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PREREQUISITES FOR PROGRESS IN NORTHERN IRELAND

WRITTEN EVIDENCE OF CHRISTOPHER STANLEY, BRITISH IRISH RIGHTS WATCH, TO THE COMMISSION OF SECURITY AND CO-OPERATION IN EUROPE, U.S. HELSINKI COMMISSION

21st March 2012

British Irish RIGHTS WATCH (BIRW) is an independent non-governmental organisation that has been monitoring the human rights dimension of the conflict, and the peace process, in Northern Ireland since 1990. Our vision is of a Northern Ireland in which respect for human rights is integral to all its institutions and experienced by all who live there. Our mission is to secure respect for human rights in Northern Ireland and to disseminate the human rights lessons learned from the Northern Ireland conflict in order to promote peace, reconciliation and the prevention of conflict. BIRW's services are available, free of charge, to anyone whose human rights have been violated because of the conflict, regardless of religious, political or community affiliations. BIRW take no position on the eventual constitutional outcome of the conflict.

In 2007 BIRW won the Beacon Award for Northern Ireland. In 2008 we were awarded the *Irish World* Damien Gaffney Award. In 2009 we became the recipients of the new Parliamentary Assembly of the Council of Europe's Human Rights Prize.

BIRW is grateful to this honourable Commission for allowing us to submit written evidence to its hearing on "Prerequisites for Progress in Northern Ireland" as a forum for following up and developing the themes of the previous U.S. Helsinki Commission hearing of March 16th 2011 on "Northern Ireland: Why Justice in Individual Cases Matters". We request that this testimony be written into the official record of the Commission.

WINNER OF THE COUNCIL OF EUROPE'S PARLIAMENTARY ASSEMBLY HUMAN RIGHTS PRIZE 2009
WINNER OF THE IRISH WORLD DAMIEN GAFFNEY MEMORIAL AWARD 2008
WINNER OF THE BEACON PRIZE FOR NORTHERN IRELAND 2007

We wish to thank the Chair of the Helsinki Commission, Representative Chris Smith in particular for his long-standing interest in human rights in Northern Ireland and BIRW should like to take this opportunity to mark the recent passing of Representative Donald Payne, who, although not a member of this Commission, also had an abiding interest in bringing peace and human rights to Northern Ireland, and whose support will be greatly missed by many: "He was a champion, a gentleman, a congressman to the world."¹

Introduction: Why dealing with the past matters in Northern Ireland

The conflict in Northern Ireland, which began in 1969 and officially ended with the Belfast/Good Friday Agreement of 1998, inevitably, because of its intensity, still causes aftershocks as Northern Ireland continues to make its painful transition from conflict to peace after such a prolonged period of violent tragedy.

The past is not a foreign country for Northern Ireland. It cannot be ignored or forgotten or remain uncharted. The past continues to shape the present and to determine the future. What has become popularly known as dealing with the past is one the prerequisites for progress in Northern Ireland. One of the reasons for this is that, although there have been many victims on all sides of the community, many people do not know why their loved one died or they themselves were injured. Understanding the cause and reason for loss is a further prerequisite for progress in Northern Ireland; as such a better understanding facilitates the transition to a settled and peaceful future, benefitting from the sad lessons learned through conflict.

There have been many untruths, particularly concerning the role of the British state in colluding in many of the killings scarring the landscape of Northern Ireland. There is a great thirst for the truth and justice, particularly as people begin to emerge from the long shadow of the conflict, becoming empowered and confident enough to ask those difficult, uncomfortable and often disturbing questions about what happened. Even more so, they want to know why still, in so many cases so relatively recently in the mind' eye, no-one has ever been held to account, either because protected by the cloak of the state or the concealment of political pragmatism shoring up a fragile peace, hard won and brokered with the help of so many American friends.

This is a history which is often described as toxic but the true toxicity lies in the failure to confront the violent recent past in Northern Ireland and to hold to account all those responsible, including those who had a role in the actions of the British state. Accountability at many levels is a further compelling prerequisite for progress in Northern Ireland.

