

# PREREQUISITES FOR PROGRESS IN NORTHERN IRELAND

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## HEARING BEFORE THE COMMISSION ON SECURITY AND COOPERATION IN EUROPE ONE HUNDRED TWELFTH CONGRESS SECOND SESSION

MARCH 21, 2012

Printed for the use of the  
Commission on Security and Cooperation in Europe

[CSCE 112-2-6]



Available via <http://www.csce.gov>

U.S. GOVERNMENT PRINTING OFFICE  
WASHINGTON : 2012

74-829 PDF

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# PREREQUISITES FOR PROGRESS IN NORTHERN IRELAND

MARCH 21, 2012

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## PREREQUISITES FOR PROGRESS IN NORTHERN IRELAND

March 21, 2012

COMMISSION ON SECURITY AND COOPERATION IN EUROPE  
WASHINGTON, DC

[The hearing was held at 2 p.m. in room 2247, Rayburn House Office Building, Washington, DC, Hon. Christopher H. Smith, Chairman, Commission on Security and Cooperation in Europe, presiding.]

*Commissioners present:* Hon. Christopher H. Smith, Chairman, Commission on Security and Cooperation in Europe; and Hon. Michael C. Burgess, Commissioner, Commission on Security and Cooperation in Europe.

*Member present:* Hon. Eliot L. Engel (D-17) a Member of Congress from the State of New York.

*Witnesses present:* Geraldine Finucane, Widow of Murdered Human Rights Lawyer Patrick Finucane; Christopher Stanley, British-Irish Rights Watch; Mark Thompson, Director, Relatives for Justice; Brian Gormally, Director, Committee on the Administration of Justice, CAJ; and Patricia Lundy, a Senior Lecturer, University of Ulster.

### HON. CHRISTOPHER H. SMITH, CHAIRMAN, COMMISSION ON SECURITY AND COOPERATION IN EUROPE

Mr. SMITH. The Commission on Security and Cooperation in Europe will come to order. And I want to welcome our very distinguished panelists to this hearing. Let me say in the outset—and I know you know this—but just last week I and some of the other Members were at the funeral of Don Payne, who had a deep compassion for the people of Northern Ireland. And he will be deeply missed.

The funeral was actually 5 hours of memorials by some thirty individuals, including President Clinton. So it was a very, very meaningful funeral. In addition to his work there, I would note parenthetically, that I Chair the Africa, Global Health, and Human Rights Committee. He served as my Ranking Member. And when the Democrats had control, I served as his ranking member. So we exchanged seats several times and worked very, very well together. He will be missed.

Today's hearing is called "Prerequisites for Progress in Northern Ireland," and our purpose today is to assess the progress made in Northern Ireland to date, with a focus on what more can be done to ensure that peace is self-sustaining, that people can reconcile

their differences to build a better future together, and that justice ultimately prevails. This takes a 100-percent commitment—not a 60-percent or even 80 percent commitment—to fulfill the promises made.

While there has been much progress, I believe that the unfulfilled British commitment—the broken commitment, unless the British Government reverses course—in the Pat Finucane case is threatening the consolidation of the peace process. In connection with the Good Friday peace agreement, the British Government promised, as we all know, to conduct public inquiries into the Finucane and other cases where collusion was suspected.

Subsequently, the British Government has backtracked in regard to the 1989 murder of human rights lawyer Patrick Finucane, despite the recommendation—which, again, the British Government agreed to abide by—of the international respected jurist and former Canadian Supreme Court Justice Peter Cory back in 2004. I note parenthetically that Judge Peter Cory testified on two occasions before the Commission and before my subcommittee. And he couldn't have been more emphatic than he was as to how integral it was that justice and absolutely a public inquiry be followed in the case of Patrick Finucane. He was articulate and very, very educated, and very incisive in his words. He repeated over and over again: There's no other option. There's no other choice than to do the public inquiry.

The decision not to proceed with a public inquiry is a glaring public breach of faith. It is a source of enormous frustration to Pat Finucane's family and to his many friends. It resonates throughout Northern Ireland, calling into question the British Government's commitment to peace and reconciliation. This is particularly sad because the British Government has taken so many other positive, truly honorable steps, many of which were painful for large sectors of the British public and official opinion—such as the Bloody Sunday Inquiry released in 2010.

To call all of that into question by renegeing on the promised Finucane inquiry is a tragedy. The British Government has admitted that it did collude in the Finucane murder, yet resolutely blocks any public inquiry into the collusion. The question asks itself: After so many positive steps, is the British Government really going to diminish the good it's done since 1998 in order to protect the identity of people who share responsibility for this heinous crime?

In closing, I'd like to thank the Irish Government for its plans to promote the Northern Ireland peace process as a case study for addressing conflict situations and post-conflict reconciliation elsewhere in Europe. Last month, the Irish Foreign Minister, in his capacity as the Chair-in-Office of the OSCE, testified in a hearing of this Commission about these plans. Despite some of the problems we are going to talk about today, there has been real progress on the ground in the north of Ireland, due also to the goodwill of the people on the ground.

We have an excellent panel of witnesses today to update us on developments and provide useful suggestions for further action. First, we'll hear from Geraldine Finucane, the widow of Patrick Finucane. Geraldine was there, along with her three children,

when assassins entered the Finucane home and took her husband's life. We are grateful for your presence here today, Geraldine. It's so great to see you again. You have been here before. And you have, with great grace and great courage, admonished all of us—including the U.S. Congress, the President of the United States, and certainly the Government of the United Kingdom—to finally, at long last, do a public inquiry and get to the bottom of the truth rather than engaging in cover-up.

Next, we'll hear from Christopher Stanley. His extensive experience as a lawyer, and currently work with British-Irish Rights Watch, has made him an effective advocate and an expert on public policy reform and the Bill of Rights for Northern Ireland. We look forward to his insights and recommendations this afternoon.

And finally, we'll hear from Mark Thompson, who is Director of Relatives for Justice. He'll describe for us the impact justice can have on healing the wounds of violence in Northern Ireland, and what happens when justice is not forthcoming and those wounds are left open and exposed and festering.

I'd like to now yield to Dr. Burgess, one of our fellow Commissioners on this Helsinki Commission.

**HON. MICHAEL C. BURGESS, COMMISSIONER, COMMISSION ON SECURITY AND COOPERATION IN EUROPE**

Dr. BURGESS. Thank you, Mr. Chairman. Thank you for calling the hearing. In the interest of time, because I know we're going to have some floor activity coming up shortly, let me just submit my statement for the record and we'll go right on to our witnesses.

Mr. SMITH. Thank you very much, Dr. Burgess. I'd like to now turn the time to Geraldine Finucane for which time she may consume.

**GERALDINE FINUCANE, WIDOW OF MURDERED HUMAN RIGHTS LAWYER PATRICK FINUCANE**

Mrs. FINUCANE. May I start by reminding everyone just how difficult it has been for everyone in Northern Ireland to reach our present position? Can I remind you all of those difficult days when there was extreme diversity on how to reach peace, when not everyone was committed, and when compromise was very hard? I ask you to remember all that because it plays such an important role in how we continue to move forward. Everyone worked so hard and gave so much; it is important that what was promised is delivered, otherwise people will feel all the work has been in vain. That is why I think the title of this hearing is so appropriate. There are many prerequisites, but I feel it is very important that commitments made during all the negotiations are honored.

As this Commission knows from previous testimony, a commitment was made to my family following talks between the British and Irish Governments at Weston Park. Under this agreement, an international judge was appointed, Mr. Justice Peter Cory. He was tasked to review six cases, including that of my husband, Patrick. Both Governments agreed to fully implement his recommendations.

Although Judge Cory did recommend a public inquiry into Pat's case, there has been nothing but delay. Publication of the report was delayed, the announcement of the way forward was delayed,

and eventually the law was changed to the New Inquiries Act 2005. This act has one important section which provides the relevant government Minister with power to override the tribunal by issuing restriction notices. In my eyes, and also in Judge Cory's eyes, it removes independence from the tribunal.

This section of the act provided my family with a great dilemma. We felt we only had one chance at an inquiry into Pat's murder and the encompassing circumstances. And we did not feel this law would let that happen. The Labour government even drew up a restriction notice under which a tribunal would have to operate. And that was before a panel had even been considered. It caused a stalemate for many years. The Labour government never seemed willing to break the logjam, but was instead happy to let time pass and blame us.

Following the change of government in 2010, we were asked for a meeting by the new Secretary of State Owen Paterson. In November 2010, my son John and I listened to him tell us his government was committed to resolving this case and moving it forward. Delay suited no one. We were encouraged.

What followed was an engagement between my family, our legal team and representatives of the British Government. John and I met with the Secretary of State in Belfast and here in DC, and lawyers from my family, including both my sons, and attended meetings over the course of last year with the Secretary of State and his officials. Most of these meetings were private in order to facilitate open discussion. The process was part of a review by the government to determine whether a public inquiry remained in the public interest. The government wanted to know if we would participate in an inquiry, and if so under what conditions.

Our objection to part of the Inquiries Act is well documented. We oppose the use of restriction notices, as I have explained, because a government Minister can impose these upon an inquiry at will. We had asked the previous government not to use them, but they would not agree. However, a recent case—the Baha Mousa inquiry—created just such a precedent. Restriction notices were not deployed, and decisions about the restriction of evidence was left to the independent judge.

We told the government that an inquiry operating along similar lines would be something we could participate in. Indications from the government officials were very encouraging, and at no time were we advised that an alternative to an inquiry was also under consideration. Lest there be any misunderstanding, we committed our position in writing in a submission delivered to the government. As it makes clear, the focus of the discussions between our family and the government was the manner in which the inquiry might proceed. It was the government itself that brought the Baha Mousa inquiry into discussions as a model to promote progress. A considerable amount of time was spent exploring how it could be utilized as a blueprint for my husband's case.

At no stage was a review in the manner that was subsequently announced by the Prime Minister ever discussed. Following the conclusion of our engagement with officials, we learned in late summer 2011 that the Prime Minister, Mr. Cameron, wished to meet with us in Downing Street. We were encouraged by this invi-



tation, and speculation was intense that the government was finally to honor its commitment to a credible inquiry, originally announced in 2004.

Furthermore, in a telephone conversation between a senior NIO official and my lawyer, Peter Madden, we were told that the Prime Minister wished to speak with us personally and was confident we would be happy with what we heard. We assumed this confidence would be a reflection of our position that had been clearly outlined during the preceding 11 months. We could not bring ourselves to believe that we were being invited as guests to the Prime Minister's home, just to be refused the public inquiry promised so many years ago.

That David Cameron did so, and in such a public fashion, ranks as one of the most cruel and devastating experiences since our campaign began. Not only were my family and I forced to listen to the Prime Minister renege on a promise made by the British Government, we had to hear him tell us over and over what it was we really wanted, how we really wanted to achieve it, and what our ultimate response would be. It was clear that we had been lured to Downing Street under false pretenses by a disreputable government led by a dishonorable man. We felt humiliated publicly and misled privately.

What Mr. Cameron has established is a review of the papers in the case. The person appointed, Sir Desmond de Silva, will simply read statements collected by the Stevens Investigation team. Although he will be permitted to speak with relevant persons, this will all be done behind closed doors. My family is not permitted to participate. We, and indeed anyone, will see nothing, hear nothing, and say nothing. If anyone refuses to cooperate with Sir Desmond, he has no powers to compel or sanction them.

My family and I, and indeed many others in Northern Ireland, have no confidence in this process. We cannot be expected to take the British Prime Minister's word that it will be effective when he is reneging on a government commitment in order to do it. People are now asking the question, if the government is unwilling to deal with the Finucane case in an open, thorough, and transparent manner, what are they going to do about all the other issues that need to be dealt with?

The case of Pat Finucane shows that promises of the British Government can be easily broken, and that their desire to help Northern Ireland is halfhearted at best. This will impact deeply on Northern Ireland on how everyone moves forward. Collusion affected everyone, and indeed continues to do so. Unless the depth of it is exposed, no one will lose their suspicions, confidence will remain undermined and no one will be able to settle to a stable future.

My son John and I are in DC once again. And once again I am testifying. And once again, I wish to thank all of our supporters in Congress and the U.S. administration. At this point, I would like to pay tribute to Representative Donald Payne who died recently. Donald was a politician of a truly inspirational kind, dedicated to human rights domestically and internationally, and personally a kind and generous man. He supported my campaign for many years, and for that I am truly grateful. He will be sorely missed,

and my condolences and that of my family go out to his family at this time.

I thank the Commission for holding this hearing on a subject that is so important and relevant to the current issues in Northern Ireland. Collusion is a nasty strategy which did not discriminate on religious or political grounds. There is no doubt that if progress is to continue in Northern Ireland, dealing with my husband's case is an absolute prerequisite. Thank you very much.

Mr. SMITH. Mrs. Finucane, thank you so very much for your eloquent—as you have done so brilliantly in the past, when asked for simple justice, simple transparency, and openness. And it does beg the question once again: What is it that the government is hiding? Why is there a cover-up? You know, Judge Cory when he testified and when he admonished any jurist or law enforcement official for being involved with what would be a truncated investigation, said you go wherever the information takes you.

And if it fingers people who may perhaps be in high places, then so be it. Eventually this information will come out. Nothing ever remains hidden or dormant or under the table forever. But it does beg the question why, through successive governments in the U.K., we have had this unwillingness to followup with the clearly stated agreement that led to the Good Friday Agreement, where one of those provisions included a public inquiry into the murder of your husband, Patrick Finucane. So I think—and I can say this without any fear of contradiction—our commission, and I know many Members of Congress, both sides of the aisle, will continue to push hard.

But it has now gotten to the point, and again as you pointed out, where you were lured to 10 Downing Street for the cruel and devastating information that was conveyed to you by Prime Minister Cameron, the reneging on what you thought was going to be good news and then the government reneges and issues a bit of very, very awful news. That only brings, I would respectfully submit, dishonor and suspicion upon the government. And that, again, is both Labour and Conservative, because it seems not to matter. But it does beg the question, what is it that they are hiding? Why the cover-up?

I'd like to yield to my friend Dr. Burgess. We do have some votes that came as you were speaking.

Dr. BURGESS. Do you want to go ahead and vote?

Mr. SMITH. OK, we'll come back. Again, Mrs. Finucane, I want to thank you for your valiant defense of your husband, and we all deeply grieve for the loss of him. And many of us got to know him after the fact, and the tremendous work that he did as a defense attorney. And certainly, with your son John who is here in the back who has testified himself, what a legacy of a family that absolutely will not be deterred in getting the truth and in fighting for human rights for all.

I remember that Rosemary Nelson said, before she was assassinated, that no one could forget Pat Finucane and the chilling message that was sent to every defense lawyer throughout all of Northern Ireland. And yet, she stood strong as well, and paid the ultimate price when she was murdered in that terrible, terrible car explosion which was obviously another investigation that was required. So thank you, Geraldine. You are an inspiration to each

and every one of us. You are a true human rights warrior and a champion. And we are all indebted to you for your courage and bravery and your clarity. How could any lawmaker, Prime Minister, President, Member of Congress hear your words and not be moved? So thank you.

