (accessed 25 January 2024).

⁷¹ Mary Lou O'Kennedy, 'Report of the Findings of the Consultation with Survivors of Mother and Baby Homes and County Homes, March - April 2021' (17 May 2021) 37 <https://www.gov.ie/en/publication/0c637-mother-and-baby-institutions-payment-scheme/> (accessed 25 January 2024).

human rights violations.⁷² In October 2022, the Irish Human Rights and Equality Commission recommended an alternative two track payment mechanism whereby survivors could choose between a common experience payment (track one) or an individualized assessment to take account of specific human rights abuses (track two).⁷³ None of these calls were accepted by the State.

6 The Irish Domestic Legal System: Elisions of Race

In Ireland, the primary legislation dealing with the prohibition of racial discrimination is the Equal Status Acts 2000-2018. This does not apply to acts of racial discrimination that occurred before enactment in 2000. Therefore, given the disappointing final report of the MBH Commission and statute of limitation laws preventing legal action for a breach of constitutional right to equality, it seemed the only options open to us was to look to international law. This is despite the government's approval⁷⁴ of an €800 million financial package, in November 2021, to cover the costs of the redress Scheme for some 34,000 people.

As the bill progressed through the lower house of parliament (Dáil) it became apparent that the government was not going to include reparations for the impact of systemic racism, even though the government had apologized for the unjust treatment of children from different racial backgrounds. Clearly, the government politicians did not fully appreciate the gravity of racial discrimination and the international human rights law implications. The challenge for us now was that our voices would be drowned out, against the legitimate claims and calls of the 24,000 survivors who were excluded from the Scheme because they were in an institution for less than six months.

Despite repeated attempts to have the words 'children of mixed-race' and remedies for racial discrimination inserted into the redress Bill,⁷⁵ we saw what legal scholars Tendayi Achiume and Devon Carbado describe as the 'complete elision of race'⁷⁶ in the pre-scrutiny legislative report⁷⁷ and in the final redress Scheme passed into law. Both scholars address the issue of 'color-blindness' in US constitutional jurisprudence, in relation to the Fourth Amendment, which is

⁷² Ryan, (2022).

⁷³ Irish Human Rights and Equality Commission, 'Submission on the General Scheme of a Mother and Baby Institutions Payment Scheme Bill' (October 2022) 2-3.

⁷⁴ Lisa O'Carroll, 'Irish Government Agrees €800m Package for Mother and Baby Home Survivors' (16 November 2021).

⁷⁵ On 25 October 2022, the author submitted a letter on behalf of AMRI, recommending amendments to the Bill, to the Joint Committee on Children, Equality, Disability, Integration and Youth, as well as to several legislators in the Irish Parliament.

⁷⁶ Tendayi E Achiume and Devon W Carbado, 'Critical Race Theory Meets Third World Approaches To International Law' (2021) *UCLA Law Review* 1462, 1476.

⁷⁷ Joint Committee on Children, Equality, Disability, Integration and Youth, 'Report on Pre-Legislative Scrutiny of the General Scheme of a Mother and Baby Institutions Payment Scheme Bill 2022' (July 2022).

designed to protect people from unreasonable search and seizure.⁷⁸ Paul Butler also notes that Fourth Amendment jurisprudence includes a 'series of race cases in which race is rarely mentioned' in court judgements, even though 'selective prosecution based on race is unconstitutional'. He further notes that 'successful claims of selective prosecution are extremely rare'.⁷⁹ In this context, Butler uses the term 'willful color-blindness'⁸⁰ to describe the 'elision of race' in Fourth Amendment jurisprudence. However, it is clear that during the debates in the Irish parliament some back-bench politicians were not color-blind. On the contrary, they explicitly supported calls for remedies to be provided for racial discrimination. Yet, similar to the 'elisions of race' in US constitutional jurisprudence, there was absolutely no mention of race in the final pre-scrutiny legislative report on the redress Scheme and the subsequent legislation enacted.⁸¹

In developing reparatory responses to human rights violations, Patrick Thornberry advises that 'States should not simply mimic bureaucratic impulses to homogenize solutions to practical problems but relate to circumstances of persons and groups caught up in the situations under review'.⁸² In this case, mixed-race children were effectively 'homogenized' since the redress Scheme was applicable to all children equally depending on the length of stay in a mother and baby institution. No specific human rights violations are separately recognized in the legislation. Instead, the mixed-race children are treated as indistinguishable from the white majority and treated as if they suffered the same human rights violations as the white majority. Racism was not a common experience amongst all survivors and its omission from the Scheme was an act of egregious color-blindness. In light of the above challenges within our domestic legal and political system, I felt it was now imperative to go outside the country to have our right to an effective remedy vindicated.