¹ <http://www.nj.com/>

There are some in Northern Ireland and elsewhere who believe that a line can be drawn under the past and that people should just move on or that 9th to 11th August 1971², or 12th February 1989³ or 15th August 1998⁴ (after Good Friday 1998, when the peace agreement was signed) are just dates or just remote, forgotten and dust gathered. However, no-one who has studied the issue (especially the Consultative Group on the Past⁵, set up by the government specifically to examine how Northern Ireland should deal with the past) believes that the wounds left by the past in psyche, soul and body can be so (often wilfully) neglected.

To forget would be to fail to learn the lessons from this recent history and to fail to build institutions and create a culture in which any repetition of past violence becomes impossible, and the hard lessons become the corner stone for progress and a model for other societies emerging from civil conflict. 1969 is an historic date; but the events since then in Northern Ireland to 1998 and beyond (remembering the Omagh Bombing of 15th August 1998) are not historical either to those relatives of the killed or to those survivors who were. History cannot be so swiftly erased or sutured at the behest of those who would rather forget for their own convenience or perhaps because of their connivance in violations, or who would assume such dangerous forgetting to be a spurious prerequisite for securing an uncertain future. Expediency, political or otherwise, cannot be a prerequisite for progress in Northern Ireland.

There have been many genuine attempts to reform Northern Ireland's institutions since 1998, but while outstanding cases remain unresolved, including those the Helsinki Commission has heard from in terms of campaign representatives previously including the Ballymurphy Massacre 1971, the McGurk's Bar Bombing of the same year and the murder of Patrick Finucane in 1989, then there is a danger that these reforms of the relevant institutions will be undermined. Particularly undermining of public confidence is any attempt on the part of politicians or public servants to protect those seeking to evade implication in crime or collusion. A further prerequisite for progress is therefore that the mechanisms and institutions of accountability are rigorously independent of state actors or their agents.

Analogous to the failure to resolve and offer satisfactory redress for the many remaining cases, and not just those ones brought to the attention of the Helsinki Commission, are the failings of those available mechanisms designed specifically to reveal or chart the truth about violent past events arising from the conflict. The British state, as the author and owner of these institutions on behalf of its citizens, must ensure that they not only appear to discharge the obligations

² The Ballymurphy Massacre

³ The murder of Belfast lawyer Patrick Finucane

⁴ The Omagh bombing

⁵ *Report of the Consultative Group on the Past*, Belfast, 2009

arising from state violation of human rights but do in effect do according to the principles of law, human rights and natural justice.

In this testimony we present a critique of the currently available mechanisms of truth delivery and a description of why their lack of independence undermines their operation when it is the state which is under scrutiny as the perpetrator or facilitator of a human rights violation. Northern Ireland is an illustration of how a state, in a legitimate bid to counteract domestic terrorism, has over-reacted and failed to approach that difficult task with the justice, integrity and accountability that are a prerequisite for progress for the future. The continued failure by the British state to adequately account for its own complicity in violent past events, stifles progress and ensures that those who would destabilise the fragile peace continue to secure political traction through violent acts. It is a failure which is also a breach of the spirit of peace brokered in 1998 and promised in developments such as the Bill of Rights for Northern Ireland, a fully developed and supported Northern Ireland Human Rights Commission, and obligations arising under other agreements such as Weston Park, in addition to the 2007 political commissioning of a Consultative Group on the Past. A symbolic devolution of powers from a central government, such as the 2012 devolution of policing and criminal justice, rings hollow without the follow through of political will and commitment to ensure that such devolution means something real to the citizens of the devolved jurisdiction. It is a further prerequisite for progress that the past in Northern Ireland cannot be devolved without satisfactory resolution. If such progress could be made in Northern Ireland it could then be used as an example where lessons could be learned of how other transitional post-conflict societies can approach examination, redress, redemption and resolution. How much better that Northern Ireland, arising from the ashes of conflict, should become a beacon than a by-word for how to get it wrong?

What are the mechanisms that can help someone to find out the truth?

There are currently six mechanisms available for helping to discover the truth about a past event arising out of the conflict in Northern Ireland. They all have their advantages and disadvantages. The first two are institutions unique to Northern Ireland whilst the others exist in other jurisdictions in similar forms. They are:

1. an investigation by the Police Service of Northern Ireland (PSNI) Historical Enquires Team (HET)
 2. an investigation by the Police Ombudsman for Northern Ireland (PONI)
 3. an inquest
 4. a judicial review
 5. a civil action for damages
 6. an inquiry.
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These are not mutually exclusive, but not every mechanism is available to everyone, and all of them take time and energy, so it is useful to work out which mechanism works best in what circumstances.