We will stand in brief recess.

[Recess.]

Mr. SMITH. The Commission hearing will resume, and I'd like to apologize for that rather lengthy delay. I would now like to go to our second witness. And again, Geraldine, thank you for your testimony. Several members did indicate they will be coming by, so hopefully that'll happen shortly.

#### **CHRISTOPHER STANLEY, BRITISH-IRISH RIGHTS WATCH**

Mr. STANLEY. Thank you very much. I can't hope to emulate the eloquence of Geraldine Finucane's testimony, but I will try and be concise and brief and to the point. I am part of British-Irish Rights Watch, and it's important to state that we're an independent, completely independent, nongovernmental organization. And I also think it's important to state that we're based in London. We're in the vicinity of Westminster.

Thank you. I'm grateful to this honorable Commission for allowing us to give testimony 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 our longer written testimony be entered into the record of the Helsinki Commission.

Mr. SMITH. Mr. Stanley, without objection, so ordered.

Mr. STANLEY. Thank you. And we also welcome the opportunity for the evidence given in written form by the Pat Finucane Center, by the Committee on the Administration of Justice, and by Dr. Patricia Lundy of the University of Ulster also to be accepted into the written record of the Helsinki Commission.

Mr. SMITH. Without objection, so ordered.

Mr. STANLEY. Thank you. We wish to thank the Chair of the Helsinki Commission, yourself, Representative Smith, in particular for your longstanding interest in human rights in Northern Ireland. And I'd also, of course, like to take the opportunity to mark the recent passing of Representative Donald Payne—although not a member of this commission, as has been noted, but with an abiding interest in bringing peace and human rights to Northern Ireland. And we send condolences to his family.

In this oral testimony, BIRW, British-Irish Rights Watch, outlines what we consider to be the actions that still need to be taken to complete the peace process and address potential implications of the failure to take these actions on the situation in Northern Ireland. What we said last year still stands, as unfortunately little or no progress has been achieved. And in some instances, particularly in relation to the case of the murder of Patrick Finucane, there has been regression in terms of no progress.

We also have—and I'll talk about this later and it's what my colleagues will also address—deep-seated flaws and problems with the available mechanisms of dealing with the past, in terms of a Police

Ombudsman's office which is seriously undermined and an [d1]Historical Enquiries Team which is actually part of the police. So it's a question of who guards the guards.

The past in Northern Ireland cannot be ignored and continues to shape the present and to determine the future. One of the reasons for this is that although there have been many victims on all sides of the community, many people still do not know why their loved one died or they themselves were injured. Many lies have been told, particularly about state collusion in killings. There's a great thirst for the truth, particularly as people emerge from the shadow of the conflict and are empowered and confident enough to ask difficult and uncomfortable questions about what happened and why no one has been held accountable in so many cases.

Therefore, our first prerequisite continues to be the introduction of an effective, human rights compliant mechanism for dealing with all the unresolved individual cases arising from the conflict. This mechanism would be independent of the British state and would accord with the elements required for the discharge of human rights violations identified in international law, and particularly of the jurisprudence applicable to the U.K. as a signatory of the European Convention on Human Rights.

One of the implications for the continuing failure to introduce such a mechanism will be that the past will continue to cast its long shadow across Northern Ireland's future and make it more difficult to achieve the peace and stability that Northern Ireland so badly needs and so greatly wants. We, again, respectfully request this honorable Commission to seek an assurance from the U.K. Government that it will establish such a mechanism without further delay and in consultation with victims, human rights experts, and others.

Truth-recovery mechanisms do exist, as I've just said, in Northern Ireland, having been developed mostly as a result of the Good Friday Belfast Agreement. And we and other civil society organizations engage with these mechanisms to assist our clients. Sometimes these existing mechanisms are able to offer what is needed. However, in some core aspects, the mechanisms are flawed, especially in regard to their independence of the state, which is so often under scrutiny for its role in the conflict.

We and others, including our colleagues at this hearing, do not shy away from our responsibility to point out the flaws in the available systems and advocate for their reform as a second prerequisite for progress in Northern Ireland. All parties to the conflict cannot avoid the political, legal and moral obligations arising from the killings and injuries, other forms of loss that occurred at that time.

It is a time not too distant: 1969 to 1998, within our lifetime. It is recent history but should not be treated as historical. The 9th to 11th of August, 1971, is not historical to those families of the victims of the Ballymurphy Internment Massacre. The 12th of February, 1989, is not historical to Geraldine Finucane and her family. The 15th of August, 1998, after the Good Friday Belfast Agreement, is not historical to those victims and the families of the victims of the Omagh bombing. There can be no progress here unless truth is exposed and confronted by all those responsible and dealt with in the form of redress arrived through consensus.

And finally, a third prerequisite for progress is therefore not consigning this past history. This is not history that can yet be analyzed by historians or archived in some form of collective memory and filed as forgotten, or even worse, dealt with. That simply will not do, despite the apparent political will to do so. This history is too fresh and alive to be written, but must be the subject of anxious scrutiny of judgment.

This is why the promises, obligations and expectations made in domestic and international agreements in places such as Stormont, Weston Park, and St. Andrews must be fulfilled and not renege upon.

Those outside Northern Ireland must realize that the peace is fragile, because the wounds of the past have not been healed. London, Dublin, and Washington continue to have obligations here, despite the U.K.'s protestations about devolution. The Bill of Rights for Northern Ireland, an aspect of the Good Friday Belfast Agreement, is now moribund and conflated with a national political agenda. The Weston Park agreement has failed to deliver what is required by the family of Patrick Finucane, and so forth. Broken covenants do not ensure progress within a society. Northern Ireland, having come so far, deserves and expects more, and the honoring of promises is a fourth prerequisite for progress in Northern Ireland.

And that's our testimony. Thank you, sir.

Mr. SMITH. Mr. Stanley, thank you so very much for your testimony, with your very specific recommendations. As you know so well, Jane Winter in the past has been before this commission and before the Human Rights Subcommittee, and you continue that very extraordinarily fine tradition of presenting incisive recommendations, and I thank you for that.

Mr. STANLEY. Thank you, sir.

Mr. SMITH. I'd like to now recognize Mr. Thompson.

**MARK THOMPSON, DIRECTOR, RELATIVES FOR JUSTICE**

Mr. THOMPSON. Thank you, Mr. Chairman, for the invitation and opportunity to address this very important hearing. I too want to put on the record and recognize the passing of Congressman Donald Payne. We had the privilege of hosting him at Relatives for Justice on two occasions in Belfast, and it was a great honor.

I begin my testimony.

Eighteen years on from the first cessations of violence in the north and fourteen years on from the peace agreement, our society has undoubtedly been transformed for the better. The sharing of power by traditional political opponents, once unthinkable, is as natural a thing as if it were always the case. We have much to be thankful for, especially those of us who have been so adversely affected by violence.

Many observers of Irish affairs could be forgiven for believing that this somehow signifies that everything has been resolved and that the focus, the concentration once given, is no longer required. However, this could not be further from reality.

Arguably, the most contentious issue of who did what to whom during the conflict, that of responsibility, culpability and account-

ability, requires addressing in a structured, resourced and independent way.

The failure to do so thus far casts a shadow not only over the lives of many of the victims and survivors but also over society too. The hurts of the past are as present as the past is. Hardly a week goes by without mention in the mainstream media and within civil society of an atrocity whereby the bereaved and injured of all persuasions give public voice to their experiences and for resolution of human rights abuses. Families are seeking truth, acknowledgment and recognition of their loss and injury. They are now telling publicly what, for them, were once unspeakable truths. They are breaking the silence after many years and have taken courageous steps toward addressing injustice. All parties to the conflict have been rightly confronted and challenged by these developments. The bereaved and the injured bear witness, testimony, and now seek answers.

The past week I have been part of a delegation of relatives visiting the United States that have witnessed the murders of 15 of their loved ones and the injuring of 14 in 3 separate incidents. As part of this important hearing, I request placed into the record reports carried out by Relatives for Justice into these killings—

Mr. SMITH. Without objection, it will be ordered.

Mr. THOMPSON. These particular killings present challenges for the British authorities. And as a sovereign government, there are certain standards and legal obligations that must be met. Institutional avoidance, prevarication and obfuscation sum up the official response to these killings. And perfunctory processes exist that are presented as models for resolution by a British Secretary of State who has abdicated his government's responsibility concerning acknowledgement and accountability. These predictable outcomes, the result of vested interests, underline the internationally accepted norm that those responsible for violations cannot examine those same violations.

No doubt the British government will present that the PSNI are one of the most regulated police services in the world. They will justify this with the oversight role of the police ombudsman and that the PSNI's Historical Enquiries Team is a unique initiative reviewing all conflict-related deaths. However, scratch the surface, and much is revealed that tells a very different story.

Former RUC members, including members of Special Branch, have been re-employed by the PSNI to work on legacy cases and are employed as civilian workers. In this capacity they are thus unaccountable to the police ombudsman's office. The HET has also recruited a significant number of former RUC members within its ranks. They too avail of this technical loophole and are unaccountable to the police ombudsman.

And even within the PSNI's own Legacy Unit, a former senior member of the Special Branch has been employed as a civilian person who vets material that goes to the courts and to inquiries and to inquests. Effectively the role of the police ombudsman's office has been hollowed out in respect to its retrospective remit examining legacy cases.

The bereaved and the injured of the conflict from all experiences and backgrounds want the truth. They want validation of being

wronged rather than vilification for standing up and speaking out. The British government has sought to make standing up for justice a negative concept. We live with the legacy of impunity. Challenging impunity is a necessary prerequisite to rebuilding a society and in creating the promotion and protection of human rights and in the administration of justice.

In a recent report for the World Bank, they linked development and security to justice. [not clear who “they” is] Truth informs positive change and reform. Justice is the bedrock of democracy. People are dying without truth and without justice. And we owe it to them to collectively address the legacy of the past in a progressive way that delivers truth, accountability and transitional justice that consolidates the peace and heals the wounds. We also owe it to future generations. The cost of not doing so is too great. The quote “Those who forget the past are condemned to repeat the past” has never been more present.

An independent international truth commission could potentially provide the best opportunity for truth recovery for the greatest number of people affected by the conflict. Such a process must be underpinned by key values and principles, including those of independence and inclusiveness. Narrowing the permissible amount of lies, securing the truth, transitional justice and accountability is the only fitting memorial to those killed and for those injured.

All of the key issues within the peace process have required an international role and remit. Dealing with the past is the last piece of the jigsaw of the peace process, and arguably the most contentious and challenging. We require international assistance and not perfunctory processes that politick, that conceal and prevent the truth from emerging. No government, no organization, no party to the conflict with a vested interest in the outcome should determine, lead and drive processes that address past violations. Rather, they should be subject to a process which is independent.

The reality is that children are growing up with a narrative of injustice rather than a narrative of hope. The issues are far from going away. If anything they are growing, and they will not be brushed under the carpet. Mona Ashrawi, U.N. Assistant High Commissioner for Human Rights, recently said: “People don’t forget. They keep their loved ones close.” Facing the truth is the only option.

We need to face the past and the unpalatable truths. Otherwise they will have a negative and corrosive effect on our body politic and throughout civil society. Individual, communal and societal healing, recovery and reconciliation can only take root within the context of such a process. We will be a stronger and a better society for it. Thank you, sir.

Mr. SMITH. Thank you very much, Mr. Thompson. That is very, very disturbing information that you’ve conveyed to the Commission and that needs to be further investigated by us, by others. So I will get to that very shortly. But we’ve been joined by Eliot Engel, a good friend and colleague of mine. We both serve on the Foreign Affairs Committee, and he has been very active in all things related to Northern Ireland for years.

Congressman Engel does have to catch a plane, but I’d like to yield to him for any comments he might have, and then invite to

the table two additional witnesses, without objection, for comments from them. And then we will go to some additional questions.

Congressman.

**HON. ELIOT L. ENGEL (D-17) A MEMBER OF CONGRESS FROM  
THE STATE OF NEW YORK**

Mr. ENGEL. Thank you, Mr. Chairman. I just wanted to come here, even though I have a plane to catch, to show my solidarity and strong support for what our people are testifying here for today. Geraldine, welcome. It's always good to see you, Mrs. Finucane, welcome. And to all the other panelists as well—my good friend Malachy McAllister also.

Please know—as you already do, but I want to state it publicly for the record—that there are a lot of Members of Congress on both sides of the aisle that are very sympathetic to what you have to say. I think while we move forward with the Good Friday accords, we should not use the Good Friday accords as an attempt to sort of paper over everything and say everything is just hunky-dory, everything's right, put everything behind us and let's move on.

I think we can only move on when the truth is finally told, when people who are culpable admit their culpability or when people point out exactly what happened. While I welcome the British Prime Minister's apologies for Bloody Sunday and think it took a lot of courage for him to say it, there are more things that need to be said. There are more things that need to be done. There are more things that need to be looked into.

And so I just wanted to come here. I have this atrocity pamphlet—which was given to me, and I'll be reading it in my district in Pearl River, New York—this ambush assassination and impunity pamphlet, and this massacre collusion pamphlet. These are things that I believe that all of our colleagues—Mr. Smith's colleagues and my colleagues—should have. And I hope we can get copies for every Member of Congress so that they can read. It's easy reading, you know. It's not something that's a thousand pages and you got to go through it and whatever. It's very short and very succinct.

We know atrocities were committed. No one disputes that. And we also know that there were cover-ups, and no one disputes that. And we all know that there was collusion within the highest perhaps levels of the British government, along with some of the paramilitaries. I think that it helps to get to the bottom of it. I think if peace and justice is to prevail, we need to know what really happened.

And I just want to assure all of you—Mr. Stanley and Mr. Thompson and Mrs. Finucane—that I will not rest; I will leave no stone unturned. And I look to my good friend Congressman Smith, who you know will leave no stone unturned. And there are others with us who will leave no stone unturned until we get to the truth.

You know, there's a picture on this pamphlet here showing the shop of Sean Graham here. And Malachy McAllister was telling me the other day that he lived down the block from it in South Belfast. I also, by the way, mentioned this to Gerry Adams yesterday when I had the occasion to talk to him. I think the U.S. Congress played a major role in trying to bring peace and justice to the north of Ire-



land. And I think the U.S. Congress still has a major role to play. And I just want to assure you that I will continue to play that role.

I'm sorry I have to run; I mean no disrespect. I wanted very much to come. And in fact I had my office get me a later plane because I didn't want to miss coming here and just to tell you that you have my 100 percent, unequivocal support. And Chris Smith and I and others are going to work together to get to the bottom of all of this. Thank you, and God bless. Thank you, Mr. Smith.

Mr. SMITH. Thank you, Mr. Eliot Engel, a good friend and colleague, for being here and for his wonderful work on behalf of Northern Ireland.