7 The International Legal System: United Nations Mechanisms

In order to try and vindicate our rights at an international level we decided to approach the United Nations. This part of the article covers the UN human rights

⁷⁸ Amendment IV of the U.S. Constitution states: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

⁷⁹ Paul Butler, 'The White Fourth Amendment' (2010) 43 *Texas Tech Law Review* 245, 253.

⁸⁰ Ibid 247.

⁸¹ See also an example of the 'elision of race' noted by Ms Gay McDougall in her comments on Ireland's State Report to CERD in December 2019: <https://youtu.be/QFNec8yfglY?feature=shared> ; Also see the full meeting at: UN Web TV, Consideration of Ireland – 2784th Meeting, 100th Session Committee on Elimination of Racial Discrimination <https://webtv.un.org/en/asset/k13/k135f991s7> (accessed 8 February 2024).

⁸² Patrick Thornberry, *The International Convention on The Elimination of All Forms of Racial Discrimination. A Commentary* (Oxford University Press, 2016) 429.

mechanisms that we have sought to engage to overcome the obstacles we faced in Ireland.

Special Procedures – Working Group of Experts on People of African Descent

As the Irish government steamed ahead with its flawed redress Bill, choosing the Working Group of Experts on People of African Descent ('WGEPAD') seemed to be the perfect avenue for our cause, with its flexible complaint mechanism. There were five human rights experts in this working group who had expertise in relation to racism against Africans. Also, the MBH Commission had by now been discredited when it lost a Judicial Review case in the Irish High Court for failing to allow survivors/defendants a right to read the draft report before it was published. The High Court declared in December 2021 that the MBH Commission 'acted unlawfully by denying fair procedure to the survivors'⁸³ in not allowing identifiable persons the right see and correct what was being disclosed about them in the draft report. This was the right time to submit an individual complaint to WGEPAD.

The key substantive human rights issues raised were in relation to racial discrimination in adoption practices, religious discrimination and illegal non-consensual vaccine trials. My analysis of these are as follows:

i. Racial discrimination in adoption practices

According to institutional records, it was the doctors and paediatricians at Pelletstown Mother and Baby Institution who decided whether a child was fit for adoption based on the child's health and colour or race. The evident distinctions made based on race would have been violations of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which states that 'the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

The practice of certifying 'fitness for adoption' should not have been made by a medical doctor. There were wider issues beyond medical and health factors which ultimately determined a child's pathway to the Adoption Board. Institutional medical records found by the MBH Commission included racial comments such as: 'Colored child. Healthy. Medically fit for adoption but owing to colour this

⁸³ Dominic McGrath, 'Mother and Baby Homes Commission Treated Survivors Unlawfully, High Court Rules', *The Irish Independent* (17 December 2021) <https://www.independent.ie/breaking-news/irish-news/mother-and-baby-homes-commission-treated-survivors-unlawfully-high-court-rules-41160751.html> (accessed 8 February 2024).

would be difficult (1959)'.⁸⁴ Another read: 'Healthy. Half caste child. On account of above will be unfit for adoption (1959)'.⁸⁵ Records of adoption societies also revealed racial prejudice, such as this note: 'I am afraid the answer there is that where there is any question of blood other than north European, there would be very little likelihood of our placing such a child.'⁸⁶

ii. Religious discrimination in adoption practices

Children of African descent were subjected to religious discrimination in ways not fully recognised by the MBH Commission. In an attempt to explain the poor adoption rates for mixed-race children, the MBH Commission Report cites a *Sunday Independent* article of 28 January 1968, quoting Lady Valerie Goulding as 'saying that 'you are looked at sideways if you have a coloured baby with you'.⁸⁷ According to this article, approximately six 'coloured' children were adopted every year but there was a backlog of 20 such children 'causing a big headache for various organisations dealing with child adoption'. However, the Commission failed to mention that the Protestant Adoption Agencies referred to in the same article had people seeking to adopt mixed-race children.

