

## **The Good Friday Agreement at 20; Achievements and Unfinished Business**

### **Evidence from the Committee on the Administration of Justice (Belfast)**

**to the**

### **Commission on Security and Cooperation in Europe United States Congress**

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The Committee on the Administration of Justice (CAJ) is honoured to be giving evidence to this Commission on the occasion of the 20<sup>th</sup> anniversary of the Belfast Good Friday Agreement. This Agreement, and the subsequent agreements of different kinds designed to implement it, has given us 20 years of relative peace; following a disastrous, thirty year violent political conflict that is something genuinely worthy of celebration. CAJ is an organisation devoted to the protection and promotion of human rights. Since we know that violent conflict always involves a bonfire of human rights, protecting and promoting the peace settlement is our top priority.

The peace agreement was designed to create a political and geographical space which could be shared by those with different national aspirations and allegiances. To do this it recognised the right of the whole people of the island of Ireland to self-determination and the right of the people of the North to vote to join a united Ireland. It declared that it was the “birthright” of those born in Northern Ireland to be Irish or British or both and established a form of government that would mean that one community could not dominate the other. To underpin all of that, however, was an infrastructure of proposed legislation and institutions which would guarantee that the Northern Ireland of the future would be a rights based society.

CAJ, along with others, made substantial efforts to ensure human rights were mainstreamed into the peace settlement and the Agreement itself. There was considerable success. A cursory search of the text of the Agreement shows that the words ‘right’ or ‘rights’ appears 61 times. The then UN High Commissioner for Human Rights, Mary Robinson noted “...the Good Friday Agreement is conspicuous by the centrality it gives to equality and human rights concerns.” The range of subsequent international Agreements between the two sovereign governments to implement and take forward the settlement also contained a number of human rights commitments (although unfortunately no dispute resolution mechanism to assist implementation).

The commitments to protecting human rights in legislation included a promise to incorporate the European Convention of Human Rights into domestic law, a Bill of Rights for

Northern Ireland including additional rights, a Single Equality Act, an Irish Language Act and a duty to be placed on public authorities to consider the equality impacts of any policy. In addition, a series of Acts would be required to implement the recommendations of the “Patten Commission” on a thorough reform of policing. Institutionally, the Agreement established a new Human Rights Commission with extensive investigative and legislative oversight power and an Equality Commission to enforce the public equality duty.

CAJ has long pressed for enforcement to ensure that the elements of the peace settlement which do protect human rights are, and continue to be, implemented. It is important to stress that these provisions were not mere manifesto commitments by governments now out of office but rather provisions which were enshrined into bilateral (UK-Ireland) treaties and international agreements between them which are binding in international law.

The reality is that, while huge advances have been made and society in the North is now very different to that of 20 years ago, there are outstanding commitments and unfulfilled promises which weaken the peace process. Concern has been expressed by CAJ and other human rights organisations for some years that there has been and continues to be persistent attempts at a ‘rollback’ by the state, or elements within its institutions, of the human rights provisions of the Agreements. This includes commitments made as part of the settlement which have never been implemented and areas where institutional and policy gains were made which are now being undermined.

There are unimplemented commitments to legislate for a Bill of Rights and Irish Language Act and to introduce an anti-poverty strategy; the statutory equality duties have not been properly implemented and there are unfulfilled commitments to repeal emergency law. There is even a threat to the European Convention on Human Rights and its incorporation into Northern Ireland law. Some commitments like the ‘right of women to full and equal political participation’ and to supporting young people from areas affected by the conflict have never had a delivery mechanism to take them forward.

There has been regression in commitments to victims’ services, a drift away from commitments to tackle inequality on the basis of objective need, and to remove employment barriers for ex-prisoners. There has been a slow pace of some justice reform and the undermining of the independence of key peace settlement institutions such as occurred during the tenure of the second Police Ombudsman. Policing also has seen regression from the Patten blueprint - most notably in the 2007 transfer of the most controversial area of policing (‘national security’ covert policing) away from the PSNI and all the post-Patten oversight bodies to the Security Service MI5.