I would like to welcome to the witness table Brian Gormally, Director of the Committee for Administration of Justice, CAJ. I would note parenthetically that, you know, on my trips to Belfast I often would meet with CAJ; would get timely insights as to what was happening on the ground, as well as far-reaching recommendations as to what I and other Members of the U.S. House and Senate ought to be doing. And in the past CAJ representatives have testified before both my subcommittee and the Commission. Thank you for being here.

And Patricia Lundy, who is a Senior Lecturer at the University of Ulster and has done tremendous amounts of research on the Historical Enquiries Team, if she could join us as well and present her testimony. Let's begin with Mr. Gormally.

**BRIAN GORMALLY, DIRECTOR, COMMITTEE ON THE  
ADMINISTRATION OF JUSTICE, CAJ**

Mr. GORMALLY. Thank you, Chairman, and thank you for the opportunity to give a very brief oral presentation to this important Commission. I also associate myself with the sentiments about the untimely death of Representative Payne. I didn't have the privilege of meeting him myself, but his contribution to human rights in Northern Ireland lives on in CAJ's institutional memory.

I just want to talk briefly from a human rights perspective about the continuing breaches in Northern Ireland. We have made a huge amount of progress, but as has already been made apparent, there is unfinished business and also attempts to roll back some of the advances that have been made.

The U.K. is a signatory to the European Convention on Human Rights. And Article 2 of that convention promotes and guarantees the right to life. Recent jurisprudence in the European court has held that, amongst other duties, a state must properly investigate any apparently unlawful killing, especially where state agents may be involved. An investigation must be effective, prompt, transparent and independent, and also involve the next of kin to the extent necessary to protect their interests and their rights.

In CAJ's opinion, the United Kingdom is seriously in breach of its European—Convention Article 2 responsibilities to protect the right to life in respect of cases where state involvement in unlawful killing is alleged. In a number of high-profile cases, including the Finucane case, it has refused to carry out proper investigations into possible direct or collusive involvement in killings. And it will be apparent from the list of criteria that I read out that the so-called Review that the British Government has offered in the Finucane

case does not meet international human rights standards for investigating an unlawful killing.

In our view, this is not a matter of the past but of the protection of the right to life in the present and the future. The reality is of a major Western government failing to put in place the investigative and regulative mechanisms necessary to prevent its agents from engaging in extrajudicial executions or other unlawful killings. We are deeply concerned that this failure is leading to a culture of impunity amongst British military, intelligence and security agencies and may result in their further involvement in unlawful killings.

There is also evidence that these failings by the U.K. Government give cover and encouragement to those states, including Council of Europe members, engaged in much more egregious human rights abuses. These cases arising from the past in Northern Ireland are therefore vital to pursue for all those who care about human rights and the responsibilities of major Western powers to take the lead in their protection and promotion.

There are various mechanisms that can currently be used in Northern Ireland to investigate past unlawful killings that might involve state collusion. However, none of them at the present time meet fully the criteria that the European court has set down. And we support the call that Mark Thompson has made for a comprehensive way of dealing with human rights abuses and other atrocities in the past in Northern Ireland. Without that, the peace process is still at risk.

I just want to mention briefly the extent to which the Office of the Police Ombudsman has been subverted over the past few years. It's an office that we fully support. It is one of the most powerful police complaints mechanisms in the world and has a duty also to investigate past cases where police misconduct may have been involved. I won't go into detail; the written evidence that I've given has been kindly put in the record. But at the present time, we have to say that the police ombudsman's office, just like the Historical Enquiries Team that Patricia Lundy is going to talk about, is not able to properly carry out the U.K.'s obligations to human rights and in particular the right to life.

The right to life is the most important human right, and we could argue that the government's foremost duty is to protect it. While there have been huge advances in Northern Ireland, and human rights including equality are better protected than ever before, the lack of effective investigations into unlawful killings is a dangerous gap. It has the capacity to undermine the peace process and to weaken confidence in policing and the new society as a whole. Although these cases happened in the past, this is not a historical question. It is a matter for the present and for the future. It's a central human rights issue. If we cannot trust the government to fully investigate cases where its agents may have killed citizens, what can we trust it with?

Thank you, Chairman.

Mr. SMITH. Thank you very much, Mr. Gormally. I'd like to now yield to Dr. Lundy.

**PATRICIA LUNDY, A SENIOR LECTURER, UNIVERSITY OF  
ULSTER**

Dr. LUNDY. Thank you. Thank you, Mr. Chairman, for the opportunity to present my oral testimony.

My testimony is based specifically on the Historical Enquiries Team. I was granted access to research the HET by Hugh Orde, the former chief constable. And for 3 years, I observed the day-to-day operations of the Historical Enquiries Team. I also had access to all the members of staff and also to documentation. Part of that research also involves interviewing families and also analyzing the reports which the HET delivered to families. So I think I have a fairly good overview and insight into the Historical Enquiries Team.

What I would say is the British Government's approach to dealing with the past has been a very fragmented approach, a piece-meal approach. But I think that the picture that is painted at the moment is one where there is progress, where there is a package of measures and those measures are actually working. They're delivering for families. But I would suggest that my own research and also information from NGOs and lawyers would indicate that with the package of measures, aspects of it are not working. They're not Article 2 compliant.

I will give you some detail about my own research and the concerns that it raised. Initially, the research considered independence, and my research finds that there were large numbers, I suppose in a sense, of former RUC officers employed in the HET. But significantly, those individuals that had responsibility for control of intelligence were former past Special Branch officers. So the entire intelligence unit was made up of former Special Branch officers, and they acted in a gatekeeping role.

I would suggest that the HET is most certainly not independent. It is the police investigating the police. But I think it goes a wee bit deeper than that even. I felt that the process actually delimited access to the truth for some families. I felt that the families had to ask the right question. If you didn't ask the right question, you didn't get the answer. I also find that if a family is represented by an NGO or a lawyer, that the quality of their report was significantly better.

But my most recent research, I think, raises even more concerns. And this is a piece of research which focuses on actual reports that were given to families and it deals with the military cases, 157 cases which are usually referred to as RMP cases, Royal Military Police investigations. And maybe just to cut, you know, a very, very long conversation down, these cases were never properly investigated at the time. There was an arrangement or an agreement between the RUC chief constable at the time and also the GOC of the British Army that the army would investigate and interview the soldiers and the police would interview civilians. And really what happened at the end of the day was those cases were never investigated by the police. So we have 157 cases which have never been investigated.

So this is now on the desk of the HET, and I have analyzed a number of the reports and the reexamination of those cases. And what I can tell you is that there is a difference and a differentia-

tion of treatment between the cases of the military and paramilitary cases. Now I can list the evidence to back this up. It's about pre-interview disclosure. It's about verification of illness. It's about the robustness of the actual interviews that take place.

And HET surprisingly will also introduce what's called a pragmatic approach. And the pragmatic approach is that they will interview the suspect, the soldier, but not under caution. And really what this is, is an informal interview, which actually goes back to the initial complaint, which was the informal interviews carried out by the RMP. The HET's justification for the pragmatic approach is if you interview someone under caution, they are likely to be more guarded, and they will not give any information. They will not be forthcoming with information. So it's quite an unusual practice, I would say. And I think it's something that a truth commission perhaps does. But the HET is not a truth commission. It does not have the powers. It does not have the power of amnesty or immunity. But it's behaving as if it is a truth recovery process.

So I would suggest that in the 157 cases there are anomalies, there are inconsistencies. And I believe that this raises serious questions about the impartiality of the HET and the effectiveness of its investigations. So I believe that it is certainly not Article 2 compliant in terms of independence, effectiveness and transparency. There's a lot more that I could talk about, but really this is really a very quick summary of the main concerns that research has raised.

Mr. SMITH. Dr. Lundy, thank you. Thank you very much for your testimony.

And all of your full testimonies will be made part of the record. And they do really paint a very disturbing picture at a time when many thought, despite the huge, colossal lack of responsiveness to the case of Patrick Finucane, that in other areas there may have been some very good progress made. The testimony presented today injects a very serious note of caution, a big amber rather than a green light of going forward, that there are serious problems that remain unattended to. And I thank you for bearing witness to those concerns in such a comprehensive manner and with such precision. Each of your testimonies are truly disturbing.

The deterioration, the backsliding, the concerns that you raise require our commission to really redouble our efforts to get answers, to ask the tough questions, to try and to hold to account, to do our part, if you will. We are going to do a letter, and I expect to have numerous Members of Congress sign it, which even in reviewing your testimonies, will be an eye-opener. You know, unfortunately in Congress—and I'm sure it's in every other parliament or Congress around the world—the issue du jour, whatever the crisis might be often crowds out longstanding problems that if unredressed and if not investigated, do fester and lead to an impunity that some of you have spoken about.

We'll ask—and I'm not sure he'll respond—but we'll ask the U.K. Ambassador to the United States if he would like to testify. Unlike standing committees of the Congress or at least of the House, we've routinely asked and have Ambassadors come and testify before our Commission in order to ask real questions in total sincerity, hoping for and expecting real answers. So we will issue an invitation to

him to see if he would like to come and testify and answer some of the profoundly disturbing questions that you have raised today.

We know that Prime Minister Cameron was recently here. I'm not sure—and matter of fact, I would bet my salary—that President Obama did not raise issues like the Finucane case or any others. I would have hoped that he would, but he did not—or at least I would love to be corrected on that. Reading some of the British tabloids, they certainly gave great details about how close and friendly they were. I mean, the state dinner and the toasts and everything else couldn't have been more cordial. And certainly we want good relations with every country, including our friends in the U.K., but issues past, which are really issues present, need to be addressed.

So thank you, each of you. This is my 14th congressional hearing on human rights abuses in Northern Ireland, backed up by a number of visits. And I met many of you, especially Geraldine, on those trips. But this testimony really injects a cautionary note that things are not getting better. If anything, you know, the idea that RUC and others, Special Branch, would be recruited and hired to run interference—and I think as you put it, the gatekeepers—I mean, that just begs the question as to how many—you know, we know of the big cover-up or at least believe there's a massive cover-up with Geraldine Finucane's husband's case—but how many other cover-ups small and intermediate and large are occurring every day as information is just thrown away that otherwise would be actionable and very embarrassing? So your testimonies, maybe more than those of other hearings, are important, because people keep expecting: "Oh, Northern Ireland. Everything's fine there." It's not so fine. And we need to redouble our efforts.

I plan on doing a resolution that will focus on the Finucane case. I've done that in the past. It has passed the House, putting all of us on record, generating a robust debate of the floor of the House. But I think we need to incorporate many of the very significant issues that you've all raised today. And I again thank you for that. So much has to be done. The key is in the followup. You know, you've presented evidence that begs action, so thank you for that. I would like to ask Geraldine, Mrs. Finucane, if you could just further elaborate on what it was like when you had that visit with the Prime Minister. I mean, you couldn't have been more clear about your reaction to it, but you certainly thought you were going there to receive good news, only to be disappointed once again.

Mrs. FINUCANE. Yes, yes, we certainly did. And I do have to say that when the meeting started on Downing Street, Mr. Cameron started extremely well by saying it was a terrible crime, something that shouldn't have happened. And he pointed out that he was only 46 or 47 years of age, and he hadn't been in politics at the time, so he wasn't going to tread on anybody's toes. He admitted that there had been state collusion in my husband's murder. And he said that he felt it was necessary to find out how high up the chain of command that actually went. That was the start of the meeting, and I was sitting there, thinking this is absolutely superb, and this is recognition of government official position on collusion. Marvelous. And he then went on to announce the paper review, in which we would have no input at all. As you can imagine, the argu-

ments put forward by myself and the rest of the family were very strong. Mr. Cameron did not seem to have any reply to this and seemed to get rather frustrated and flustered during the meeting. Indeed, when John was asking him a question at one point, he sort of gestured and pointed out around the windows outside and said, you know, there are people in Whitehall who would not let me have this inquiry, so this is the best there is to offer. And that was a rather shocking statement, and I really would like to know what he means by that.

Mr. SMITH. Great question.

You know, Mr. Stanley, how do the British people feel about a public inquiry that was promised that was absolutely part of the Good Friday agreement? Are they angry? Are they worried about what the government might be hiding?

Mr. STANLEY. I think there is anxiety in many levels of British society about power in the U.K. and who holds that power and the relationship between the executive and democracy and the erosion of that relationship. It's partly in response to recent cases which we try to consider as analogous to Patrick Finucane's case, where the British state has been held accountable for torturing Iraqi civilians, for example, and where there have been public inquiries into those atrocities in Basra and so forth. That's the model which now Geraldine and her family will accept as a model inquiry. But for those truths to come out about an instance in 2003 about breaches of Article 2 and breaches of Article 3, which received very extensive press report, and then you have the extensive let-down of a family being invited to Downing Street by the British Prime Minister to be told, we're going to do it behind paper, we're going to be behind the doors, secret investigation of a paper review for the third time—it's simply not acceptable. And I think the British public, even though not directly concerned, but I think there is a concern about this response to the abuse of power by government and by the executive.

Mr. SMITH. Regarding the subversion of the Office of the Police Ombudsman, which was included in your testimony, Mr. Gormally, we had Christopher Patten testify at one of my previous hearings. I remember at the time the biggest concern that I raised to him was the grandfathering or the bad apples, as he called them, the people particularly in higher positions who would not be gone after. There are a lot of good things, obviously like the creation of the new police services. There are many real reforms. And we certainly showered praise upon that part of it. But again, others were grandfathered in, if you will. But the police ombudsman was created, you know, from those reforms. Are there people like Patten and others who are upset with this subversion of that office?

Mr. GORMALLY. Well, I think—I think—

Mr. SMITH. Are they aware of it?

Mr. GORMALLY. Well, yes, I think they are. And the person most upset, I would suggest, was the previous police ombudsman, Baroness Nuala O'Loan.

Mr. SMITH. Nuala O'Loan.

Mr. GORMALLY. And she has now publicly criticized the subversion of that office. I mean, what has happened is that the powers, the legislation that established the office are good and certainly ca-

pable of conducting the human rights complaint investigation into unlawful killing.

But over the past period, we have had interference by the government in the appointment process of the last ombudsman. He wasn't given proper security vetting. There are problems with the relations of the ombudsman with families and the whole question involving the families since Nuala O'Loan left and the current ombudsman took over. He has redrawn or failed to use the definition of collusion that Judge Peter Cory developed, which is a perfectly adequate and broad definition, so that he points to a list of failings by police or incompetence or evidence being accidentally destroyed—facts that all put together would add up to collusion, but then he concludes there wasn't any collusion because of his own invented, narrow definition.

In terms of independence, again, the whole appointment lowered the independence, the intelligence, again, as with ATT is provided by the intelligence unit of the PSNI, which has a large element of staffing by former RUC Special Branch men. Reports are being rewritten to exonerate the police. There are deep divisions—real deep divisions—in the office, with some senior investigators refusing to sign off on reports that were then published, because they'd been changed to not reflect their actual findings.