Furthermore, in the article, Fr Colleran of the Catholic Protection and Rescue Society states that 'Irish people have no prejudice against coloured children and they ought to get over their lack of confidence in them'. These details were strangely omitted by the MBH Commission in its report. The *Irish Times* journalist Eileen O'Brien noted that in 1967, the Protestant Adoption Society in Ireland reported that 'there were many more would-be adopters than children offered for adoption and many people come to the society seeking to adopt children of mixed-race or Vietnamese orphans'.⁸⁸ Clearly, the assumption made by the MBH Commission that there were few people who would take mixed-race children was wrong; in fact the underlying issue was a form of religious discrimination faced by mixed-race children in difficult circumstances.

The structural aspect of this issue can be seen in legislation. The 1952 Adoptions Act (s. 12) prohibited adoptions of children to adoptive parents who were not the same religion as the natural parents. In the case of an illegitimate child, only the natural mother was recognised. The religion of the African father was not taken into account, and many would not have been Catholic. As noted in a letter to the *Irish Independent*: 'The other [issue] is the difficulty in finding eligible Christians to adopt coloured children ... Thus the adoption of many coloured

⁸⁴ 'MBH Report' (2020) para 31.26.

⁸⁵ Ibid 31.26.

⁸⁶ Ibid para 31.13.

⁸⁷ Niall Carroll, 'Niall Carroll reports a growing problem for adoptions societies', *Sunday Independent* (28 January 1968).

⁸⁸ Eileen O'Brien, 'The Problems of Adoption', *Irish Times* (30 September 1968).

children is rendered difficult'.⁸⁹ This predicament could have been over-ridden by the Adoption board in certain circumstances as the Adoption Board had the discretion under the Adoption Act 1952 Art 12(3): 'The Board may, having regard to the special circumstances of a particular case, make an adoption order although the persons referred to in subsection (2) are not all of the same religion.' While other Irish Protestant religions were permitted, certain Christian denominations such as the Church of England were precluded. My own South African father was an Anglican, a precluded religion. A child, in my position, should equally have been offered and placed in a Protestant family based on the father's religion. I doubt if any of the African fathers were members of these alternative Irish Protestant denominations.

Although this law gave some discretion to the Adoption Board it is clear from the MBH Commission's report that the Catholic church and adoption societies were ferociously against giving 'Catholic' children to Protestant or non-Catholic families. According to press reports at the time, children were 'never given to adoptive parents who are of a different religion to that of its natural parents...[which was]...different to that of Britain and many other countries'.⁹⁰ The MBH Commission noted that 'The main motivation behind the British and Irish Catholic charities... was to prevent these children being 'lost' to Catholicism through adoption into Protestant families. Concerns... that State-regulated adoption would result in Catholic children being adopted by parents of a different religion were a factor in delaying the introduction of legal adoption in Ireland until 1952'.⁹¹

The MBH Commission noted that in 1975, '[t]he High Court found that the requirement of uniformity of religion in the Adoption Act 1952 amounted to discrimination on grounds of religious belief or status in breach of Article 44, s.2(3) of the Constitution'.⁹² For example, in a case where the mother of the child was a member of the Church of England, not listed in the Adoption Act 1952, an adoption application had been rejected because of the different religion of the prospective adoptive parents.⁹³ This religious clause in the Adoption Act, which appeared to be a neutral rule, also indirectly discriminated against children in racial groups who were baptised as Catholics (mother's religion). It appears that the Catholic congregations preferred to keep mixed-race children in institutions rather than have them placed in protestant families, despite protestant families seeking to

⁸⁹ Michael J Nagle, 'Letter to the Editor - Coloured Children', *Irish Times* (2 May 1967).

⁹⁰ Richard Grogan, 'Adopting Children', *The Irish Press* (29 December 1965).

⁹¹ 'MBH Report' (2020) para 49.

⁹² *Ibid* 96.

⁹³ *Ibid* para 32.102.

adopt them. This was indirect discrimination, which further restricted opportunities to realise the right to a family and private life.