Below is a brief description of each mechanism, and an explanation of the reasons why it might not be available. These mechanisms have been subject to scrutiny and critique by our colleagues at the Committee on the Administration of Justice, the Pat Finucane Centre and Dr Patricia Lundy of the University of Ulster, all of who have submitted written evidence on the theme of this hearing to the Helsinki Commission

1. **A HET investigation** is normally only available in a situation where a person died because of the conflict prior to the signing of the Good Friday/Belfast Agreement in April 1998 (this therefore excludes the Omagh bombing of 15h August 1998). The HET do not look into anything other than conflict-related deaths. The HET will try to find as much material as they can about the death, whether it is held on police files or elsewhere (for example, newspaper cuttings, documentaries, books, inquest papers and so forth). If the family of the deceased wish to engage with the HET, they will meet the family and will try to answer as many of the family's questions as they can. Family questions are not restricted to the matters normally covered in a police investigation. The HET will try to find answers to questions like, "Could her life have been saved if the ambulance had arrived sooner?" or "Did she get the Last Rites?" However, the HET cannot always answer every question put to them. The principal aim of the HET is to discover whether there are any new investigative opportunities that were not followed up in the original police investigation. If there are any such opportunities, the HET do not investigate themselves; they transfer the case to the Serious Crime Branch of the PSNI (C2), and a normal police investigation takes place. Once the HET investigation is over (whether it included a PSNI investigation or not), they will write a final report setting out what they know, and give it to the family. The more that families engage with the HET, the better the report is likely to be, especially if the family seeks the help of an NGO in dealing with the HET.

As we mentioned in the testimony of BIRW in 2011, the HET has come under criticism for a number of reasons. The HET's officers often misunderstand the Northern Ireland context or fail to communicate appropriately with families. Research by Dr Patricia Lundy of the University of Ulster highlighted the "gate-keeping" of intelligence by former RUC officers which led to concerns that the truth was being inhibited. The time taken to carry out investigations is often much longer than anticipated, leading to disappointment and disengagement from families. This has also been our experience in the cases and families BIRW have supported. Finally, the HET has faced patchy and uncertain funding which has

required re-structuring, staffing cuts and uncertainty about the future. We also do not consider the HET to be human rights compliant due to its lack of independence. However it is at present the only real opportunity for families to discover what happened to their loved one and on that basis organisations such as ourselves and the Pat Finucane Centre engage with it: engagement by NGOs such as ourselves, even with mechanisms which we identify to be flawed, remains important in ensuring accountability and striving toward best practice within the parameters of available remits, whilst continuing to offer constructive criticism.

- 2. A PONI investigation** can only look at allegations of police misconduct or police criminality. Where a conflict-related death that happened before the 1998 Good Friday/Belfast Agreement involves one or more police officers, it will not be investigated by the HET, but by PONI. If the HET finds any suspicion of police misconduct or criminality, they will refer the case to PONI for investigation. Once the PONI investigation is over, it goes back to the HET. PONI also provides reports on its investigations to families, but it does not and cannot conduct as wide-ranging an investigation as the HET. PONI can also investigate cases arising from the past where no-one died, so long as there is alleged police misconduct or criminality and so long as the PONI considers it is in the public interest to do so.

The PONI has been criticised for the length of time its investigations take to be completed, its failure to communicate with families and the diversion of resources away from historical cases. The PONI has highlighted the strain these historical cases place on the office and cuts in PONI's budget do not suggest that this situation will improve. PONI has also been criticised for its relationship with the PSNI and is now subject to thorough examination of its operations whilst its historical inquiries have been suspended and new Ombudsman is appointed. The work of BIRW, PFC and CAJ has been central in bringing about reform of the work of PONI.