The Criminal Justice Inspectorate, which is an independent inspectorate body, has found bad governance and so on, and so much so that the current ombudsman was forced to resign, although he is still formally in post. But recently they've reinterpreted legislation, got apparently a secret council's opinion. That means that they will not investigate past cases that had been investigated by the police in the past so that it's a completely narrow interpretation, not one that Nuala O'Loan adopted. And that is going to restrict its freedom of operation.

And we are very concerned that what's happening is that with the appointment of a new ombudsman imminent—well, at least I understand it's down to the last four, Minister David Ford was telling me yesterday, although he's not involved in the appointment process since it's the Office of the First and Deputy First Minister that makes the appointment—but what we're concerned about is that his or her freedom of action will be constrained and hamstrung by a number of developments, in particular this reinterpretation of the legislation.

Now, there is a process, supposedly, of reform going on because the ombudsman's investigation into historic cases has had to be suspended, and it will really be very important that our friends in the United States maintain pressure upon the Ministry of Justice to make sure this program of reform is effective and restores the police ombudsman to what it once was, a very powerful and highly respected institution, which is essential to maintain trust in our new police service.

Mr. SMITH. Mr. Thompson?

Mr. THOMPSON. Thank you, Mr. Chairman. I think effectively we have three key mechanisms that are dealing with the past currently. We've an inquest system. We have the coroner. We have the historical inquiries team and the police ombudsman. And what we effectively have is a number of senior civil servants, formally the

NIO, within the Department of Justice and around all of these issues, and former Special Branch people who themselves are actively being scrutinized by these processes back in the system, and they're flouting any examination.

Let me give you a couple of examples, if I will. I'm supporting a number of families that have been affected by the policy of shoot to kill, which was investigated in the mid-1980s, which took place as six killings over a matter of a number of weeks in the year of 1982. The coroner initially abandoned these inquests. Geraldine's husband, Pat, who was our chairperson, got them involved and to take the cases initially, and he fought. And the then-chief constable refused to cooperate with the coroner, Sir Jack Hermon, who is now deceased.

Those inquests were, post the European ruling of May 2001, reopened by the current coroner. There was agreement to provide redacted copies of the report conducted by John Stalker into these killings, and was concluded by Colin Sampson. In court two Fridays ago, Council for the Chief Constable said that there was 172,000 documents, constituting 1 million pages, and that he was now not going to hand them over.

Now, these inquests had resumed 5 years ago, and there was an expectation that they would now begin. There were two police officers appointed in the—PSNI's vetting team that are now going to read these 1 million pages before the chief constable will decide to hand over the material. These same two police officers in the vetting process have to also look at 33 or 34 other inquests with voluminous material. We have a process of thwarting and slowing down and not cooperating. And at the heart of this are people within the Special Branch. And they are not accountable to the Office of the Police Ombudsman.

There is one senior former manager within Special Branch, and he is employed as a consultant around the legacy unit. This person has been questioned in the past by the ombudsman in regards to his knowledge about actions that took place with collusion. In 2007, my own details were given out by a member of the PSNI who was a civilian worker. And I followed the case. He gave my details to loyalist paramilitaries who were following me.

I then spoke to the ombudsman, and the ombudsman told me in April 2007 they didn't have jurisdiction. I've raised this continually. There are now almost 300 former officers inside the PSNI. They're involved in training, they're involved in intelligence and they're involved in legacy work. We aren't going to get to the bottom of this if we continue in this vein. We do need U.S. assistance and support. In one sense the PSNI are actively politicking on these issues through the HET or through their own mechanisms of concealing truth and not dealing with the cases in an effective way.

Mr. SMITH. Just so I'm clear, when you said in your testimony and just referenced that former RUC members, including Special Branch, have been re-employed by the PSNI to work on legacy issues as civilian workers, is that that three-hundred number you just said?

Mr. THOMPSON. It wouldn't be all of them. They're through the PSNI in various capacities, but in legacy this person is employed



as a consultant and he is effectively deciding what happens to the material. So he's in control in many regards.

Mr. GORMALLY. Just to add to that, these civilians staffs, so-called, have all been hired through an agency. And there's clearly some kind of employment agency. And the difficulty is that the police have now admitted to the policing board that there were three-hundred or so odd involved, and have detailed where they're working, with some of them in intelligence and training, as Mark has said.

But the difficulty is that as civilian staff, they are not actually accountable to the police ombudsman. So as well as being ex-RUC Special Branch men, whatever they do is not within the jurisdiction of the police ombudsman. We have asked the deputy chief constable actually to answer questions, whether these so-called civilian staff are tasking warranted police constables? Are they involved in operations? Are they involved in surveillance? Are they in a back office or are they on the streets? And we have received no reply.

Mr. SMITH. Who vets them to ensure that they have no baggage?

Mr. GORMALLY. Well, exactly.

Mr. SMITH. OK.

Dr. Lundy.

Dr. LUNDY. I would just like to add to what the previous speakers have said. And I'll just bring it back again to the HET. And this is not in the public domain, but the foundations on which the HET is built are very shaky, because the HET employed 31 ex-RUC officers, some of them Special Branch, to go out to every police station in Northern Ireland, to collect the documents, collate the documents and bring them back to the HET to be stored so that the re-examination of cases could take place.

Now, this is certainly not independent, and it raises questions about the documentation of what's collected. So this is the basis, the foundation, on which the HET is built. And I put it to the deputy director of the HET, "why have you done this?" You know, this will certainly, I would suggest, raise questions and concerns. And he said, "well, it would cost too much to employ people from outside Northern Ireland. And actually, these are the people that know where the documents are."

Mr. SMITH. That's a red flag in and of itself.

Dr. LUNDY. Yeah.

Mr. SMITH. Would there be any way of knowing if certain documents went missing or were shredded?

Dr. LUNDY. Well, you see, you don't know. It's hard to tell. And that's the point.

Mr. THOMPSON. I can give some insight into that. The PSNI have destroyed documents that were stored at Gough Barracks in relation to interviews of suspects that were detained after murders. And the reason that they give for the destruction of this material was that it was in a store that had an asbestos roof. And then under health and safety they had to destroy the documents.

I was at an inquest in which documents were destroyed, and the coroner had said that they could have been copied and preserved. But that's happened. And we don't know if it's happened with the forensic exhibits also. There's unclarity about that. But even in regard to the Historical Enquiries Team in the role of some of the

most controversial things, you do have a report that's been submitted, and it was referred to by Congressman Eliot Engel in regards to Sean Graham's bookmakers.

And the HET looked at that case, and quite controversially at the heart of that case is a weapon that was used, a nine millimeter Browning pistol, to which the killer of Geraldine's husband, Pat Finucane, Ken Barrett, stole allegedly from a military barracks. He provided it to William Stobie, who gave it to his Special Branch handlers. It was handed back and used to murder Ian Wallace, and then 6 weeks later used in the bookmakers attack.

Lord Stevens found out about the history of this gun and that Special Branch had handled it. When he rumbled them, they told him they deactivated the weapon. But the killing of Ian Wallace would have made that quite obvious to the Special Branch that it had not been deactivated and was subsequently used in the bookmakers to kill five people, along with another weapon supplied by Brian Nelson.

The HET examined the case, and they said that the interview notes concerning the 9 millimeter Browning pistol were disposed of. We uncovered those documents at the public records office. And it showed that a man in possession of the gun, on his way to carry out a murder, was arrested and that he was the son of a serving police officer. We also found in the discovery of those interview notes that the forensic report of that weapon showed it to be mechanically sound.

Now, if the HET are going to say that these are disposed of, and these families met Owen Paterson at the Northern Ireland Bureau event the other morning, and they asked him this question. And he said to them: "It has nothing to do with me. Take it up with your own executive. The British government is no longer there."

And one of the relatives said to him, "but British military intelligence, including the people that murdered Pat Finucane, are centrally involved in this incident too, and that Judge Cory touched on this in his report into Pat Finucane's murder." And he then said, "go and talk to David Ford." Now, the relatives talked to David Ford and he said, "we can't look at the past because we've no money." Brian rightly referred to how these people were recruited. It's been revealed that there were sixty million pounds spent in recruiting these former people through a private recruitment firm. That does not include their salaries.

So when we are being told, you can't have inquiries and we can't look at the past because of the cost, we then see that there is huge financial payments to the RUC and British army—that there's half a billion under Patten to reform policing. There are 250 million to the UDR in terms of a pension payoff, tax free. There was 20 million given to the RUC Reserve in an ex gratia payment. There've been hundreds and millions of pounds spent in covering up the truth. This is not about cost; it's about will. We can have public inquiries into planning, into health and into everything. It's only when it comes to these issues that we can't. And it's about the British government using their sovereignty as a shield to prevent the truth.

We do need international support and international intervention. And the peace process is an example of how all the big issues were

handled and addressed with that support. The Americans are allies of the British, as is the Irish Government. Enda Kenny, the taoiseach, has rightly stood up and said what needs to be done in one of the cases in regard to Geraldine and her family and Pat's murder. What we need to do is bring them over the line.

John Finucane and I were in San Francisco during the election campaign prior to the election of Barack Obama as President. And we were able to initiate a process with Irish-Americans and other activists to secure his commitment to a truth and reconciliation process pre-election. We need to see it through. The taoiseach, the American administration and the American President need to bring David Cameron and Owen Paterson over the line. They're on the wrong side of the line. And we need to get them across it. And as allies, the United States needs to support getting them to the place where they need to be to build a better future for our society and to address the core issues that need to be addressed. And we'd urge the United States, please to do it—

Mr. SMITH. Can I just ask you, has there been any indication that President Obama has done that?

Mr. THOMPSON. We don't know what was raised. You know, no journalists raised the issue that, here we're standing in Washington with the President as a Prime Minister that has acknowledged not only that there was collusion, but he's powerless to do anything about it. Who runs the country? And I think that's the pertinent question.

What we need to do is to try and engage the White House. And we need to say, as allies of you, Mr. Cameron, we want to bring you to the place and to the right place. You are on the wrong side of this. We need to get you across the line, and we need the one last push to do that. They need the honor and the commitment in terms of that. But more widely out there in society we need to look at the issues. They're across our communities, and they are surfacing, if not on a daily, on a weekly basis. And we need to address them.

Mr. SMITH. You know, I would just note for the record that we will send a letter to the President and find out what, if anything, he has done. But on human rights globally, President Obama has been a serious disappointment. When Hu Jintao, the President of China, was here, I actually put together a press conference of people who had spent upwards of 20 years in the Chinese laogai system including Harry Wu, Rebiya Kadeer and many others—Wei Jingsheng, who was another great human rights activist.

And here is the man who is the jailer of Liu Xiaobo, the Nobel Peace Prize winner of 2010. And his jailer is at the White House. President Obama obviously got the Nobel Peace Prize and preceded Liu Xiaobo by just 1 year. And we asked that the President raise in a public forum, the press conference or any other way, human rights abuses in general and Liu Xiaobo in particular. When the Associated Press asked President Obama and especially Hu Jintao about human rights, the President—our President—ran interference for the President of China.

And it was so egregious that The Washington Post did an editorial, and the headline was, "Obama Defends Hu"—President Hu Jintao—"on Rights." And Obama offered an explanation which I

find despicable, where he said, well, they have a different culture in China, and they have a different political system. All these tens of thousands of Chinese human rights activists who are languishing and being tortured daily understand, as does Hu Jintao, what human rights and democracy are all about. They just choose not to have it and they prefer dictatorship. I have repeatedly raised these issues with Hillary Clinton and others, and there has been muted silence as to what the president has done vis-a-vis China.

We will ask by way of letter if this has been asked. And you know, hope springs eternal. My hope would be that the President, you know, into his fourth year as President would raise the issue and do so in a—in a serious way with Cameron—Prime Minister Cameron to try to get specifically a public inquiry for the Finucane case.

But when did it get worse like this? Maybe you might want to speak to that. When was the definition of collusion changed? You know, we all were operating under, you know, the Peter Cory and a very, very serious definition of collusion, and you might want to speak to that as well. When was that changed?

Mr. THOMPSON. It was in June last year, if I'm not mistaken, in the Loughinisland report which you have in front of you with the families—the Loughinisland massacre. Their report that was lodged 5 years ago and published in June of last year, or July of last year. And it was at that press conference that the families had made public that, in the week leading into the publication of the report, the ombudsman had decided not to use the definition set out by Judge Cory and by Lord Stevens.

The disclosures in regard to the HET stuff are ongoing, and I could talk all day about them. The disclosure in relation to Sean Graham's bookmakers about the disposal of the material was last year. And it was in October of last year that we managed to obtain from the public records office the interview notes and forensic report of the weapon. So this is ongoing, and it's current.

Mr. SMITH. Yes, Mr. Gormally.

Mr. GORMALLY. The point about the definition of collusion is that it's been varied and contradictory. And it isn't that the new ombudsman has come up with a definitive new definition, but that it varies from case to case. As far as I'm aware, in no case that the current ombudsman—correct me if I'm wrong, Mark—in no case that the current ombudsman has signed off has he actually come up with a finding of collusion.

Mr. THOMPSON. No. It had been taken, given that they were working to the definition as set out by Stevens and Cory, about what happened in an examination of the bomb in Claudy that was carried out by the IRA. One of the senior people that we referred to of Special Branch who's now working in legacy as a civilian worker interfered with the office at that time and tried to overturn the findings. And we were being told that they were using the definition of Cory and Stevens in regard to that report.

Mr. SMITH. Before concluding and asking if you have any final comments you'd like to make, let me just ask: Is there any court venue that you, Geraldine Finucane, could avail yourself of, including European Court of Human Rights, to try to compel the British

Government to finally—at long last—provide this open public inquiry?

Mrs. FINUCANE. Well, after the announcement in October we had a family discussion and discussion with our lawyers. And we have decided to take proceedings in the high court in Belfast against the British Government, asking them to review the decision to have a review as opposed to the inquiry that was promised.

And we went to court in January, and we were granted leave to proceed to the full hearing. That was granted unopposed, and the hearing is set for the beginning of May. I would presume that, no matter what way it goes, it will be appealed and then it will probably go to the Supreme Court in London. So we are at the start of a judicial process.

Mr. SMITH. As I indicated, I will be introducing a new resolution. I just would note for the record that I have offered four resolutions that put the House on record. And one of them was signed by President Bush, because I did it as part of a larger bill, and that was in September 2002. The first was in 1999, the second in 2002, the third in 2006, and the fourth in 2007. All of those were passed. We will do it again, and we will never quit.

You know, it's interesting that in cases of civil rights in the United States, when killers of African-Americans are found years—there's no statute of limitations on murder, and that includes collusion or those who were accessory to those crimes [inaudible] would be here. And could I—so I just want to assure you that this member—and I'm joined, I know, by many others who are deeply concerned as well—will not let up as well. [Inaudible.]