Finally, the MBH Commission's statement that '[i]t appears that race was a less important factor in decisions relating to adoption than religion or disability'⁹⁴ reveals a complete lack of understanding of the intersectionality between race and religion described above. The hierarchy of discrimination inferred by this statement also revealed incompetence by the Commission in its inability to critically analyse systemic racism.

iii. Illegal vaccine trials and the targeting of vulnerable children

The MBH Commission found that many children of all backgrounds, including mixed-race children, were subjected to illegal vaccine trials across several institutions. It also found that 'there was not compliance with the relevant regulatory and ethical standards of the time as consent was not obtained from either the mothers of the children or their guardians and the necessary licences were not in place.'⁹⁵ Furthermore, the Commission referred to the Nuremburg Code (1947) as setting the standards for clinical trials at this time,⁹⁶ which were not kept. Seven vaccine trials took place in the institutions under investigation in the period from 1934-1973, and a number of the children involved were identified. Children of mixed-race and with disabilities were targeted for the oral polio vaccine trial identified in Pelletstown institution in Dublin. The Commission stated that it could not confirm it as part of the Glaxo trials but concluded that 'considering the methodology employed and the selection criteria as it pertained to the children involved, the Commission takes the view that there is a high probability that it was' a vaccine trial.⁹⁷

A Department of Health document dated 30 September 1963 dealing with this application noted that, in April 1962, Professor Meenan had asked to field-trial an Oral Polio Vaccine in Pelletstown. In that instance, the Department of Health raised concerns regarding the selection of Pelletstown: 'While the procedure proposed appeared to be a safe one, the selection of the group to participate was open to objection and approval was not given on that occasion.'⁹⁸ The selection methods used resulted in a high proportion of mixed-race children, along with children with disabilities. In 1965, 56 children were selected to receive an oral polio vaccine course, and all were living in Pelletstown unaccompanied. At least 44 of these children had already received a full three-shot vaccination against polio. The

⁹⁴ Ibid Executive Summary, para 262.

⁹⁵ Ibid Executive Summary, para 248.

⁹⁶ Ibid para 34.10.

⁹⁷ Ibid para 34.163.

⁹⁸ Ibid 34.92.

institutional records show that 53 of the 56 children selected were 'illegitimate' children and that the three 'legitimate' children involved were either 'abandoned' or had a physical disability. Eight of these children were described as 'mentally retarded', 'backward' or 'of low intelligence'. Others had physical disabilities and associated notes which read 'child won't walk', 'not lifting head', 'underdeveloped child', 'enlarged heart and partially deaf' and 'no teeth, large head'. In 13 further instances, mixed-race children were described as 'half-caste' or 'coloured child',⁹⁹ which represents 23% in the trial sample of 56 children. Considering that non-white ethnic minority group representation in the general population at this time was less than 0.5%, this is a disproportionate number of mixed-race children targeted for the trial, which is a further indicator of systemic racism. Here, I would also note that in Article 7 of the International Convention on Civil and Political Rights ('ICCPR'), non-consensual medical experiments sit alongside torture, cruel and degrading treatment and reads as follows: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.'

The Commission concluded that there was 'no evidence of injury to children as a result of these vaccines'.¹⁰⁰ However, this conclusion was successfully challenged by a survivor in the Judicial Review in the High Court, as mentioned earlier.¹⁰¹ It is worth noting here the point made by Virginia Leary in 1995:

Although medical experimentation, for example, may result in good for the general populace, it must not violate the dignity of the individuals subjected to it— particularly the dignity of society's most vulnerable groups: the poor, racial and ethnic minorities, disabled persons and the mentally and physically handicapped who have often been the subjects of medical experimentation.¹⁰²

Importantly, Article 7 does not refer to injury caused by medical experimentations but rather the requirement to obtain consent, a violation for which an effective remedy is required. The Irish government is refusing to provide remedies for non-consensual vaccine trials on the basis that the redress scheme is intended to be non-adversarial and, therefore, individual assessment is not being carried out.

The basic premise the MBH Commission appears to rely on in arriving at its conclusion is that society was to blame for the problem of mixed-race children being left in institutions. It states that the

⁹⁹ Ibid para 34.162.

¹⁰⁰ Ibid para 248.

¹⁰¹ McGrath (2021) As part of the settlement the Government agreed to make a declaration that the defendant disagreed with the statement on vaccine trials in paragraph 248 in the Commission's final report.

¹⁰² Virginia A Leary, 'Justiciability and Beyond; Complaint Procedures and the Right to Health' [1995] *The Review* 55.

absence of people of non-European ethnicity in the Irish population meant that children or unmarried mothers from a different racial background were conspicuous, and there was a lack of knowledge and understanding about their culture, religion and ethnicity.¹⁰³

This is an unacceptable justification for the State's failure to protect these children from institutionalisation. This line of argument deflects responsibility from those who owned and ran childcare institutions who held racist views and 'negative bias' similar to others in society.¹⁰⁴ In addition, it deflects from the State's international legal obligation to protect children from racial discrimination within the State (society) and, by extension, within its childcare institutions. ICERD Article 2(d) states: 'Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation.'

