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Commission on Security & Cooperation in Europe
(U.S. Helsinki Commission) – March 22nd 2018

'Dealing with the past': including accountability for past abuses and collusion, the need of surviving family members for justice & closure, and reform of policing

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May I firstly take this opportunity to thank the Committee, Chairman Senator Wicker, and Co-Chair Congressman Smith, your staff, and all involved in facilitating and convening this hearing.

Dealing with the past in which multiple harms and egregious human rights violations have occurred – not least systemic abuses that had official government sanction - is a perquisite of any post-conflict situation.

Righting the wrongs of the past – truth seeking and accountability - are an imperative to individual and societal recovery and healing, the restoration of human dignity, and the promotion and protection of human rights. They are central to the correction and rebuilding of the institutions of governance post-conflict not least criminal justice agencies.

No one community has a monopoly on the human heartache that was our conflict. We all suffered.

However, in terms of accountable justice there exists a huge deficit for those affected by State violence and collusion and it is no coincidence they face innumerable barriers to justice – barriers erected by those who are charged with ensuring justice – those accused in the first instance of violation.

There is huge and powerful resistance to enabling a process that addresses the past in an openly transparent, legally compliant, and above all independent way. This resistance emerges from within the police, the military, some institutions, political unionism, and the British government – who are not neutral.

They all seek to maintain a false narrative of the past and about their true role in the conflict. This position necessitates the denial of rights and ultimately accountable justice. Moreover, this position is unsustainable if there is to be meaningful change.

Families actively using the law & courts, asserting their rights, seeking accountability for past violations

Two weeks ago in the Belfast High Court Justice Paul Girvan ruled that former First Minister Arlene Foster acted illegally and with improper political motive¹ when she arbitrarily blocked attempts by the North's foremost legal representative the Lord Chief Justice (LCJ) Sir Declan Morgan, and the then Justice Minister David Ford, to secure funding for legacy inquests into 55 cases involving 97 killings; inquests where families have waited up to four decades to hear².

At the same time in an adjoining courtroom Justice Bernard McCloskey finally recused himself from a hearing in which the former head of RUC special branch, Raymond White, challenged the Police Ombudsman's powers and findings into the Loughinisland massacre, which evidenced RUC collusion³. Having delivered a scathing judgment against the Police Ombudsman it had been discovered that there was a lack of candour in disclosing to the court that as a lawyer Justice McCloskey had previously acted for the same applicants, White et al, when they unsuccessfully challenged the Police Ombudsman's report into the 1998 Omagh

¹ <<https://www.judiciary-ni.gov.uk/sites/judiciary-ni.gov.uk/files/decisions/soi-In-re-Brigid-Hughes.pdf>>

<<http://relativesforjustice.com/inquest-funding-judicial-review/>>

<<http://relativesforjustice.com/4089-2/>>

<<http://www.bbc.com/news/uk-northern-ireland-43330861>>

² <<http://www.bbc.com/news/uk-northern-ireland-41165119>>

³ <<https://relativesforjustice.com/mr-justice-bernard-mccloskey-finally-leaves-the-building/>>

bomb in which Nuala O’Loan was highly critical of special branch⁴. These criticisms included prior intelligence about the planned attack from an agent within the organisation responsible, which might well have prevented it. The McCloskey judgment was strikingly similar to his failed legal submission when acting for the former head of RUC special branch on that occasion. The case will be held afresh.

As a consequence the Police Ombudsman is unable to publish several major reports into killings involving collusion until the court case concludes⁵. This rearguard action by the former head of special branch is also designed to stall and frustrate accountability. With appeals and challenges it may take several years to conclude which is time families don’t have. The current Police Ombudsman, who has the confidence of families, has approximately 15 months left to serve.

More recently in the same High Court the PSNI chief constable George Hamilton was found to be in contempt, not once but several times by Justice Ben Stephens, for refusing to provide disclosures in a civil case taken by John Flynn in respect to a series of murder bids on him by the notorious Mount Vernon UVF, in which multiple members of this sectarian and criminal gang worked for the special branch⁶.