So we will—we will also look at—and I would appreciate your thoughts on this, whether or not it might be timely to invite back to this Commission Judge Cory to get his insights once again, because he played obviously a crucial role in cobbling together that agreement. So we'll look for your advice on that, and others who might come before the Commission to amplify and provide a better and more in-depth record. Because again, what you all have provided is just staggering in its disappointing features. So I thank you for it, but I wish you had better news to offer.

Is there anything else? If there are any concluding remarks that any of you would like to make, we certainly would welcome that.

Dr. LUNDY. My concluding remark is, I think, that what needs to happen is an independent, international truth recovery process. I think it is absolutely clear now that the package of measures or aspects of that package are simply not delivering. They're hugely problematic. So I think the way forward is an independent, international truth recovery process.

Mr. SMITH. Thank you. Again I want to thank you for your testimony, for your insights, and for bearing witness to some very horrific truths. The hearing is adjourned.

[Whereupon, at 4 p.m., the hearing was adjourned.]

**APPENDICES****PREPARED STATEMENT OF HON. MICHAEL C. BURGESS, M.D.,  
COMMISSIONER, COMMISSION ON SECURITY AND COOPERATION  
IN EUROPE**

Thank you Mr. Chairman for the recognition and for calling this hearing. Thank you to our witnesses for being here today.

Today we will discuss the challenges to the Good Friday Agreement, peace in Northern Ireland, and what needs to happen so that people there and abroad can be confident in the peace process. We will also discuss how past crimes can be addressed, and we will hear from the family of one of the victims and people who are intimately familiar with the situation.

In 2006, I voted for a resolution introduced by our Chairman Chris Smith offering condolences for the murder of Patrick Finucane and calling on the British government to implement an independent inquiry into the death of Mr. Finucane. Although Prime Minister David Cameron has offered an apology on behalf of the British government, as Mr. Finucane's family knows, this will never erase the tragic events that occurred. We must go forward, working to ensure that terrible things like this do not happen again. I look forward to hearing from my colleagues and the witnesses about what steps need to be taken in the future to prevent further wrongdoing.

I thank Chairman Smith for holding this hearing and I yield back.

**PREPARED STATEMENT OF CHRISTOPHER STANLEY,  
BRITISH-IRISH RIGHTS WATCH**

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.

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."<sup>1</sup>

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;

<sup>1</sup><http://www.nj.com/>

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's 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.

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 1971<sup>2</sup>, or 12th February 1989<sup>3</sup> or 15th August 1998<sup>4</sup> (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 Past,<sup>5</sup> 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

<sup>2</sup>The Ballymurphy Massacre

<sup>3</sup>The murder of Belfast lawyer Patrick Finucane

<sup>4</sup>The Omagh bombing

<sup>5</sup>Report of the Consultative Group on the Past, Belfast, 2009



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 bought 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 arising from state violation of human rights but do in effect to 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 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 bye-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 disadvan-

tages. 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.

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. Re-

search 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 restructuring, 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 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 known as Bloody Sunday 1972. Legal aid known as Bloody Sunday 1972. Legal aid known as Bloody Sunday 1972. Legal aid<sup>6</sup> 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. 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

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<sup>6</sup>Financial assistance from the state

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 Rights<sup>7</sup> 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

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.

<sup>7</sup>Similar to the International Covenant on Civil and Political Rights

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 2009.<sup>8</sup> 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 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

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<sup>8</sup> Report of the Consultative Group on the Past, 2009

the post-Franco era, might be a way forward.<sup>9</sup> Similarly, he has suggested that the HET's files could be consigned to an archive like that compiled on the Stasi in Germany.<sup>10</sup> 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.<sup>11</sup> 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 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.

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<sup>9</sup>Historians may be best at dealing with Troubles: Owen Paterson, Belfast Telegraph, 17th November 2010

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

<sup>11</sup>Owen Paterson under fire for rebuffing talks on past, Belfast Telegraph, 8th November 2011

**PREPARED STATEMENT OF MARK THOMPSON, DIRECTOR,  
RELATIVES FOR JUSTICE**

The absence of violence does not necessarily mean peace and for many years we had what was described as an imperfect peace. In many ways this is understandable, violence had stopped and the imperative then was to ensure that this was maintained.

18-years on from the first cessations of violence in the north, and 14-years on from the peace agreement, our society has undoubtedly been transformed for the better. Violence has largely been absent and the militarization of our communities comparatively is a world apart. The visible manifestations of war and all of its paraphernalia are thankfully gone.

The sharing of power by traditional political opponents, once unthinkable, is as natural a thing as if it were always the case.

We have much to be thankful for, especially those of us who have been so adversely affected by violence.

Many observers of Irish affairs could be forgiven for believing that this somehow signifies that everything has been resolved and that the focus, the concentration once given, is no longer required. However, this could not be further from reality.

Of course the excellent work of the Helsinki Commission is an exception in maintaining its focus on human rights in the north and we are gratefully indebted.

Arguably the most contentious issue of who did what to whom during the conflict; that of responsibility, culpability and accountability requires addressing in a structured, resourced and independent way. The failure to do so thus far casts a shadow not only over the lives of many victims and survivors but also society too.

The hurts of the past are as present as the past is.

Hardly a week goes by without mention in the mainstream media and within civil society of an atrocity whereby the bereaved and injured, of all persuasions, give public voice to their experience and to their current will to have legitimate resolution of human rights abuses.

Families are seeking truth, acknowledgement and recognition of their loss and injury; they are now telling publicly what for them were once unspeakable truths. They are breaking the silence after many years and have taken courageous steps towards addressing injustice. All parties to the conflict have been rightly confronted and challenged by these developments. The bereaved and injured bear witness, testimony and now seek answers. They want truth and justice.

This past week I have been part of a delegation of relatives visiting the US that have witnessed the murders of 15 of their loved ones and the injuring of 14 in three separate incidents. As part of this important hearing I have placed into the record reports by Relatives for Justice (RFJ) into these killings; those of Loughinisland in County Down where 6 men were killed as they watched the opening game of the 1994 World Cup, hosted here in the US, when Ireland played Italy; the atrocity at Sean Grahams bookmakers shop on the Ormeau Rd, Belfast, in 1992 where three men and two boys were killed; and at Clonoe, Coalisland, County Tyrone also in 1992 when the SAS ambushed and killed 4 men.



These particular killings present challenges for the British authorities and as a sovereign government there are certain standards and legal obligations that must be met.

The killings identify thematic patterns of collusive acts on the part of the authorities implicating members of the then RUC Special Branch and British Military Intelligence. In the words of Sir John Stevens these actions undoubtedly fuelled and sustained the conflict.<sup>1</sup> Also identified are direct state killings where the use of excessive force was favoured rather than making safe and effective arrests within the rule of law.

Unfortunately these killings are by no means unique. Rather they are symptomatic of numerous acts of violence that maimed and killed hundreds of people, in which those responsible are immune from accountability and prosecution.<sup>2</sup> Collectively these actions constitute a policy that was structured, resourced, and relentlessly pursued with devastating consequences.

Institutional avoidance, prevarication and obfuscation sum up the official response to these killings and perfunctory processes exist that are presented as models for resolution by a British Secretary of State who has abdicated his governments responsibility concerning acknowledgement and accountability.<sup>3</sup> These predictable outcomes, the result of vested interests, underline the internationally accepted norm that those responsible for violations cannot examine those same violations.

Politicking and double standards also exist on the part of the British government when concerning non-state groupings to the conflict juxtaposed to investigative bias for state actors. Impartiality and independence are consequential casualties too.

No doubt the British government will present that the PSNI are one of the most regulated police services in the world. They will justify this with the oversight role of the Police Ombudsman and that the PSNI's Historical Enquiries Team (HET) is a unique initiative reviewing all conflict related deaths. However, scratch the surface and much is revealed that tells a very different story.

The retrospective remit of the Police Ombudsman's office, successfully secured under Nuala O' Loan and which specifically pertains to these killings, has been effectively hollowed out.<sup>4</sup> Processes of external interference combined by a lack of resources, which can only be viewed as deliberate, have contributed to this. It is also no accident that the office also controversially abandoned its working definition of collusion. These definitions had been set out by Justice Cory and by Lord Stevens.<sup>5</sup> That this occurred during the publication of the report into the Loughinisland Massacre of June 18th 1994 where collusion is undoubtedly evidenced is no coincidence.

<sup>1</sup> 19-page statement On April 17th 2003, after 14 years and three enquiries, Sir John Stevens released at a Belfast press conference. It was during that press conference that he made the comment attributed to him in this submission. A copy of his report is also available at: <http://cain.ulst.ac.uk/issues/collusion/stevens3/stevens3summary.htm>

<sup>2</sup> [http://www.ppsni.gov.uk/Site/1/Documents/Publications/FINAL\\_PPS\\_statement\\_25.6.07.pdf](http://www.ppsni.gov.uk/Site/1/Documents/Publications/FINAL_PPS_statement_25.6.07.pdf)

<sup>3</sup> Also see bibliography ref in Carroll family statement of amnesty to 11 RUC officers  
<sup>3</sup> Belfast Telegraph article re British Secretary of State Owen Patterson's comments dealing with the past

<sup>4</sup> Report by the criminal Justice Inspectorate for NI 2011 September 2011

<sup>5</sup> <http://cain.ulst.ac.uk/issues/collusion/cory/cory03finucane.pdf>

The HET is not independent.<sup>6</sup> In the last correspondence that was publicly available, of the 133 staff, 67 were former RUC officers. That figure included members of RUC Special Branch. Figures were not made available for the number of former British soldiers working in the HET. At the heart of the HET sits a Command and Intelligence unit that determines those cases meriting further actions and possible prosecutions. These determinations are then passed onto the PSNI's Crimes Section 2 (C2). C2 sits alongside C3, which has responsibility for intelligence and agent handling.

Working alongside this framework is the PSNI's Legacy Unit. The Legacy Unit had responsibility for providing information to inquiries. It has ongoing responsibility for providing information to inquests and in other judicial matters pertaining to legacy cases arising from the conflict.

Recently it was revealed that a former Special Branch officer was re-employed by the PSNI to assist the Legacy Unit. It was also revealed that this same person had previously sought to overturn the findings of the Police Ombudsman in respect of a case involving collusion.

Because this person is employed as a civilian worker he is not accountable to the Police Ombudsman.

It has been reported that having taken the Patten severance payments some 300 former RUC officers have been re-employed as civilian workers.<sup>7</sup> A significant proportion, just fewer than 70, are former Special Branch. They too avail of this technical loophole of not being accountable to the Police Ombudsman.<sup>8</sup> As do the PSNI's HET.

The PSNI's C2 have made a number of arrests in respect of the HET's work and prosecutions have been initiated with some concluded. Not surprisingly none of these arrests and prosecutions involves members of the states security and intelligence forces.

In the submitted report to this Commission into the 1992 February 5th killings of three men and two boys, and the injuring of 7 others who were left for dead, at Sean Grahams bookmakers on the Ormeau Rd, Belfast, one of the weapons used in the atrocity, a 9mm browning pistol, was provided by RUC Special Branch through their agent William Stobie. Ken Barrett 'allegedly' stole the weapon from a British army barracks before then passing it onto Stobie, who in turn handed it to Special Branch, who then returned it back to Stobie.

This weapon was then used to murder 22 year-old Aidan Wallace on December 22nd 1991 and then several weeks later again used at Sean Grahams bookmakers. The other weapon used, a VZ 58

<sup>6</sup> RFJ Submission to the Committee to the Council of Ministers of Europe on the HET available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=DH-DD\(2012\)244&Language=lanEnglish&Site=CM-](https://wcd.coe.int/ViewDoc.jsp?Ref=DH-DD(2012)244&Language=lanEnglish&Site=CM)

<sup>7</sup> It was widely reported that in the region of £60 million was spent on re-hiring former RUC officers in this capacity

<sup>8</sup> Former Special Branch officers are now employed within the PSNI as 'consultants' and 'civilian staff' and in this capacity are not accountable to the Police Ombudsman NI (PONI). Importantly the Legacy Unit of PSNI that deals with historic cases has engaged a former Special Branch officer as a 'Consultant'. This 'Consultant' was at the center of controversy when as a Special Branch officer he sought to overturn findings of an investigation by the PONI in which collusion was established—see reports by Vincent Kearney of the BBC NI November 29th 2011 and January 17th 2012

<http://www.bbc.co.uk/news/uk-northern-ireland-15952518>

<http://www.bbc.co.uk/news/uk-northern-ireland-16600069>

automatic assault rifle, was part of a shipment of weapons imported into the north by MI5 using their agent Brian Nelson<sup>9</sup> and then distributed to loyalist paramilitaries. The fatalities related to these weapons and other collusive acts were documented by RFJ in September 1995 and at that time accounted for 229 killings. This document too has been submitted as part of this hearing.<sup>10</sup> Since that period the weapons have claimed many more lives and were used during internal loyalist feuds.

In the RFJ report into the Sean Grahams bookmakers atrocity we reference the HET report. It states that previous information concerning the retrieval of the weapon provided by Special Branch and the arrests of two persons in possession of it had been 'disposed of'. This is a totally false claim. RFJ along with lawyers Kevin R Winters & Co obtained these same documents through the Public Records Office. The documents are all revealing in relation to the weapon and those arrested.<sup>11</sup>

The HET spoke to only to one relative out of the 50 plus relatives affected in this atrocity. They did not speak to any witnesses.

Overall the bereaved and the injured of the conflict want and deserve the truth and they are entitled to that truth. They want validation of being wronged rather than vilification for standing up and speaking out about their experiences. The British government has sought to make standing up for justice a negative concept when the focus is on them.

The right to truth—the right to know—is now an emerging and developing legal right and was first adopted by the Office of the High Commissioner for Human Rights (OHCHR) in April 2005 (Human Rights Resolution 2005/66). Previously the OHCHR set out key principles aimed at combating impunity concerning violations where conflict occurred.<sup>12</sup>

We live with the legacy of impunity—state impunity. Challenging impunity is a necessary pre-requisite to rebuilding a society and in creating the promotion and protection of human rights and in the administration of justice. In a recent report by the World Bank<sup>13</sup> they linked development and security to justice. Truth informs positive change and reform, justice is the bedrock of democracy.

We welcome the announcement recently by the UN Human Rights Council of the appointment of a Special Rapporteur on Truth and await with interest the appointment. Already we have taken steps to invite the Rapporteur to Ireland to meet directly with the bereaved and injured.

<sup>9</sup>BBC Panorama a license to murder pt1 & pt2

<http://news.bbc.co.uk/1/hi/programmes/panorama/2019301.stm>

<sup>10</sup>[www.relativesforjustice.com](http://www.relativesforjustice.com) Collusion Report 1990–1994 Loyalist Paramilitary Murders in North of Ireland

<sup>11</sup>The son of an RUC officer was one of those arrested in possession of this weapon. When Sir John Stevens investigated the Stobie link and uncovered that Special had handed back the weapon, including that it had been used in two separate attacks, Special Branch then claimed that they had 'deactivated' the weapon. However, if this was the case then they did not act after the killing of Aidan Wallace to retrieve the weapon. The file that the HET claimed was 'disposed of' also contained a forensic report of the weapon which showed it to be 'mechanically sound'. There was no evidence of interference with the weapon. Attention to the weapon was only as a result of Judge Cory's report, page 86 and over a decade after the atrocity, which referenced the killing of 18 year-old Peter Magee killed at Sean Grahams bookmakers.