There are some challenging implications behind this broad prohibition in the context of 'orphaned'/institutionalised children from ethnic minority communities. One may say you cannot force a white person to adopt or foster a black child. But this misses the point here, which is that in a society where there are clearly white families from different religious backgrounds and with no religion who were keen and willing to take mixed-race children into their families, the only conclusion one can come to for the lower number of family placements for mixed-race children is systemic discrimination (racial and religious). The fact that some mixed-race children were adopted proves that society was not to blame. That some were adopted also cannot mitigate against a charge of systemic discrimination, for which the State is responsible and should be accountable.

On 23 September 2022, the WGEPAD and four other UN Special Rapporteurs issued a joint statement in response to my complaint, which concluded that the 'proposed Bill Payment Scheme provides a unique opportunity to provide redress for the harms caused due to racial discrimination and systemic racism to which children of African and Irish descent were subjected'.¹⁰⁵ The State has a legal obligation, under Article 6 of ICERD, to provide effective remedies and to assure the right of everyone to seek just and adequate reparations for any damages suffered as a result of racial discrimination. This public statement by the independent human rights experts has been roundly ignored by the Irish government, despite the pressure from several cross-party politicians calling for the State to address the issue raised by the experts. The standard response from

¹⁰³ Ibid para 31.10.

¹⁰⁴ Ibid 31.172.

¹⁰⁵ UN Special Rapporteurs, 'Ireland: UN Experts Call for Adequate Redress for Systemic Racism and Racial Discrimination in Childcare Institutions 23 September 2022' (*Statements: Special Procedures*, 23 September 2022) <https://www.ohchr.org/en/statements/2022/09/ireland-un-experts-call-adequate-redress-systemic-racism-and-racial> (accessed 12 February 2024).

the State to all politicians who posed parliamentary questions was that 'there is no financial payment which could make up for the immense pain and suffering endured by so many of our citizens whose lives have been affected by these issues'.¹⁰⁶ In parliament, an independent member of the opposition, Catherine Connolly, asked the Minister for Children, Roderic O'Gorman, 'if he intends to attach the UN statement to the commission's report maintained online and in the Oireachtas library as the official and historical record.'¹⁰⁷ He replied, 'that the UN statement and the State's response are in the public domain and, therefore, available and accessible to all'.¹⁰⁸ As such, the conclusion expressed by UN experts remains unchallenged by the State. It is perhaps a tacit acceptance of reality.

UN Treaty body -- Committee on the Elimination of Racial Discrimination (CERD)

Given the refusal of the Irish State to provide reparations, we now need to consider taking the complaint further to the CERD to adjudicate. This step will now mean entering the UN treaty body system to establish if a State is in breach of binding international law, ICERD in this case. The purpose of CERD is to monitor compliance with ICERD, make General Recommendations and receive complaints from individuals, groups of individuals or State parties (inter-state cases) for adjudication. After consideration of communications from all parties to a dispute, CERD will issue suggestions or recommendations to resolve the dispute.

This complaints mechanism is provided for in ICERD Article 14, which Ireland formally accepted upon ratification.¹⁰⁹ It is, therefore an option available to our group and represents a historic case taken against Ireland for a violation of the ICERD Article 6, which reads:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

The two key decisions critical to the success of our case, currently being considered by CERD, are a) the decision on admissibility and b) the final decision on the

¹⁰⁶ Éamon Ó Cuív, 'Dáil Éireann Debate' (*Oireachtas.ie*, 9 November 2022) https://www.oireachtas.ie/en/debates/question/2022-11-09/98/#pq_98 (accessed 12 February 2024).

¹⁰⁷ Catherine Connolly, 'Dáil Éireann Debate' (*Oireachtas.ie*, 15 November 2022) https://www.oireachtas.ie/en/debates/question/2022-11-15/433/#pq_433 (accessed 12 February 2024).

