

Tom Lantos Human Rights Commission

Hearing

on

Northern Ireland: Accountability at Risk

February 15, 2022- 1:00 p.m.

Virtual, via Cisco WebEx

Statement of Jon Boutcher QPM

Head of Operation Kenova

1. I provide this submission at the request of the Tom Lantos Human Rights Commission.
2. I am the Officer in Overall Command (OIOC) of a series of ongoing independent investigations or reviews into Northern Ireland legacy cases that are collectively described in this submission as Operation Kenova cases. The Chief Constable of the Police Service of Northern Ireland (PSNI) has asked me to lead each of these inquiries; In June 2016 I agreed to lead an investigation into the activities of an alleged agent known as ‘Stakeknife’. This investigation was established following a legal direction under section 35(5) of the Justice (Northern Ireland) Act 2002 from the then Director of Public Prosecutions for Northern Ireland.
3. I have almost forty years of police service rising to the rank of Chief Constable. I have considerable experience of leading international counter terrorism and serious and organised crime investigations. As a Chief Officer, I was the United Kingdom law enforcement leader for the Regulation of Investigatory Powers Act (RIPA) 2000 (the oversight and management of covert police tactics including the use of Covert Human Intelligence Sources (CHIS) – previously known as informants, sources or agents). I also led United Kingdom law enforcement in undercover policing and the use of Technical Surveillance Units (securing evidence and intelligence from covert equipment). I was also the National Policing lead for Race, Religion and Belief.
4. I recognise that addressing the legacy of Northern Ireland’s past is a significant issue to all Northern Ireland’s communities and, in particular, of vital interest to the families of over 3,700 people killed during the Troubles. We should also never forget those who suffered terrible injuries, including psychological injuries, many of whom continue to seek answers about what happened. My evidence comes from the experience of leading Operation Kenova and my professional history and is intended to assist and inform the Commission. For consistency I have adopted the evidence that I provided to the Northern Ireland Affairs Committee (NIAC) in the United Kingdom Parliament.

5. Operation Kenova has submitted a number of files to the Director of Public Prosecutions for Northern Ireland containing evidence regarding serious criminal offences that include murder, kidnap, torture, misconduct in public office, perverting the course of justice and perjury. This evidence presented relates to the activities of terrorists and the security forces. For operational and legal reasons, I am restricted in the information I can provide in relation to specific cases. I am grateful for the Commission's understanding of these constraints.
6. Before beginning to investigate these cases and designing an investigative structure to examine them, indeed throughout Kenova, I have consulted those who previously led legacy investigations. It was critical to the success of both Kenova and any future investigative process to learn the lessons of such previous inquiries. Many who have led such investigations previously have been critical of their access to official records.
7. Those I have spoken to include; legacy victims and their families, Lord Stevens, Sir Desmond De Silva, the Historical Enquiries (HET) Team, Judge Smithwick (Ireland) and his legal team, Judge Corey's (Canada) senior counsel Judge Pomerance, retired Chief Constables who served in Northern Ireland, the author of Her Majesty's Inspectorate of Constabularies (HMIC) report on the HET, Lord Eames, Denis Bradley (Eames Bradley report), the Commissioner for Victims and Survivors in Northern Ireland, victim advocacy groups, political parties, serving and retired government Ministers, senior religious leaders, solicitors representing those affected by legacy, academics, senior serving and retired members of the security forces, ex-paramilitaries, human rights organisations and human rights advocates.
8. I am currently responsible for the following investigations:
 - **Operation Kenova.** The investigation into the activities of the alleged agent known as 'Stakeknife' and related matters. It includes investigating the activities of the Provisional IRA and its Internal Security Unit as connected to the alleged agent. The investigation is also examining any potential complicity of the state in multiple cases of murder, torture or other related criminality.
 - **Operation Mizenmast.** The investigation into the killing of Jean Smyth-Campbell in June 1972.
 - **Operation Turma.** The investigation into the killing of three RUC officers in October 1982 – the pre-cursor to the 'shoot to kill' investigations conducted by John Stalker and Sir Colin Sampson.
 - **The Barnard Review.** The review of the Glenanne Gang series of murders committed during the 1970s – this is estimated to encompass over ninety incidents involving around one hundred and twenty-six murders.