<sup>12</sup>Set of Principles for the protection and promotion of human rights through action to combat impunity UN ref: (E/CN.4/Sub.2/1997/20/Rev.1, annex II) & updated version of these principles (E/CN.4/2005/102/Add.1)

<sup>13</sup>The World Development Report 2011: Conflict, Security, and Development

In the absence of a proper independent truth process many victims and survivors, dissatisfied with the lack of official response to their efforts, are increasingly seeking legal redress and remedy by launching civil proceedings, taking judicial reviews, and seeking to make application to reopen inquests. Many victims and survivors are active and their proactive efforts resemble global trends post conflict and from which we can learn and inform elsewhere. That is why the New York based International Center for Transitional Justice (ICTJ) is an important NGO and one, which we have engaged with.

However, even within the judicial system there are delaying tactics and stalling and particularly so concerning inquests into some of the most controversial killings of the conflict.<sup>14</sup>

We are supporting many families bereaved and people injured, people with life diminishing injuries. In our last financial year our three main offices had contact with and supported almost 3,000 victims and survivors. Truth, justice and addressing the past are priorities for these families. Developing strategies towards that aim is an obvious priority for RFJ. Reaching out to the international community for support is imperative.

We are further away from the beginning of the conflict in the north than that period was from the ending of the Second World War. People are dying without truth and without justice and we owe it to them to collectively address the legacy of the past in a progressive way that delivers truth, accountability and transitional justice through an agreed truth recovery process. A process that consolidates the peace and heals the wounds. We also owe it to future generations. The cost of not doing so is too great. The quote "Those who forget the past are condemned to repeat it"<sup>15</sup> has never been more present.

Such a process must be underpinned by key values and principles of independence and inclusiveness.

International law also makes the case that states undergoing transition are faced with certain legal obligations, including: the provision of independent investigation of past violations, upholding victims' rights, providing adequate reparations to victims, preventing future abuses, and preserving and enhancing peace. We also now have the right to truth and the right to know.

An independent international truth commission could provide the best opportunity for truth recovery for the greatest number of those affected by the conflict. We believe this will contribute to individual and societal healing and recovery, dealing with the legacy of the past in a positive way and building a better future for everyone.

Narrowing the permissible amount of lies, securing truth and transitional justice and accountability is the only fitting memorial to those killed and for those injured.

All of the key issues within the peace process have required an international role and remit; chairing the political talks, policing, prisoner release, and decommissioning being some examples. Dealing with the past is the last piece of the jigsaw of the peace process and arguably it is the most contentious and challenging. We there-

<sup>14</sup>Statement from the family of Roddy Carroll concerning shoot-to-kill inquests whereby Chief Constable stalls yet again in the provision of material to the court March 9th 2012

<sup>15</sup>George Santayana (1905) Reason in Common Sense, volume 1 of The Life of Reason

fore require international assistance and not perfunctory processes that politick, conceal and prevent the truth from emerging. No organization, no government, no party to the conflict with a vested interest in the outcome should determine, lead and drive processes that address past violations, rather they should be subject to an independent process.

As stakeholders and beneficiaries victims and survivors need to help shape and inform the development of a truth recovery process and not be excluded.

The reality is that children are growing up with a narrative of injustice rather than a narrative of hope. The transgenerational effects and impacts of this are increasingly seeing new generations energized and pursuing truth and justice. This too is an international experience of post conflict and unresolved violations.

The issues are far from going away, if anything they are growing and they will not be brushed under the carpet. Mona Ashrawi, UN Assistant High Commissioner for Human Rights, recently said: 'people don't forget they keep their loved ones close.'<sup>16</sup> Facing the truth is the only option. We need to face the past and the unpalatable truths otherwise they will have a negative and corrosive effect on our body politic and within civil society.

Individual, communal and societal healing, recovery and reconciliation can only take root within the context of such a process.

We will be a better and stronger society for it.

Thank you

**PREPARED STATEMENT OF BRIAN GORMALLY, DIRECTOR,  
COMMITTEE ON THE ADMINISTRATION OF JUSTICE, CAJ**

THE RIGHT TO LIFE—CONTINUING BREACHES IN NORTHERN IRELAND

ABOUT CAJ

The Committee on the Administration of Justice (CAJ) is an independent non-governmental human rights organisation that was established in 1981. CAJ's areas of work are extensive and include policing, emergency laws, criminal justice, equality and the protection of rights. Its activities include publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

INTRODUCTION

Article 2 of the European Convention on Human Rights promotes and guarantees the right to life. Recent jurisprudence in the European Court has held that, amongst other duties, a state must properly investigate any apparently unlawful killing, especially where state agents may be involved. An investigation must be effective, prompt, transparent and independent and involve the next of kin to the extent necessary to protect their interests. The UK is a sig-

<sup>16</sup>Address to Nottingham University on Human Rights, truth, justice & accountability February 2012

natory to the Convention and has partially incorporated it in domestic law through the Human Rights Act 1998.

In CAJ's opinion, the United Kingdom is seriously in breach of its European Convention Article 2 responsibilities to protect the Right to Life in respect of cases where state involvement in unlawful killing is alleged. In a number of high profile cases, including the Finucane case, it has refused to carry out proper investigations into possible direct or collusive involvement in killings. In our view, this is not a matter of the past but of the protection of the right to life in the present and the future. The reality is of a major Western government failing to put in place the investigative and regulative mechanisms necessary to prevent its agents from engaging in extra-judicial executions or other unlawful killings. We are deeply concerned that this failure is leading to a culture of impunity amongst British military, intelligence and security agencies and may result in their involvement in further unlawful killings. There is also evidence that the failings by the UK government give cover and encouragement to those states—including Council of Europe members—engaged in much more egregious human rights abuses. These cases arising from the past in Northern Ireland are therefore vital to pursue for all those who care about human rights and the responsibilities of major Western powers to take the lead in their protection and promotion.

There are various mechanisms that can be used in Northern Ireland to investigate past unlawful killings that might involve state collusion. The Historical Enquiries Team (HET) of the Police Service of Northern Ireland is, in our opinion, deeply flawed as to its independence and effectiveness and we share the concerns that colleagues in this delegation are reporting on. New inquests are now being held into some cases and the UK Supreme Court has held that they must be Article 2 compliant. The first of these inquests has just started and we are monitoring its progress. Inquiries are possible in some cases and are the most appropriate mechanism when there is evidence that wrongdoing may go to the highest levels of the state—as in the Finucane case. The other mechanism is the Office of the Police Ombudsman for Northern Ireland which is the main focus of this briefing.

#### SUBVERTING THE OFFICE OF POLICE OMBUDSMAN

The Office of the Police Ombudsman for Northern Ireland (OPONI) is a product of the peace process and specifically of the Patten Report into policing. It is a powerful and independent office with extensive powers and it is a significant part of the architecture of human rights-compliant policing. CAJ fully supports the Office and believes that the legislation guiding it allows it, in principle, to carry out Article 2 compliant investigations into unlawful killings that may have involved the actions of the police or their agents. As well as investigating current complaints against the Police Service of Northern Ireland (PSNI), OPONI has a role in investigating past cases where police (the old Royal Ulster Constabulary) wrongdoing is alleged. In relation to these cases, CAJ believes the independence and effectiveness of the Office has been subverted over the past few years.

In June 2011 we published a major report into OPONI's investigation of past cases. This report took the criteria for human rights compliant investigations and examined OPONI's record against them. In terms of effectiveness, the report found that OPONI did not use any consistent definition of the concept of "collusion" in relation to involvement of state agencies in unlawful activities including murder. In general, it now takes a narrow and restrictive view of the term with the result that police misconduct tends to be exonerated in the absence of evidence of a formal conspiracy. In relation to analysis of past investigations, the Office now tends to use the term "failings" which covers both incompetence and wilful perversion of the course of justice.

The report expressed concern that the current levels of efficiency or 'promptness' offered by the Police Ombudsman's Office were not Article 2 compliant. The investigative process is agonisingly slow and it is often difficult to ascertain why the research requires such an extensive period to conduct. The length of time it takes for historic cases to be investigated and once opened, completed, is particularly stark given that many families have already waited decades to uncover the truth of their loved ones death.

Transparency was regarded as fundamental to accountability and the building of public confidence by the Patten Commission. It also forms part of the core legislative responsibility of the Police Ombudsman's Office to exercise his or her powers in such manner and to such extent as appear best calculated to secure public confidence. Thus, while the role of the Office is to investigate complaints against police, in doing so it needs to be accessible and to provide information to families. In fact, in addition to unacceptable delays, the treatment of families by the Police Ombudsman's Office has often been painful and distressing for family members. In particular, concerns exist around the frequency and nature of communication, willingness to consider views of relatives, and inequality of treatment in relation to prior access to reports. As regards historic cases, the requirements for transparency and openness to public scrutiny form a core part of the Article 2 obligations, and have particular relevance in the context of building confidence in policing and accountability in a post-conflict society.

The requirement for independence is a statutory duty of the Office of the Police Ombudsman and a key requirement for compliance with Article 2 of the ECHR. The CAJ report identified a number of issues that impact upon the independence of the Office. There were irregularities in the appointment process of the current Police Ombudsman (who has since resigned but is still in post).

CAJ became aware that the criterion of prior Northern Ireland experience appeared to have been added at a very late stage in the recruitment for the current Police Ombudsman, potentially favouring a particular candidate. It has also emerged that there were irregularities in the manner in which security vetting procedures were conducted with respect to the current Police Ombudsman. The way in which the process appears to have been conducted raises questions as to whether normal procedures were applied, suspended or circumvented.

An important issue relating to independence is the fact that all intelligence material for historic cases is provided by the Police In-

telligence Branch now known as C3. It is believed that a number of former RUC Special Branch officers are still employed in this branch which is of concern given that the old Special Branch is at the heart of many allegations of collusion. Furthermore, probing by CAJ and the BBC has now brought to light the fact that the PSNI employs over three hundred ex-RUC officers as “civilians” working in many areas of policing including intelligence.

Since the CAJ report was published, two other reports, by the Department of Justice (June 2011) and the Criminal Justice Inspection Northern Ireland (September 2011) have broadly concluded that the effectiveness and efficiency of the Office have been severely undermined due to political and police interference as well as “weak leadership.” The Criminal Justice Inspection further determined that reports into historic cases were altered or rewritten to exclude criticism of the RUC with no explanation; senior officials in the Office requested to be disassociated from reports into historic matters after original findings were dramatically altered without reason; staff investigating some of the worst atrocities of the conflict believe police have acted as ‘gatekeepers’ to withhold key intelligence from them; and major “inconsistencies” exist in the Police Ombudsman’s investigations of Loughinisland, McGurk’s Bar and Claudy. The report also found a “fractured approach” to governance and management and expressed concerns over the handling of sensitive material. It also noted the lack of respect for the demands of civilian oversight in a previous restructuring of the Intelligence Unit of the Office. This report therefore concluded that the Police Ombudsman’s Office should be suspended from conducting historic investigations due to what it called a “lowering of independence.”

After intense public pressure, the current Ombudsman, Al Hutchinson, resigned (although he continues to exercise some of his functions) and a recruitment process for his successor is now taking place. A process of reform is now supposedly going on and a public consultation was launched on 13/03/12 on the legislation and structure of the Office, including the mechanisms for dealing with historic cases. We are concerned that the delay in implementing this reform is causing further traumatising to families who have already waited years to have their cases properly investigated by OPONI.

In another development, in late November 2011 news reports indicated that the Office had decided to “reinterpret” its legislation in a manner which means the Office reportedly argues it can no longer conduct investigations into nearly 50 cases where RUC officers were responsible for deaths. CAJ issued a Freedom of Information request on the 1 December 2011 seeking information to clarify the basis of the Office’s reinterpretation of the legislation and documentation indicating what had prompted the Office to re-examine the legislation. Only a partial response has been provided. However, a recent government reply to a CAJ complaint to the European Council’s Committee of Ministers states that “an expert legal opinion provided to the Police Ombudsman in late 2011 confirms that in the absence of new evidence, not reasonably available at the time the matter originally occurred, he cannot investigate any matter that has previously been investigated by police.” This view con-



flicts with the understanding of the previous Ombudsman, Baroness Nuala O'Loan, and the practice of the Office up to this point.

There are other clear derelictions of duty by the current Ombudsman. One of the last major reports published by the previous Ombudsman, known as Operation Ballast, found systemic collusion by RUC Special Branch with a murderous unit of the Loyalist Ulster Volunteer Force in North Belfast. It appeared that police agents had been allowed to get away with murder by their handlers and forensic and other evidence had been systematically destroyed to cover up their involvement. After an enquiry by the HET, investigation into civilian criminality was handed back to the PSNI and prosecutions (albeit botched) have taken place. However, the investigation into the possible criminal activities of police officers was made the responsibility of OPONI which appears to have done little or nothing to pursue the matter. In a BBC documentary broadcast on 14/03/12, Nuala O'Loan commented that if she had still been Ombudsman she would have investigated fully.

CAJ believes that the reinterpretation of legislation mentioned above is an attempt to circumscribe the scope of operation of the new Police Ombudsman when he or she is appointed. Together with the "lowering of independence" created by police and government interference, with the complicity or complacency of the current Ombudsman, this amounts to a subversion of the role of the Police Ombudsman. We believe that these subversive developments can be reversed, but it will take concerted and continuing pressure on an establishment which appears to resent independent investigation of past human rights abuses.

#### CONCLUSION

The right to life is the most important human right and we could argue that government's foremost duty is to protect it. While there have been huge advances in Northern Ireland and human rights including equality are better protected than ever before, the lack of effective investigations into unlawful killings is a dangerous gap. It has the capacity to undermine the peace process and to weaken confidence in policing and the new society as a whole. Although these cases happened in the past, this is not a historical question; it is a matter for the present and the future. It is a central human rights issue—if we cannot trust the government to fully investigate cases where its agents may have killed citizens, what can we trust it with?

#### WHY HUMAN RIGHTS IN NORTHERN IRELAND ARE STILL INTERNATIONALLY IMPORTANT—A GENERAL COMMENT BY CAJ

##### THE SIGNIFICANCE OF THE CONFLICT

Over 3,600 people died out of a population (in the North) of about 1.5 million. If that figure is extrapolated to Britain, it is the equivalent of 144,000 deaths—well over twice the number of British civilians that died in the Second World War. Extrapolated to the United States it would give a figure of 720,000 deaths—more than one and a half times the total US casualties in the Second World War or the equivalent of eight 9/11 attacks for each of the 30 years of the conflict.