¹⁰⁸ *Ibid.*

¹⁰⁹ 'Depositary - International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966' (Depositary, *United Nations Treaty Collection*) https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en (accessed 5 May 2023).

merits of the complaint. Regarding admissibility, CERD will first consider the State's arguments against our complaint submitted to the Committee. The State may argue that the case is inadmissible *ratione temporis* (by reason of time) and that as the abuses happened so long ago, they cannot be defended. Since Ireland ratified ICERD on 29 December 2000, long after the alleged abuses of racial discrimination and systemic racism occurred, ICERD is therefore not applicable. The State may also argue that domestic remedies through the Irish courts have not been fully exhausted. Some of the victims in the case were compensated previously for abuses in Reformatory and Industrial Schools, and it could be argued that Article 6 right to remedies have already been met for these victims and that this and the new redress Scheme both represent effective remedies. Our counterarguments will include, for example, the fact that the statute of limitations law in Ireland is unduly restrictive and that the remedies offered by the State are not effective. Further, in order to be admitted, it is not necessary to pass all tests.

If our case is admitted, CERD will make its final decision on the substance of the case at the end of the merits stage. The key allegation made is that the State violated Article 6, in failing to provide 'just and adequate' reparations for children of African descent. The State has already acknowledged that racial discrimination resulted in the institutionalisation of children with different racial backgrounds, and the UN Special Procedures have also concluded that children were subjected to systemic racism. The issue then becomes whether the minimalist and generalised redress offered by the State, which fails to acknowledge or compensate systemic racism and racial discrimination, satisfies the requirements of ICERD Article 6. It would be our view that the Commission mechanism and subsequent scheme falls far short of this standard and erases the correct history of what occurred to children of African descent in childcare institutions. CERD may then have to consider the ongoing impact and damage caused by racial discrimination to determine the proper right to a remedy. No matter how well or poorly any of the victims fared in later life, each and everyone is poorer as a result of a degraded childhood.

8 Political Activism and Support

An important part of this legal campaign was to engage with legislators in the Irish parliament as the redress scheme was debated. This enabled us to run a concurrent political campaign, holding the government to account during the debates on the Bill while our international case was already underway. The parliamentary questions and challenges from Senators to the Minister in the chamber were remarkable. They ranged from strong criticism at the way so many victims were being excluded from the scheme to direct requests to the Minister to avoid obstructing our case at the United Nations and to allow it to be heard by CERD.

In one case, a Senator challenged the Minister for Children directly, saying that 'this is about those who experienced racism, those who were subjected to drug trials and those who spent fewer than six months in an institution. None of these people are covered or getting any redress'.¹¹⁰ Another Senator criticised the redress scheme by reminding the Minister that 'mixed-race survivors have exhausted all possible domestic avenues for redress. There is currently no way for survivors to get justice in Ireland for historical racial discrimination'.¹¹¹

In the end, the Minister was forced to admit that there is no 'specific stream of payment to recognize the discrimination they suffered as a result of being mixed-race. There is no additional payment for the fact they received a non-consensual vaccination. I accept there is criticism'.¹¹² He later explained in the chamber that the reason the State did not believe in an individualized examination of a person's circumstances was that it would be difficult to obtain the evidence, 'particularly in the area of racism'.¹¹³ This parliamentary discourse was very helpful to us and provided us with some clues as to the thinking and positioning of the State *vis-à-vis* our complaint to CERD. This has enabled us to make additional pre-emptive submissions to CERD in advance of a decision to refute what the Minister appears to believe: that there is no *prima facie* case to be heard.

In summary, the use of parliamentary question times, with the support of politicians in the debates, to hold the State to account has been extremely beneficial to this campaign. For me, the most interesting development in parliament was how the statement from the UN Special Procedures (September 2022) helped to change the narrative so that by the time the Bill reached the Seanad (the Senate, Ireland's upper house of parliament), the 'colour-blindness' we saw in the early stages seemed to lessen significantly and politicians and the Minister were now openly talking about 'mixed-race' people, thus placing our group on the public record.

9 Concluding Remarks

This article has provided an overview of the shortcomings in Ireland's domestic legal and political systems in relation to historical racial discrimination. The story of the children of African Irish descent who found themselves incarcerated in Irish childcare institutions between the 1940s and 1970s has been hidden for decades. In recent years, as adults, the group mobilised and received tremendous support and solidarity from legal scholars, politicians and the general public. In the end, to

¹¹⁰ Senator Victor Boyhan, Seanad Éireann debate, 21 June 2023, available at <https://www.oireachtas.ie/en/debates/debate/seanad/2023-06-21/17/> (accessed 15 September 2023) (insertion added).