9. **The Strategy for Operation Kenova.** To provide an effective, efficient and independent investigation that seeks to meet the standards imposed by Article 2 European Convention Human Rights (ECHR). The investigations apply transparency wherever possible with a focus upon and due consideration towards the victims and families of the offences being investigated. The investigations apply an equal and fair approach towards all those we engage with, treating everyone with courtesy and respect.
10. **The Vision for Operation Kenova.** To be trusted by victims, their families and the wider public. To establish the truth of what happened. To gain the confidence of the communities and stakeholders. To be unwavering in the search for the truth with each agency, department, political party or other organisation or individual, including those who might seek to prevent the truth from being established.
11. Further information can be obtained from the Operation Kenova website at <https://www.kenova.co.uk>
12. The key requirement for a comprehensive investigation is access to information. Much of the information relevant to our enquiries is held by the PSNI, the Ministry of Defence (MOD) and MI5. Information sharing protocols have been agreed between each of these organisations and myself. One of the critical success factors of Operation Kenova has been access to information that was not made available to previous investigations. A crucially important factor is that any investigation or review is only as good as the information which is available to it.
13. Where families and stakeholders trust in a legacy process, their engagement will lead to previously unavailable information being provided. In Operation Kenova through the bravery and trust of families and wider stakeholders, information has been provided that was not disclosed to prior investigations.
14. Independence from those considered as being affiliated to any side of the conflict is essential. The Kenova employment model provides for an independent structure and workforce that is entirely separate from the PSNI (RUC), the British Intelligence Agencies and the Military. Funding is allocated to Kenova by the PSNI, this is a major concern to some stakeholders and families. They raise the risk of restrictions being exerted on Kenova's capabilities through reduced or inappropriate levels of funding. This has not been the case and would be highlighted by me should it occur. To reassure families and to ensure operational independence, Kenova's business functions, including budget management and our employment framework, are delivered through an independent police force, Bedfordshire Police. We are not an arm of the PSNI, but a detached part of an England and Wales police force providing special assistance under section 98 of the Police Act 1996. Further to this I have introduced three independent oversight groups and commissioned a number of independent examinations of Kenova.

15. **The Independent Steering Group (ISG).** Provides robust challenge and scrutiny of our approach and decision making. I established this group of international renowned policing leaders and investigators with considerable experience of complex and sensitive investigations. This group provides a diversity of thought and expertise, contributing significantly to both the independence and effectiveness of the investigations. The group has exceptional experience of leading investigations in politically challenging environments and of delivering the truth for victims. The group includes Kathleen O’Toole the ex-Chief of Boston Police and Seattle Police, Mike Downing the ex-deputy chief of Los Angeles Police Department and John Miller currently a Deputy Commissioner with the New York Police Department. The Group meets quarterly.
16. **The Governance Board.** To provide further provide European Convention of Human Rights (ECHR) compliance, I have established a Governance Board responsible for the oversight of the business and broad investigative functionality of Kenova. The Board will not have access to investigative information, as that is the remit of the ISG. However, the Board will ensure the ISG is functioning properly. It will review all Kenova public facing reports of our findings ahead of publication to ensure that legal and investigative due diligence has been applied and that the reports are robust and accurate for families and stakeholders. The Board meets quarterly.
17. **The Victim Focus Group (VFG).** The group provides further challenge regarding ECHR compliance by scrutinising the Kenova Victims Strategy and victim related issues encountered in our investigations. I was conscious of the role and rights of the families and next of kin with regards to Article 2 ECHR compliant investigations and therefore introduced this panel of independent international victim experts to provide advice and scrutiny on behalf of victims and their families to Operation Kenova. The VFG have met Kenova families and conducted a survey of families. Last year the VFG produced a progress report on Operation Kenova. This has been shared with the Commission. The VFG meets quarterly.
18. For many victims and families there remains a lack of information being provided to them. In many cases, families had no contact with the police following the murder of a loved one. In some cases families were not made aware that an inquest into the death was due to be or had been held. As a result, what they know about how their loved one died has been based on media reports and second or third hand information passed to them by friends, neighbours and others. This is a problem which has affected the relatives of Catholics, Protestants and of members of the security forces killed during the Troubles. This lack of information is rarely experienced by those bereaved by homicide elsewhere in the United Kingdom. This has contributed to mistrust by families from across all sectors. Many families have still not had any meaningful information or contact from the police.