Ten times as many people were injured as were killed—over 36,000. It is estimated that at least 20,000 people were imprisoned for offences arising out of the conflict. If we take people's immediate families into account, that makes at least 300,000 people directly affected by the conflict. That does not take into account those forced out of their homes, intimidated, beaten up, harassed, made to leave their jobs and all those who lived in fear and constant tension.

This occurred in Western Europe, amongst the population of one of the leading liberal democracies in the world. The causes, features and responses to such a conflict are therefore of abiding significance.

The nature of human rights abuses during the conflict

The proved or alleged human rights abuses that were perpetrated by the UK state during the conflict include state sanctioned murder, torture, collusion with non-state armed groups, detention without trial and denial of a fair trial, accompanied by a culture of impunity, together with toleration of religious and other forms of discrimination. The exposure and holding to account of elements of the state for these crimes is a so far uncompleted task and therefore amounts to an impediment in the creation of a society fully based on human rights and the rule of law.

#### THE NATURE OF THE PEACE PROCESS

In spite of the deep trauma caused to Irish and British society by the conflict, a relatively successful peace process was undertaken and consolidated. The process of negotiation and agreement involved an inclusive approach to all political parties and armed groups and a lengthy period of demobilisation, disarmament and reintegration of state and non-state forces. The fundamental foundation of the settlement was a serious commitment to human rights and equality. The political settlement guaranteed a place in governance for representatives of the two main communities but this was underpinned and guaranteed by an infrastructure of legislation and institutions designed to promote human rights and equality. These included:

- Fundamental police reform with extraordinarily powerful oversight and accountability mechanisms

- Reform of the criminal justice system with new oversight and inspection institutions

- Incorporation of the European Convention of Human Rights in domestic legislation

- Uniquely strong (for the time) equality legislation

- A human rights commission and equality commission to oversee all elements of society

Civil society organisations like CAJ played a significant role in the negotiation, settlement and consolidation elements of the peace process and are well-equipped to reflect upon and generalise from the experience.

The lessons from Northern Ireland in how to deal with fractured societies, rebellion by armed groups and the characteristics of inclusive peace processes—all on the basis of a commitment to human rights—are of wide applicability.

## UNFINISHED BUSINESS AND CONTINUING PROBLEMS

The major unfinished business of the peace process is the UK government's failure to legislate for a Bill of Rights for Northern Ireland including identified rights supplementary to the European Convention. The significance of building in human rights protections to a constitutional document—or failing to—is demonstrated by the Northern Ireland experience. There are other failures to carry out commitments which have a tendency to weaken the stability of the peace settlement.

There are continuing problems with attempts to roll back the human rights elements of the peace settlement, especially with regard to policing. The ways in which exemplary institutions can be subverted and the methods of preventing and opposing that process are being demonstrated in the current situation in Northern Ireland.

There is no comprehensive method of dealing with past abuses and unsolved crimes in Northern Ireland. Although there are many interesting projects within civil society, neither the state nor political society has been willing to agree a thorough truth recovery or reconciliation process. This is a fundamental weakness and efforts to use international examples and to continue the debate on dealing with the past are important not just for the local situation but also to demonstrate the problems and possibilities in such processes.

The UK state is seriously in breach of its European Convention Article 2 responsibilities to protect the Right to Life in respect of cases where state involvement in unlawful killing is alleged. In a number of high profile cases it has refused to carry out proper investigations into possible direct or collusive involvement in killings. This is not a matter of the past but of the protection of the right to life in the present and the future. The reality is of a major Western government failing to put in place the investigative and regulative mechanisms necessary to prevent its agents from engaging in extra-judicial executions or other unlawful killings. There is evidence that this failure has led to further unlawful killing by British forces in Iraq and elsewhere. There is also evidence that the failings by the UK government give cover and encouragement to those states—including Council of Europe members—engaged in much more egregious human rights abuses. These cases arising from the past in Northern Ireland are therefore vital to pursue for all those who care about human rights and the responsibilities of major Western powers to take the lead in their protection and promotion.

**PREPARED STATEMENT OF PATRICIA LUNDY, A SENIOR  
LECTURER, UNIVERSITY OF ULSTER**

Dr Patricia Lundy is grateful to the Helsinki Commission for allowing her to submit written evidence to its hearing on “Pre-requisites for Progress in Northern Ireland”. The submission is based on empirical research. In August 2005, the former Chief Constable of the PSNI Sir Hugh Orde granted Dr Lundy permission to conduct research, and wide and unfettered access to the Historical Enquiries Team (HET) was permitted. In the context of Northern Ireland, this was unprecedented access to policing and provides unique insight into a distinctive process. The HET is an innovative process and a unique concept in policing internationally. The research raises a number of concerns examined in Part 2 of the current submission.

BACKGROUND

Since the Good Friday Agreement was signed in 1998 there have been dramatic changes that have transformed society. Between 1966 and 1999 approximately 3,636 people died as a result of the conflict in Northern Ireland and many more suffered injury and loss.<sup>1</sup> During this period there were widespread and systematic violations of human rights by state and non-state actors and allegations of collusion between state agencies and Loyalist paramilitaries. The supposition is systematic human rights violations would not happen in a liberal democracy, committed to the rule of law. Northern Ireland demonstrates that this is not confined to underdeveloped dictatorial regimes and can occur in western highly developed democracies with a plethora of human rights protections, legislation and institutions designed to detect and protect victims of such violations within an ostensible democracy. Indeed this context may constrain acknowledgement of abuse as government is less willing to accept institutional failure.

WHAT ARE THE BENEFITS OF AN INDEPENDENT INTERNATIONAL  
TRUTH RECOVERY PROCESS?

Unlike many other “post-conflict” societies, “truth” recovery was not envisaged as part of the initial Northern Ireland peace deal. To date it has been marked by, what could be interpreted as, a deliberate fragmented approach by the state that is not designed to address the past in a comprehensive and holistic way. Whatever the interpretation of this policy, it has created a vacuum which is filled by almost daily media reports that drip feed toxic revelations about the atrocities of the past raising more questions than answers.

Post-conflict the dilemma is whether, and if so, how, to address the legacy of conflict and address victims’ needs. In the aftermath of conflict, victims often desire ‘truth’, justice and accountability. However, victims are not a homogenous group, some desire answers to unanswered questions about the tragic death of their loved ones; others seek prosecutions; victims’ of state violence frequently prioritise accountability. Internationally, transitional jus-

<sup>1</sup> In Northern Ireland there are differing estimates of the number of people who have died as a result of the conflict. David McKittrick (ed.), *Lost Lives*, Mainstream, Edinburgh, 1999, p. 1476.

tice initiatives are promoted as a vital component in conflict transformation and a prerequisite for sustainable peace. The United Nations has embraced and employed transitional justice measures and ‘truth’ recovery in particular, in its interventions in “post-conflict” situations. The societal benefits attributed to ‘truth’ recovery (and especially truth commissions) are well documented; it is not possible to explore each in detail here. Briefly, “truth” recovery is important because by acknowledging suffering and wrongdoing and allowing victims to “tell their story” this will assist the healing process. The logic is by learning from the mistakes of the past it will prevent a repetition of human rights abuses in the future—the “never again” maxim. Therefore, “truth” recovery helps consolidate democracy by establishing respect for human rights and the rule of law. Crucially, it can help achieve accountability and combat impunity. However, justice and accountability do not necessarily mean prosecution and imprisonment of those who have been involved in human rights abuses. This raises the question of amnesty (or immunity) and its role, if any, in post conflict peace building and justice. Some commentators have argued that a de facto amnesty exists for members of the security forces in Northern Ireland. Amnesty is an extremely emotive topic, but whether we like it or not, society needs to have a conversation about this difficult topic. These are the dilemmas and challenges of grappling with the past. Despite strong opposition to ‘truth’ recovery within sections of Northern Irish society, the reality is, ‘truth’ recovery is taking place by means of a plethora of unofficial and official means. However, this is fragmented, partial and long-drawn-out. Indeed, the current ‘drip feed approach’ has the potential to undermine, and/or unravel, much good work and progress already achieved. Finding a satisfactory way to deal with the past remains the outstanding prerequisite for progress in Northern Ireland.

#### THE CURRENT POSITION

The UK government has been found in breach of Article 2, the right to life, in a number of cases in Northern Ireland. In a joint judgment delivered on 4 May 2001 the court set out the elements which must be adhered to for an investigation to be Article 2 compliant—effectiveness, independence, promptness, accessibility to the family and sufficient public scrutiny.<sup>2</sup> In 2002, in response to the above judgments, the UK Government presented the European Court of Human Rights with a “package of measures”, which it claimed were necessary steps to address the issues raised in the Court’s judgment and would ensure future Article 2 compliant investigations. A key component of the “package of measures” was the Historical Enquires Team (HET). There is mounting evidence that some aspects of the current ‘package of measures’ do not have the capacity to effectively investigate some of the more contentious conflict related deaths in Northern Ireland. A prerequisite for progress, in the absence of a comprehensive “truth” recovery process, is the current mechanisms must be capable of delivering impartial and effective investigations. The remainder of this submis-

<sup>2</sup>Which encompasses the cases *Jordan v UK* (No. 24746/94); *McKerr v UK* (No.28883/95); *Kelly and Others v UK* (No.30054/96); *Shanaghan v UK* (No.377715/97).

sion to the Helsinki Commission will discuss recent research, conducted by Dr Lundy, on the HET.

PART 1:

RESEARCH REPORT (2009): CAN THE PAST BE POLICED?

The first research report published by Dr Lundy raised a number of concerns about the HET, including lack of independence and the role of retired RUC officers. The research found that each stage of the HET process had involvement of significant numbers of long serving retired RUC officers; this included the Command Team, senior managers of intelligence and the entire HET Intelligence Unit. The research further noted; given the very high numbers of retired police officers working in the HET, a crucial matter seemingly overlooked was who has oversight responsibility. While the issue of independence is extremely important, it is not the focus of this current submission.<sup>3</sup> Nevertheless, it is important to note that the HET has recently undergone significant changes to its processes and structural relationship with the PSNI. It originally reported directly to the Chief Constable; HET now reports directly to the Assistant Chief Constable (ACC) for Crime Operations. From 2009 HET refers cases (where realistic evidential opportunities exist) back to the Serious Crime branch (“C2”) of the Crime Operations Department. This raises a number of concerns which are reflected in a joint submission by the Committee on the Administration of Justice (CAJ) and Pat Finucane Centre (PFC) to the Committee of Ministers (CM) February 2012.<sup>4</sup> The submission expressed deep concern that since CM assessment of the general measures in 2009<sup>5</sup> a number of developments significantly undermine the HET’s capacity to carry out the work it was deemed capable of doing. Concerns were expressed about the independence and effectiveness of the process underpinning reports prepared by the HET. Whilst some families have received a satisfactory measure of resolution from the HET, CAJ and PFC do not accept that it is an operationally independent unit of the PSNI and have some concerns about HET’s capacity to conduct effective independent Article 2 compliant investigations where state actors may have been involved in a death. The submission “formally requested the reopening of scrutiny by the Committee of Ministers of General Measures relating to the HET in the ‘McKerr group of cases’.”<sup>6</sup>

<sup>3</sup>See, Lundy, P. (2009) Can the Past be Policed?: Lessons from the Historical Enquiries Team Northern Ireland, Law and Social Challenges, Vol.11, pp. 133–138 download at <http://ssrn.com/abstract=1425445>. A copy has been submitted to the Helsinki Commission.

<sup>4</sup>Joint submission by Committee on the Administration of Justice (CAJ) and the Pat Finucane Centre (PFC) in relation to the supervision of cases concerning the actions of the security forces in Northern Ireland, Submission no. S376, February 2012, p. 3–9. Copy available at <http://www.caj.org.uk/>

<sup>5</sup>In 2009 the Committee of Ministers decided to close its examination of general remedial measures on the grounds that the HET could bring “a measure of resolution” to victims’ and had “the structure and capacities to allow it to finalise its work”, see Interim Resolution CM/ResDH(2009)44.

<sup>6</sup>Joint submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) and the Pat Finucane Centre (PFC) in relation to the supervision of cases concerning the actions of the security forces in Northern Ireland, Submission no. S376, February 2012, p. 3.

## PART 2:

RESEARCH REPORT (2012): HET REVIEW OF ROYAL MILITARY POLICE  
(RMP) 'INVESTIGATIONS'<sup>7</sup>

The remainder of this submission will discuss the HET's review processes and procedures in Royal Military Police (RMP) investigation cases (hereafter RMP cases). RMP cases involve the fatal shooting of over 150 civilians by the British army between 1970 and September 1973.<sup>8</sup> In November 2011 the HET had completed 36 RMP case reports.<sup>9</sup> This paper sets out research findings based on the analysis of twenty-four HET reports, relating to seventeen individual RMP cases.<sup>10</sup> The submission considers a number of issues about the way in which the HET conducts investigations in RMP cases. Of particular note are apparent anomalies and inconsistencies in the investigation process where State agencies (in this case the military) are involved, compared to non-state or para-military suspects. This raises questions about the ability of the HET to undertake independent, impartial, effective investigations in cases involving State agencies.

The following aspects of HET investigations in RMP cases are examined:

- 'Pragmatic approach'
- Interviews under caution
- Pre-interview disclosure
- Pre-prepared written statements
- Robustness of interviews
- Equality of treatment
- Editing and changes to reports
- Effectiveness of reviews
- Tracing, illness verification
- Accountability

## CONTEXT

The Saville Inquiry revealed that between 1970 and September 1973 an informal agreement (hereafter Agreement) existed between the Chief Constable of the RUC and the GOC of the British army about the conduct of investigations in fatal shootings involving the military.<sup>11</sup> The Agreement specified that soldiers suspected of involvement in a fatal shooting episode would be questioned by the Special Investigations Branch (SIB) of the Royal Military Police (RMP); and the RUC would take responsibility for interviewing civilian witnesses and all other aspects of the investigation. These

<sup>7</sup>For a full discussion of HET investigations in RMP cases see briefing prepared by Patricia Lundy, available from the author on request.

<sup>8</sup>There is some evidence to suggest that RMP investigations might have extended beyond 1973.

<sup>9</sup>FOI Request number F-2011-03623, received November 21, 2011, on file author. "36 review summary reports have been delivered to families." Each victim's family receives a HET report detailing the nature of the review conducted and a response to unresolved questions raised by the family.

<sup>10</sup>The sample of 24 HET reports is made up of 12 individual HET case reports completed between 2010 and 2011; a further 5 individual HET case reports completed in 2006-7; the remaining 7 reports are various drafts of recently completed reports. These reports are part of a much larger sample of HET reports collated by the author from 2006 to the present and cover all categories of deaths.