¹¹¹ Senator Lynn Ruane, *ibid.*

¹¹² Minister Roderic O'Gorman, *ibid.*

¹¹³ Minister for Children, S Seanad Éireann debate, 24 May 2023, available at <https://www.oireachtas.ie/en/debates/debate/seanad/2023-05-24/15/> (accessed 15 September 2023).

quote M.L. King, 'the arc' of justice was bending towards international law, which has led us to the United Nations complaints procedures.

However, two difficult questions still remain: Firstly, what makes the violations against this group so different that they justify additional remedies? Secondly, how can we make these allegations now if Ireland was not bound by ICERD at the time the violations occurred, having only ratified this convention in 2000? The Irish government itself declared, in its State Apology in 2021, that children of different racial backgrounds suffered 'additional impacts' and that 'opportunities' for placement in families were 'restricted'. The additional impacts arose mainly due to the longer periods in institutions compared to the total population. As a consequence, they were at a higher risk of suffering from additional abuses and were disproportionately targeted for non-consensual vaccine trials. They were also racially segregated and suffered from racial denigration. Racial discrimination resulted in separation from family and inheritance. As Professor Bryan Fanning, a witness at the MBH Commission, said: 'black children were problematic to the system, and the stories he had heard from them suggest that they had experienced racism as children and that it had impacted on their lives'¹¹⁴ such as the emotional toll of being constantly told you are not Irish, and the low socio-economic standards of living and diminished educational outcomes.

Concerning the applicability of ICERD, which was not ratified at the time of the original violations, in the *Elizabeth Coppin v Ireland* case brought to the Committee Against Torture at the UN, the Committee against Torture concluded that 'the State party had not produced evidence to indicate that an effective remedy was available... It decided that communication was admissible *ratione temporis* due to possibly continuing violations...of the Convention'.¹¹⁵ Under CERD's own jurisprudence, the principle of ongoing violations can also be a justification for admissibility *ratione temporis*. In one example, CERD decided that, 'As the State party had so far failed to complete its investigations...and to offer other remedies...the alleged violations were ongoing'.¹¹⁶

This jurisprudence is relevant to our case. However, it is still uncertain as to whether we will succeed in this group action. Nevertheless, this is an important international case that forms a small part of the worldwide campaign for reparatory justice for people of African descent and future generations.

¹¹⁴ 'MBH Final Report' (2020) para 31.43.

¹¹⁵ *Elizabeth Coppin v Ireland* UN Doc CAT/C/73/D/879/2018, para 6.

¹¹⁶ *Dragan Durmic v Serbia and Montenegro* UN Doc CERD/C/68/D/29/2003, 8 March 2006, para 6.4.



THIRD WORLD APPROACHES to INTERNATIONAL LAW *Review*

EDITORIAL COLLECTIVE

LAURA BETANCUR-RESTREPO ~ *Universidad de Los Andes*

AMAR BHATIA ~ *York University, Toronto*

FABIA FERNANDES CARVALHO
~ *Getulio Vargas Foundation São Paulo Law School*

SARA GHEBREMUSSE ~ *Western University*

USHA NATARAJAN ~ *Columbia University*

JOHN REYNOLDS ~ *Maynooth University*

AMAKA VANNI ~ *University of Leeds*

SUJITH XAVIER ~ *University of Windsor*

EDITORIAL ASSISTANT

SARANGA UGALMUGLE ~ *University of Windsor*

FRONT COVER IMAGE

Guernica
via wikimedia commons

TWAIL Review Issue 5

Published October 2024

Windsor, Canada ~ Bogotá, Colombia

www.twailr.com

editors@twailr.com

submissions@twailr.com

twitter: @TWAILReview

facebook: @twailr

ADVISORY BOARD

GEORGES ABI-SAAB

PENELOPE ANDREWS

ANTONY ANGHIE

REEM BAHDİ

MOHAMMED BEDJAOUİ

HILARY CHARLESWORTH

BS CHIMNI

CYRA CHOUDHURY

KAMARI MAXINE CLARKE

KIMBERLÉ CRENSHAW

RICHARD DRAYTON

RICHARD FALK

JAMES GATHİİ

CARMEN GONZALEZ

ARDI IMSEİS

BEVERLY JACOBS

KARIN MICKELSON

VASUKI NESIAH

LILIANA OBREGON

OBIORA OKAFOR

ANNE ORFORD

SUNDHYA PAHUJA

VIJAY PRASHAD

BALAKRISHNAN RAJAGOPAL

NATSU SAITO

MUTHUCUMARASWAMY SORNARAJAH