- 3. An Inquest** an inquest must make findings as to the identity of the deceased, and how when and where s/he died, and crucially, the broad circumstances surrounding the death. An inquest can usually only be held if there has not already been an inquest. However, the Attorney General for Northern Ireland can order a new inquest if he believes it is advisable to do so. The current Attorney General, John Larkin, has ordered a number of new inquests since he took up post, and seems to be prepared to study any application carefully. These include inquests into those shot murdered by British soldiers during the Ballymurphy internment massacre of 1971, six months before similar events in Derry
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known as Bloody Sunday 1972. Legal aid⁶ is only available for inquests in exceptional circumstances: the death must raise a wider public interest and public funding to be necessary to enable the coroner to provide an effective investigation in compliance with Article 2 of the European Convention on Human Rights (the Convention), which protects the right to life. Public funding is usually available for obtaining advice and assistance prior to an inquest. There is currently a long backlog of contentious inquests arising from deaths that occurred during the conflict in Northern Ireland. Some families have waited many years for an effective inquest.

4. **Judicial Review** is unlikely to establish the full facts surrounding a death but it may lead to the disclosure of documents which might not be made available at an inquest. Judicial review is a legal action which can be used to force a public body or official to make, change or reconsider a decision or take a particular action. It is prohibitively expensive and should only be considered if public funding is available. Legal advice is essential. However, as we have seen with the work of the family of Patrick Finucane and their legal representatives, judicial review can be used to challenge government decision making and failures to abide by commitments.
5. **A civil action for damages** may be appropriate if there was negligence involved in a death. For instance, if a person was allowed to die in order to protect the identity of a police informer, the police may be found to have acted negligently. Like judicial review, a civil action can be useful in obtaining disclosure of documents or other information. A civil action can also be used to establish responsibility for a death. Civil actions require a lower standard of proof (on the balance of probability) than a criminal trial (proof beyond reasonable doubt). Civil actions are also very expensive and should only be considered if legal aid is available. Legal advice is essential.
6. **An inquiry** is the remedy of last resort. It is very difficult to obtain an inquiry, and an inquiry is only granted where all other remedies have failed. The relevant Secretary of State of the British government can grant an inquiry, but in reality decisions to hold inquiries usually require the agreement of the Cabinet of the British government (as we saw in the recent intervention of Prime Minister Cameron into the Patrick Finucane case). Such decisions are highly political and many people who deserve an inquiry have been refused because an inquiry would be too embarrassing for the government or a government agency such as MI5.

⁶ Financial assistance from the state

Inquiries are held under the Inquiries Act 2005. The Secretary of State has the power to establish an inquiry, but also to halt it, and s/he can also interfere in many ways, including preventing the inquiry from being held in public, preventing evidence from being made public, and preventing the publication of the inquiry's report. Inquiries are usually publicly funded. They do not have the power to attribute civil or criminal liability, but they can make findings of fact. Another sort of inquiry is a non-statutory inquiry. These inquiries have no powers to compel witnesses to attend or the production of evidence. They are very unlikely to be of any use where a contentious death is involved. In both kinds of inquiry, legal advice is essential. The present British coalition government has repeatedly stated since coming to office that there will be no more inquiries in Northern Ireland due to expense; this has not precluded the government establishing inquiries in Britain into the abuse of Iraqi civilians held in military custody in Iraq, shooting by police officers of a suspect in London or deaths caused by negligence at a hospital trust, all running into many millions pounds.

What is an effective investigation into a death?

The European Court of Human Rights (ECtHR) have, in a series of judgments, one of the best-known being *Jordan v UK*, set out the elements necessary to provide an effective investigation into a death involving the state. The UK is a signatory of the European Convention on Human Rights⁷ and gives the Convention partial effect in domestic law through the Human Rights Act 1998. The elements are:

- deprivations of life must be subjected to the most careful scrutiny, taking into consideration all the surrounding circumstances
- the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident
- there must be an effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility
- a prompt response is essential
- the authorities must act of their own motion, once the matter has come to their attention; they cannot leave it to the initiative of the next of kin
- the burden of proof rests on the authorities to provide a satisfactory and convincing explanation where they have exclusive knowledge about the death
- the persons responsible for and carrying out the investigation must be independent from those implicated in the events

⁷ Similar to the International Covenant on Civil and Political Rights

- the investigation must also be capable of leading to a determination of whether the force used in such cases was or was not justified and to the identification and punishment of those responsible
- there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory
- the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

This is a simple list of requirements for investigation and reflects international standards.