19. Kenova has established that for many families the truth of what happened can be uncovered. Notwithstanding that charging decisions are awaited in relation to thirty-three files submitted to the Public Prosecution Service of Northern Ireland (PPS NI) and my Kenova report is expected later this year, Kenova has demonstrated that the truth can be uncovered as regards what happened to victims in unsolved legacy cases. It is of course right to stipulate that in some cases we have found very little, but in most cases we have discovered information that is not known to families and should be shared with them as it would in a homicide case anywhere else in the United Kingdom.
20. The responsibility of terrorists for atrocities committed during the Troubles is clear and undeniable. This was an incredibly difficult period of history for the United Kingdom during which terrorists caused countless and needless loss of life, life-changing injuries and lifetime trauma for so many people. That is an irrefutable position that should never be forgotten or glossed over. Many in the security forces sense that legacy investigations are merely a witch hunt into the activities of their organisations whilst it is the terrorists who caused the overwhelming majority of deaths. I acknowledge and understand their frustration however we in the security forces are held to a higher standard, if we acted illegally or should our actions have caused the deaths of others we must be open and transparent and reveal such failings. Legacy investigations have a history of not being provided unfettered access to records and of obstruction and obfuscation.
21. The cost of terrorism to the security forces in lives lost and injuries suffered and that they mostly did their very best to keep people safe should never be forgotten. Equally, it is evident that on occasions members of the security forces were involved in assisting terrorists or even in committing terrorist acts. Various prosecutions of security force personnel during the Troubles prove this to be the case. The bravery, courage, dedication and sacrifice of the majority cannot excuse wrongdoing by the minority or prevent the pursuit of those that harmed those they were required to protect.
22. It is important that all those with an interest in addressing the legacy of Northern Ireland's past are realistic about the practicability and utility of prosecutions. There are significant legal and practical obstacles to bringing cases from so many years ago to the criminal courts today. The passage of time impacts significantly on the capability to provide best evidence. We face evidential challenges in relation to fading memories, witnesses and suspects no longer being alive or well enough to provide evidence, to be interviewed or stand trial and regarding the continuity and completeness of records. There will inevitably be abuse of process and admissibility arguments in criminal proceedings relating to events from so long ago.
23. I have previously made clear my nervousness about taking away the prospect of a prosecution in legacy cases. Recent failed prosecutions have been shown to have resulted from a series of outdated investigative methods and defective processes. These failed

cases have been referenced as evidence that legacy cases can no longer be investigated to prosecution standards. However by applying a “best in class” modern investigative process a very small number of prosecutions would undoubtedly be possible. The impact of prosecutions for some of the victims and families would be detrimental to their wellbeing and such a position must be avoided. Legacy requires innovative and bold thinking in regard to the manner in which any such prosecutions might be decided. This has previously been provided to assist those involved in the conflict in securing the Belfast Agreement it is only right that victims are afforded similar progressive thinking.

24. To demonstrate that Kenova is independent, effective, prompt, works with families and is open to public scrutiny I arranged independent reviews of Kenova. I commissioned an independent barrister Alyson Kilpatrick BL a respected expert in human rights law to examine Kenova’s compliance with Article 2 ECHR. Ms. Kilpatrick produced two interim reports and a final and comprehensive document, these documents have been provided to the Commission. Ms. Kilpatrick reports that Kenova is an exemplar of an Article 2 compliant investigation and the best example that she has yet seen of such an investigation.
25. I also requested that the National Police Chiefs Council (NPCC), the leadership body for UK policing, to conduct two separate reviews of Kenova. Their reviews have been made available to the Commission and provide various positive findings that include an assessment that Kenova is exceptional value for money and that it should be considered as the basis for a future legacy framework. The Victim Focus Group (VFG) have also produced an exceptionally positive findings report of Kenova’s approach towards and interaction with victims and families. The VFG report has also been shared with the Commission.
26. The United Kingdom Parliamentary group the Northern Ireland Affairs Committee (NIAC) produced a report about legacy in October 2020 following their examination of ‘Addressing the Legacy of Northern Ireland’s Past: The United Kingdom Government’s Proposals’. Their report praised Kenova describing the trust that had been secured with families. NIAC recommended that the United Kingdom Government examine how Kenova has engaged with victims groups and families, whether Kenova could be scaled up and whether aspects of Kenova could be replicated including our use of investigative, governance and victim mechanisms.
27. Kenova has shown that;
 - Legacy investigations are capable of being investigated notwithstanding the passage of time and families can receive information of what happened to their loved ones.
 - Prosecutions are possible although criminal justice outcomes will be exceedingly rare. Such prosecutions need to be carefully considered as for some families a criminal

justice process might well bring unwanted and harmful consequences – families have suffered enough.

- When families and stakeholders trust a legacy process they will provide evidence and information that can lead to cases being solved.
- Where Government agencies are reassured about the information handling and security arrangements of a legacy investigative body they will share information that will potentially enable cases to be solved.
- Through various independent examinations of Kenova subject matter experts consider the investigative model as scalable for wider legacy, offering value for money and has proven to have the support of victims and families.

28. Victims and families have been repeatedly let down in their pursuit of being acknowledged, listened to and given information of what happened to their loved ones. There is an opportunity for Northern Ireland legacy to finally be addressed. I welcome the United Kingdom Government's intention to achieve a resolution for legacy. To get to such a position the United Kingdom Government, victims groups, political parties and the Irish Government need to work together to achieve a broad consensus.