Policing is particularly important in establishing trust in the institutions of society and in the rule of law. Huge progress has been made. In many respects the Police Service of Northern

Ireland tries to live up to the Patten Report's statement that the purpose of policing should be "the protection and vindication of the human rights of all... There should be no conflict between human rights and policing; policing means protecting human rights." Our systems of accountability and oversight, especially the independent Ombudsman with its own investigators, should be a model for democratic policing throughout the world. However, areas of concern remain.

The unaccountable and secret Security Service or MI5 has primacy for national security intelligence policing in the North, which is a huge gap in accountability. They run agents with no system – that we know of – for limiting their engagement in criminality. The PSNI also run secret informants but at least an Assistant Chief Constable has to sign off on any criminal activity. The PSNI is also obliged to support the activities of the UK Border Force and Immigration Enforcement – which have a history of human rights abuses and no local accountability. We believe that there is *prima facie* evidence of the police unlawfully using counter-terrorism powers in immigration enforcement.

Elements of the police are also responsible for some of the delay and obfuscation in dealing with the past which we detail below. The control of intelligence material by officers who served in RUC Special Branch, its over classification and the wilful failure to expedite the production of evidence to inquests and courts are all continuing problems.

It is arguable, however, that the main area in which continuing human rights violations undermine society and threaten the peace process is one not properly covered by the peace agreement. That is the continuing search for impunity by the UK state for the actions of its agents during the conflict.

Combating impunity is one of the foremost preoccupations of human rights activists throughout the world. The reasoning is simple – if impunity persists there can be no justice or truth for victims, future perpetrators will be emboldened and confidence in the rule of law is weakened. Those outcomes are exactly being produced with regard to continuing impunity for those who violated human rights during the conflict in Ireland. Victims are dying without seeing justice or even serious attempts to achieve it, torture and other crimes have been carried out by UK security forces in other parts of the world and faith in the rule of law is falling away.

The delays, obfuscations and squeezing of resources by the UK authorities and local allies, which have been detailed year after year, can only be understood as designed to maintain an apparatus of impunity. The insistence on security agencies and ministers having a "national security" veto over what information is published is an insistence on impunity for their agents. This is why combating impunity is CAJ's top priority.

In August 2001, the European Court of Human Rights gave judgement in a number of cases from Northern Ireland known collectively as the “McKerr group of cases.” These were cases involving deaths in which UK security forces were involved; CAJ was the legal representative in three of them. Other judgements followed in 2002, 2003 and 2013. All said that the UK was in breach of its obligation under Article 2 of the Convention (“Right to Life”) to properly investigate these crimes. To this day, the UK has still not discharged its obligations and the cases remain under the supervision of the Committee of Ministers of the Council of Europe, the body which oversees implementation of the judgements of the Court.

In its decision of September 21<sup>st</sup> 2017, the Committee of Ministers:

“noted with deep concern that the Historical Investigations Unit (HIU) and other legacy institutions agreed upon in December 2014 [ the Stormont House Agreement] have still not been established because of a failure to reach agreement on the legislation required;

“considered it imperative that a way forward is found to enable effective investigations to be conducted particularly in light of the length of time that has already passed since these judgments became final, and the failure of previous initiatives to achieve effective, expeditious investigations; called upon the authorities to take all necessary measures to ensure that the planned public consultation phase regarding the HIU is launched and concluded within a clear timescale to ensure that the legislation can be presented to Parliament and the HIU established and made operational without any further delay;”

It went on to say that it:

“deeply regretted that the necessary resources have not been provided to allow effective legacy inquests to be concluded within a reasonable time; strongly urged the authorities to take, as a matter of urgency, all necessary measures to ensure both that the legacy inquest system is properly resourced and reformed in accordance with the Lord Chief Justice of Northern Ireland’s proposals and that the Coroners’ Service receives the full co-operation of the relevant statutory agencies to enable effective investigations to be concluded.”

The exasperation of the Committee with the procrastination of the UK Government is clear – more important is the hurt of the victims still denied justice and the corrosive impact of the lack of institutions to deal with the past on the present trust in the institutions of state and the rule of law.