The British government's stance on dealing with the past in Northern Ireland

As we have noted, in 2007 the British government established the Consultative Group on the Past. The Group were inundated with submissions and requests for meetings; there was clearly an appetite on all sides of the community for scrutinising Northern Ireland's painful past, coming to terms with it, and moving on. The Group produced a thoughtful and thought-provoking report in 2009⁸. They rejected the notion that there can be a hierarchy of victimhood (that some victims are more deserving of sympathy than others), pointing out that it is survivors who deserve our equal support, because the loss of a loved one is equally painful whatever the circumstances. In that spirit, they recommended a one-off recognition payment of £12,000 to the family of everyone who had lost someone in the conflict. This recommendation sparked immediate controversy on all sides of the community. Many confused the proposal with compensation, and regarded the amount of £12,000 as derisory. Others could not equate the suffering of the widow of, for example, a soldier with that of the widow of a paramilitary killed by the army. Others still welcomed the payment, seeing it as being of practical benefit in, for instance, sending a child to college. Many, including the NGOs, wondered why the payment was limited to the families of those who had died, and did not include the wounded, many of whom have long-term unmet needs.

So controversial was the recognition payment idea that unionist political parties rejected the rest of the report, thus doing their constituents a great disservice by throwing the baby out with the bathwater. We know from our contact with members of the Protestant/unionist/loyalist community that, whatever their opinion of the recognition payment proposal, many of them would like to see some mechanism for dealing with the past, as would their Catholic/nationalist/republican counterparts (many of whom also rejected the recognition payment idea).

Chief among the Group's recommendations was a Legacy Commission, which would seek to ascertain the truth about every death brought about by the

⁸ *Report of the Consultative Group on the Past, 2009*

conflict and to help to achieve reconciliation. We do not agree with all the details of these proposals, but it was an idea that could and should be developed into something workable and human rights compliant

The previous government allowed the recommendations of the Consultative Group on the Past to run into the sand, simply publishing a compilation of responses to its tardy consultation on the Group's report. The present coalition government has failed to take up the reins, merely promising a further round of consultations with those who have already voiced their views.

The present Secretary of State for Northern Ireland has made a number of proposals for dealing with the past in Northern Ireland. For example, he has suggested that "historians rather than lawyers" should deal with the past, and that a Historical Memory Documentary Centre such as that established in Salamanca, Spain, in the post-Franco era, might be a way forward⁹. Similarly, he has suggested that the HET's files could be consigned to an archive like that compiled on the Stasi in Germany¹⁰. Not only are these comparisons with the aftermath of totalitarian states rather surprising coming from a minister in the UK government, but they clearly indicate that he regards the past as something that is over and can be filed away, which is far from being the case as we have stressed in this testimony. As recently as November 2011 the Secretary of State was criticised over his decision against immediate all-party talks to find a way of dealing with the conflict.¹¹ When it is in part the agencies of a government whose past actions demand to be scrutinised a government cannot simply ignore its responsibility to those affected by history. Engagement by the state with the processes for identifying the unpalatable truths arising from the conflict is a prerequisite for future progress in Northern Ireland.

Conclusion: Dealing with the past as a prerequisite for progress in Northern Ireland

The past remains very much part of the present in Northern Ireland today. Unless an effective, human rights-compliant mechanism is found for dealing with all the unresolved individual cases arising from the conflict, then the conflict will continue to cast its long shadow across Northern Ireland's future and make it

⁹ *Historians may be best at dealing with Troubles: Owen Paterson, Belfast Telegraph, 17th November 2010*

¹⁰ *Northern Ireland cold case files 'could form Stasi-like archive', Belfast Telegraph, 14th February 2011*

¹¹ *Owen Paterson under fire for rebuffing talks on past, Belfast Telegraph, 8th November 2011*

more difficult to achieve the peace and stability that Northern Ireland so badly needs and so greatly wants. It is such a mechanism which is a prerequisite for progress in Northern Ireland and a core step in completing the peace process.

We respectfully request this honourable Commission to seek an assurance from the UK government that it will establish such a mechanism without further delay and in consultation with victims, human rights experts and others.

We thank this honourable Commission for your interest in Northern Ireland; long may it continue.

CS/BIRW