Police Ombudsman Nuala O’Loan’s report Operation Ballast detailed the activities of this group⁷.

The disclosures were relevant to establishing a quantum for damages in the case.

At the same time in the adjacent criminal court families who had loved ones killed by the Mount Vernon gang observed as leading UVF figure Gary Haggarty was being sentenced for a series of criminal activities including murder⁸. Haggarty, a special branch agent throughout his reign of terror, had become an assisting offender in 2009⁹. As an assisting offender Haggarty spent seven years providing evidence on all his activities and accomplices including his special branch handlers who directed his activities, evidence which the court accepted as credible. Families accepted that Haggarty would get a reduced sentence as an assisting offender but this was mitigated somewhat in that they would also see his special branch handlers in the dock as well as his fellow loyalists as part of this process. None of this happened despite promises by the PSNI and Public Prosecution Service (PPS) throughout. The matter is now subject to judicial review by the McParland and Monaghan families¹⁰.

⁴ <<https://www.irishtimes.com/news/ireland/irish-news/loughinisland-families-welcome-judge-s-stepping-down-from-case-1.3370081>>
<<https://www.irishnews.com/news/northernirelandnews/2018/01/26/news/relatives-welcome-judge-s-move-over-loughinisland-massacre-challenge-1242804/>>

<<https://www.belfasttelegraph.co.uk/news/northern-ireland/loughinisland-drama-as-judge-told-to-withdraw-from-police-ombudsman-collusion-report-case-36506937.html>>

⁵ <<http://www.irishnews.com/news/northernirelandnews/2018/02/08/relatives-call-for-ombudsman-reports-to-be-published-1251470/?ref=sh>>

<<https://relativesforjustice.com/ombudsman-forced-to-delay-publication-of-collusion-reports/>>

⁶ <<https://www.newsletter.co.uk/news/police-ordered-to-reveal-files-in-loyalist-agent-collusion-case-1-7841475>>

<<https://rm.coe.int/168073e17d>>

<<https://www.belfasttelegraph.co.uk/news/northern-ireland/police-given-five-week-extension-to-disclose-files-on-loyalist-informer-in-collusion-case-36516257.html>>

<www.belfasttelegraph.co.uk/news/northern-ireland/judge-refuses-psnis-high-court-appeal-for-disclosure-of-loyalist-informer-files-36068766.html>

⁷ <<https://policeombudsman.org/Investigation-Reports/Historical-Reports/Operation-Ballast-investigation-into-the-circumsta>>

⁸ <<http://www.irishnews.com/news/northernirelandnews/2018/01/30/haggarty-victims-hit-out-as-loyalist-supergrass-has-35-year-jail-term-cut-to-six-and-half-1244832/?ref=sh>>

⁹ <<http://www.bbc.com/news/uk-england-40379903>>

¹⁰ <<http://www.bbc.com/news/uk-northern-ireland-42428270>>

It is suspected that the reasoning behind the deliberate failure to disclose evidence in the Flynn case is to protect the same group of agent handlers within the special branch also involved with Haggarty – shielding them from prosecution.

Policing reform - certainly not when it comes to dealing with the past

This brings into sharp focus the whole matter of the independence of the PSNI, where a cabal of former RUC officers who transferred over and now hold senior positions, including those who took the incentivised redundancy/retirement package to leave¹¹ but who through a loophole returned as 'consultants' and 'civilian workers' and who now control legacy¹². Further in this 'civilianised' capacity they are not subject to the oversight powers of the Police Ombudsman.

Taken together with the position of the PSNI moreover on legacy this has had a corrosive effect on nationalist confidence in policing, which is now, at an all time low.