<sup>11</sup>Report of the Bloody Sunday Inquiry, full transcript of the proceedings is available at <http://www.bloody-sunday-inquiry.org.uk>.

arrangements meant that soldiers involved in fatal shooting incidents were rarely interviewed by the RUC and consequently any opportunity for independence was negated. An RUC policy at the time directed that the RUC should forward all available evidence to the RMP prior to an interview taking place with soldiers.<sup>12</sup> In effect the RMP rarely received witness statements before military personnel were interviewed. The interviews appear to have been conducted informally with no assessment of criminal responsibility. The procedure appears to have been to question soldiers as witnesses, rather than to interrogate them as suspects, thereby dispensing with the need for formal cautions. The adequacy of RMP investigations was examined in the Saville Inquiry; the following evidence from a military witness captures the statement-taking process: "It was not a formal procedure. I always wore civilian clothing and the soldier was usually relaxed. We usually discussed the incident over sandwiches and tea."<sup>13</sup>

In 2003 these arrangements were judicially reviewed in the Kathleen Thompson case.<sup>14</sup> Sir Brian Kerr, Lord Chief Justice of Northern Ireland, concluded that investigation into Mrs Thompson's death was not effective and it is questionable whether the Chief Constable of the RUC had the legal authority to delegate the critical responsibility of interviewing soldiers to the RMP.

#### HET INVESTIGATION PRACTICES AND PROCEDURES:

The HET has a number of processes and procedures that it adopts in RMP cases.

##### 1. *The 'Pragmatic Approach'*

The 'pragmatic approach' refers to HET interviews of suspects conducted 'informally' or not under caution. The soldier is interviewed as a witness, rather than cross-examined as a suspect, thereby dispensing with the need for formal caution. The 'pragmatic approach' appears to be a recent development in HET procedures and as far as can be established is specific to RMP cases.<sup>15</sup> The HET has stated that, 'the methods used for identification, tracing and interviewing military personnel are the same as those employed by the police service'; RMP cases are 'treated as per the guidelines of the Police and Criminal Evidence (NI) Order'.<sup>16</sup> There are very clear codes of conduct and standards that govern criminal investigations. The research indicates that the HET appears to have departed from the accepted standards in RMP cases. It is not within the scope of this submission to the Helsinki Commission to detail numerous examples; the following abstract from recent HET report is illustrative.

HET procedures in RMP cases are outlined as follows:

<sup>12</sup>The 'RUC policy' is referred to in most of the HET RMP case reports examined.

<sup>13</sup>Witness INQ2052, see also witness INQ1831, INQ3, a full transcript of the proceedings is available at <http://www.bloody-sunday-inquiry.org.uk>.

<sup>14</sup>Mrs Kathleen Thompson mother of six was killed 6 November 1971 by a British soldier of the Royal Green Jackets in disputed circumstances. See, Kerr, J. In the High Court of Justice in Northern Ireland, Queen's Bench Division (Judicial Review), In the Matter of an Application by Mary Louise Thompson For Judicial Review, Ref:KERA36391

<sup>15</sup>In over 100 HET reports I have studied - covering all categories of deaths (unionist civilian/nationalist civilian/paramilitary/security forces) - none refer to a pragmatic approach.

<sup>16</sup>Direct quote from FOI Request number F-2011-03623, received November 21 2001, on file author.



“The question as to whether the HET should interview soldiers who were involved in shooting incidents whilst on duty in Northern Ireland is considered on a ‘case by case’ basis. Usually, but not exclusively, the determining factor will be around the thoroughness of the original investigation, especially the way in which interviews were conducted by the military, and whether the original interviewers had prior knowledge of any allegations that may have been levelled against the soldiers. Another major consideration is the evidence that was tendered by the soldiers or their representatives at the inquest, and most importantly whether there is any evidence available now that would not have been available to investigators at the time.”

The HET report goes on to say, “this pragmatic approach was adopted specifically to give the HET maximum opportunity to obtain as much information as possible for the benefit of [the] family. **People who are interviewed under caution as ‘suspects’ are typically either extremely guarded in what they say, or exercise their right not to say anything at all.**” [Emphasis in bold added].

Taking into consideration the earlier discussion about the deeply flawed nature of RMP investigations and Sir Brian Kerr LCJ ruling in the Thompson case (2003), and acceptance by the HET that clear discrepancies appear in the statements made, it is unclear why the HET took the decision not to interview the soldier under caution. The RUC at the time were clearly of the opinion that the shooting was unlawful and strongly recommended prosecution of the soldier in question.

It appears that the HET decision to interview the soldier as a witness (and not as a suspect) fails to challenge and/or reinforces the original procedural inadequacies. Perhaps with the best of intentions in mind, the HET justify this approach as; “A classic dilemma’—no information for the families, or adopt a pragmatic approach in the pursuit of some answers for them.”

This implies a ‘truth recovery’ process. However, the HET cannot offer the guarantees and/or incentives deemed necessary to encourage ‘truth recovery’ i.e. immunity or amnesty. In the absence of such guarantees suspects would run the risk of self-incrimination.

Participating in such a ‘pragmatic process’ does not appear to reveal any greater level of substantive information than previously available in the original papers. Statements tend to be a repetition of the original argument advanced in the RMP interview. The process does however offer the soldier an opportunity to bolster his original statement by plugging any gaps in his defence and to include some additional descriptive self-serving detail.

Importantly, the research found inconsistencies in HET decision-making to interview military suspects under caution or ‘informally’.

Tracing and Verification of Illness:

In a number of cases the HET were unable to identify and trace soldiers responsible for the fatal shooting of civilians and/or key military eyewitnesses.

In some instances, where soldiers have been identified and traced, ill health is a factor in the decision not to interview the suspect under caution or otherwise. In one instance the HET state that the suspect (soldier B) “is suffering from dementia and a heart condition and was unable to assist with the review.” But the report goes on to give some limited detail about an interview that seems to have taken place; including soldier B’s expression of regret. Importantly, it is evident that the verification of illness (i.e. medical evidence) of soldiers directly involved in fatal shootings in RMP cases is not always confirmed and/or sought by the HET. The process involved is not transparent.

It was confirmed in a recent meeting with Dave Cox (HET Director) and other senior staff that the HET do not always seek verification of illness with regards to soldiers directly involved in fatal shootings in RMP cases (i.e. medical evidence).<sup>17</sup> In addition, further evidence is provided by a member of the legal profession who recently received written confirmation from the HET that medical evidence was not sought in his client’s (RMP) case which involved the death of an eleven year old boy (copy of letter on file with the author).

#### ISSUES TO BE CONSIDERED INCLUDE:

- In order to comply with Article 2, investigations must be effective and transparent. In this regard the ‘pragmatic approach’ raises serious concerns.
- There are very clear codes of practice, standards and procedures which govern criminal investigations. The HET appear to depart from the accepted standards and justify this by calling it a ‘pragmatic approach’. This raises an issue as to whether the HET is acting outside its authority and powers.
- The nature and conduct of ‘informal’ interviews (sometimes conducted in the soldier’s own home) is not clear.<sup>18</sup>
- The research also found inconsistencies in HET decision-making whether to interview military suspects under caution or ‘informally’.
- More generally, the ‘pragmatic approach’ appears to be a recent development in HET procedures and as far as can be established is specific to RMP cases. This raises questions about equality of treatment and procedural impropriety; some suspects appear to receive more favourable treatment than others.
- Differentiation in treatment raises questions about the HET’s impartiality in conducting investigations into cases concerning State agencies.
- Legal advice is required to determine whether a ‘pragmatic approach’ could prejudice any future prosecution. And/or whether this amounts to an abuse of process.
- Are families aware of the risks (if any) in adopting an “informal/pragmatic” approach?
- Is there full transparency in respect of this process?
- How are illnesses verified?

<sup>17</sup> Meeting, 8 February 2012, held in CAJ Office, also in attendance were Patricia Lundy and Gemma McKeown (CAJ), minutes of the meeting are on file with the author.

<sup>18</sup> It is believed that these interviews are not recorded; but it is not clear.

- What does the ‘pragmatic approach’ deliver (compared to interviews under caution)?
- In view of these concerns, should RMP investigations be brought to the attention of the European Court for consideration?
- The DPP/PPS decision not to prosecute also raises concerns which require further scrutiny.

## 2. Interviews Under Caution

In RMP cases where soldiers are interviewed under caution the investigation processes and procedures also raise a number of concerns.

### Pre-interview disclosure:

The HET states in RMP case reports that, “there is a legal obligation placed upon the HET to serve on those representing an interviewee a pre-interview disclosure package. This consists of all existing evidential documentation and other material that is relevant to the case.”<sup>19</sup>

Importantly, there is evidence to indicate that the ‘package’ includes contemporary or new witness statements made by individuals who witnessed the death/incident but did not make a statement to the police at the time. It is my understanding that the witnesses, the families, NGOs and/or lawyers who enabled the new witnesses to come forward, were not informed by the HET that new statements would form part of a ‘pre-interview disclosure package’ to solicitors representing soldiers. In a recent meeting with Dave Cox (HET Director), senior staff and the author it was confirmed that new witness statements are included in the ‘pre-interview disclosure package’.<sup>20</sup>

In response to a Freedom of Information (FOI) request about pre-interview disclosure the HET made the following point; “Under the Criminal procedures and Investigations Act 1996, the HET **is under no obligation to reveal the prosecution case to the suspect or their legal representative before questioning begins.** However, the Court of Appeal has held that if the police do not provide sufficient information to enable a solicitor properly to advise his client, the solicitor is entitled to advise his client to refuse to answer questions under caution.”<sup>21</sup> [Emphasis in bold added]

It would appear that the HET has taken, in some cases, a very wide interpretation of ‘sufficient information’.

It is of considerable concern that there appears to be inequality in treatment where State agencies (in this case the military) are involved, compared to non-state or paramilitary suspects. There are examples in paramilitary related historic cases where suspects have received significantly less fulsome

<sup>19</sup>HET Review Summary Report, on file with author. Details of the case are not revealed for reasons of confidentiality.

<sup>20</sup>Meeting with Dave Cox (HET Director), Paul Johnson (SIO) and Neill Kerr, 8 February 2012, held in CAJ Office, also in attendance were Patricia Lundy and Gemma McKeown (CAJ), minutes of the meeting are on file with the author.

<sup>21</sup>FOI Request number F-2011-03623, received November 21, 2011, on file author.

pre-interview disclosure.<sup>22</sup> There is no clear rationale for this less favourable differentiation in treatment.

**Pre-Prepared Statement:**

When soldiers are interviewed under caution it is in the presence of their solicitor, recorded, and generally in his/her offices. The soldiers are voluntary attendees. Under these circumstances the HET state that “they are treated as per the guidelines of the Police and Criminal Evidence (NI) Order.”<sup>23</sup>

An analysis of HET reports reveals that at the start of interviews soldiers present the HET with a pre-prepared written statement. These tend to be carefully crafted detailed statements which have benefited from the wide pre-interview disclosure package and several months preparation. Pre-interview disclosure is likely to have an effect of memory recall and/or jogging memory. It appears that the value of soldiers’ statements in terms of the level of additional information revealed (or answering unresolved questions) is limited. Statements tend to be a repetition of the original argument advanced in the RMP interview, but with any gaps carefully plugged, and some additional self-serving personal details about the individual. The process offers the soldier an opportunity to bolster his original statement and defence.

Pre-prepared statements are not uncommon. But the pre-prepared statements in HET investigations appear to depart from standard practice and procedures. The statement has the advantage of the full pre-interview disclosure package (including new/recent witness statements) and weeks or months in preparation, in advance of a HET formal interview. In cases where there are conflicting accounts, it would appear that the HET do not withhold (even recent) witness statements to test the veracity of a soldier’s statement.

**Interviews/ Robustness/ Editing:**

An analysis of a sample of case reports indicates that some HET interviews appear to lack robustness and inconsistencies are frequently not adequately challenged. By way of illustration, the following comment is taken from a recent HET report:

“Soldier A accepted that he shot ‘John’ in the back, but was adamant that he was turning towards him when he fired. He said the fact that the exit wound had come out the front of his body at angle supported what he was saying.” [John is not the victim’s real name]

This statement does not appear to have been challenged and/ or followed up by the HET (i.e. forensic report).

In all of the reports examined, the actual questions put to suspects and answers during HET interviews are not revealed. The content of interviews is edited by the HET (and appears to be summarised); this will be addressed further below. In some instances the extent of the interview amounts to one page and a half in HET reports. The processes and procedures are not transparent.

<sup>22</sup>This is based on interviews with a number of solicitors representing paramilitary suspects in recently examined historic cases; details of these cases are confidential. A more in depth investigation and scrutiny of comparative cases is recommended.

<sup>23</sup>FOI Request number F-2011-03623, received November 21, 2011, on file author.

Drafts, Changes to HET Reports:

It is not clear how in one report the wording of an account given by a soldier to the HET, about his direct involvement in and recollection of a fatal shooting, changed in a redrafted report. The interview was not under caution and it was not recorded. The wording in the report is a summary based on a senior investigating officer's notes and recollection (or interpretation) of what was said during the interview. The following direct quotes from the original and redrafted report show changes which appear to legally bolster the soldier's defence.

The direct quotes have been removed to protect the report/victim from being identified.

It is not clear who directed the changes and what the process or procedures involved and what explanation there could be for changing it in this manner whether under caution or otherwise.

QUESTIONS TO BE CONSIDERED:

Interviews under caution raise a number of concerns as indicated above; in particular that the investigation process and procedures appear to depart from accepted standards.

- Does this amount to abuse of process?
- Does it impair the prospect of future prosecutions should a family wish to pursue this option?
- What power does the HET have to depart from accepted procedures and best practice guidance?
- What is the rationale for treating suspects differently by subjecting some to a more robust process which is compliant with the law and departing from these standards in other cases?
- Are families aware of the risks (if any) in prejudicing future prospects for prosecution.
- Is there full transparency in respect of this process?
- Why are there no written policy documents on procedures for identifying, tracing and interviewing military personnel?

3. *Accountability:*

To comply with Article 2, investigations must be effective in order to secure accountability. The research raises questions about the HET process, the effectiveness of investigations and ability to hold the military to account. There are individual expressions of regret and/or apologies from individual soldiers in HET reports.<sup>24</sup> And, crucially, victims are frequently vindicated. The symbolism of apologies is important for many families; it provides a measure of acknowledgement. However individual expressions of regret or apology should not diminish the obligation to secure accountability, and responsibility, at an individual and institutional level.

CONCLUSION:

There are many more issues raised by the research that require to be discussed but are outside the scope of the current submission to the Helsinki Commission. The points above are the most salient

<sup>24</sup>These apologies raise a number of issues that cannot be adequately addressed in this briefing paper.

for current purposes. Of particular note are apparent anomalies and inconsistencies in the investigation process where the British military is involved, compared to historic cases where non-state or paramilitary suspects are involved. This raises questions about the ability, and/or perception, of the HET to undertake impartial, effective investigations in cases involving State agencies and the extent to which the families participating in the process are aware of departures from accepted procedures. The perception of independence as well as its reality is critical as it impacts directly on the confidence of those who engage in the HET process. A prerequisite for progress is a clear break with the injustices of the past. It is vital that State initiated past-focused mechanisms are impartial, effective and transparent.





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