There are some signs of progress in the courts. Exactly a fortnight ago, the High Court in Belfast held that the decision of the then First Minister, Arlene Foster, to prevent a request going to the British government to fund legacy inquests was unlawful (*Hughes Case*). The judgement was partly based on the finding that each part of government has to take into account the Article 2 duty to investigate past deaths and to ignore that responsibility is unlawful. The so-called “hooded men” case, in which CAJ represents the daughter of one of the 14 men tortured in 1971 and who died because of it, is being fast tracked by the Court of Appeal with the intention of getting a swift judgement from the Supreme Court on the application of the investigative obligation in both right to life and torture cases.

The judgement in the Irish application for revision of the European Court of Human Rights judgement in *Ireland v. UK* – which in 1978 made the disastrous distinction between torture and inhuman and degrading treatment in respect of the hooded men – was delivered on the morning of Tuesday 20<sup>th</sup> March. This is a narrow and largely technical decision by the European Court of Human Rights. It considered that the new evidence was not sufficient to show that, had it been taken into account by the original court, it would have been decisive in changing the original judgement. This is hugely disappointing in that it leaves the unjustified distinction between “torture” and “inhuman and degrading treatment” intact. However, we should remember that the Article 3 prohibition on all such treatment, whatever the definition, is absolute. Those who have sought to justify brutal interrogation methods on the basis of the 1978 judgement are still wrong in law and barbaric in their practice.

For the last four years we have been expecting the UK Government to publish legislation to implement the Stormont House Agreement (SHA). We are now told the text will be published after Easter for consultation. It remains to be seen whether this will be a good faith attempt to implement the SHA in a human rights compliant manner or another way of delaying and denying truth with a blanket national security veto on information to be released to families.

In a highly disturbing development, and notwithstanding the reality that only a small number of legacy cases relate to British soldiers, a recent report of the Commons Defence Select Committee called for the enactment of a “statute of limitations” covering all Troubles-related incidents involving members of the Armed Forces. This concept effectively means a selective amnesty for crimes committed by British soldiers. The Committee also suggested that it be extended to the RUC and other security force members. This position is, of course, completely contrary to human rights standards and, were it enacted, would probably be found unlawful by the courts. Nonetheless, the UK Government has said that it will include the proposal in the forthcoming consultation on the implementation of the Stormont House Agreement.

It is impossible to conclude a discussion on the status of the Good Friday Agreement without mentioning “Brexit,” the decision by the UK to leave the European Union. This will have a profound effect on the legal and constitutional underpinning of the present jurisdiction of Northern Ireland, its relations with the Irish state and UK-Ireland bilateral relations. The UK and Ireland’s common membership of the EU was an assumption in the Belfast Good Friday Agreement (GFA) and the UK’s adherence to EU law regulates the powers and legislative operations of the devolved institutions. The equal rights of Irish and British citizens, a principle of the GFA, in great part relies on the equal rights of both as having EU citizenship. The lack of significant border regulation is largely due to common membership of the EU, North and South, as well as the improved security situation. The UK clamp down on immigration after Brexit may turn Northern Ireland into “one big border” with enhanced enforcement and serial human rights abuses. Many equality and anti-discrimination provisions in Northern Ireland, which have particular importance in a divided society, rely on EU law. Furthermore, the decision to leave the EU, based on a UK referendum in which Northern Ireland (as well as Scotland) voted to stay, is an affront to the principle of self-determination of the Irish people, which is a foundation stone of the Agreement.

All of these impacts could have a destabilising effect on the constitutional, political and legal settlement that, in the main, ended the violent political conflict which devastated the people of Northern Ireland and gravely affected those in the rest of the UK and Ireland. While it is unlikely that any one particular effect of leaving the EU would destroy the peace settlement, the cumulative impact could begin to unravel it. In particular, any diminution in the protection of rights of the people living on the island could reduce trust in the GFA institutions and any unravelling of the settlement would be disastrous for human rights. A continuing preoccupation of CAJ will therefore be the protection of the integrity of the peace settlement and the various agreements that make it up.

We would like to commend this Commission for holding this hearing and to support the resolution that has been put to Congress. The Good Friday Agreement has won us 20 years of relative peace but the goal of making that peace permanent, based as it must be on a rights based society, remains to be achieved.