The 2009 offer to Haggarty it was revealed came - strangely or not - from MI5, the PSNI and the PPS¹³. The blurring of boundaries and interference in due process, politically and from the intelligence agencies involved in the conflict and whose activities are highly questionable if not directly illegal, is nothing new. It was and continues to be wrong.

Impunity

The trial of British Army Force Research Unit (FRU) agent Brian Nelson in 1992 saw the then British Attorney General (AG), Patrick Mayhew, direct the prosecution case against him following interventions by the UK government in a bid to prevent Nelson from taking the witness stand and disclosing his full activities including murder. A deal was struck with Nelson and 20 counts were removed from the indictment including two for murder¹⁴.

In 1988 the same Attorney General told the British parliament that it would not be in the public interest to proceed with prosecutions against RUC officers, from a specialist unit known as E4A, involved in a series of shoot-to-kill incidents of unarmed republicans¹⁵.

The collusive activities of the FRU and RUC special branch were the subject of three major enquiries by the UK's most senior police officer, Sir John Stevens, from September 1989 to April 2003. His enquiries found collusion¹⁶ and he recommended that 25 members of the FRU and special branch be prosecuted¹⁷. This was never acted upon. Sir John Stevens later told a British Parliamentary Committee that of the 210 people he arrested during his enquiries – that is non-military and police – 207 were agents working for the State¹⁸.

¹¹ <<http://www.thedetail.tv/articles/rehiring-in-the-police-the-full-story>>

¹² <<http://www.bbc.com/news/uk-northern-ireland-16600069>>

¹³ Minutes of 21st January 2010 Policing Board meeting on file with RFJ & judgment in Haggarty case page 1, para 1; <<https://www.judiciary-ni.gov.uk/sites/judiciary-ni.gov.uk/files/decisions/R%20v%20Haggarty%20%28Gary%29.pdf>>

¹⁴ The North's shadow Labour spokesperson Kevin McNamara MP would later raise the matter in a parliamentary debate where he questioned the motives of that government intervention:

"I was not happy when the (British) Attorney-General took control of that prosecution and I was dubious about his reasons for deciding to drop charges. Those reasons remain undisclosed"

<<https://publications.parliament.uk/pa/cm200203/cmhansrd/vo030514/halltext/30514h01.htm>> Column 73WH

¹⁵ <<http://hansard.millbanksystems.com/commons/1988/jan/25/royal-ulster-constabulary-stalker>>

¹⁶ <<http://relativesforjustice.com/wp-content/uploads/2016/11/Stevens-3-Inquiry-Report.pdf>>

¹⁷ Letter from PPS on file with RFJ & Stevens public statement re same

¹⁸ <<https://www.youtube.com/watch?v=q9LFp95CCHO>>

And so we see the pattern where accountability is thwarted and prevented when involving State killings, its agents operating inside illegal paramilitaries involved in murder, and those agent handlers directing and protecting them.

It is about protecting British State conflict policies and practices of wrongdoing on a massive scale that uncovered would completely tilt the conflict narrative. It is about protecting the reputational damage this would inflict on the UK. It is all about where this leads to in London and importantly – to whom.

Moving the goal posts – British bad faith

The pattern of insulating and protecting against such situations of exposure can also be seen across a range of institutions and proposed mechanisms. Take for example the agreement reached in December 2014 at Stormont House to address the legacy of the past¹⁹. Post the agreement the UK government arbitrarily inserted a 'national security' veto into draft legislation enabling the retention and non-disclosure of information in any case they deemed necessary. Charlie Flanagan, who as minister negotiated the agreement on behalf of the Irish government, described this as 'a smothering blanket' that was 'unacceptable'²⁰.

More recently in correspondence to RFJ the British Secretary of State for the North said that any consultation on the implementation of any proposed mechanism to address the past would also include a 'statute of limitations'²¹ for British soldiers – an amnesty. This would be unacceptable.

The 'lack of resources' excuse exposed

One of the main arguments proffered for systemic delays in addressing legacy is a lack of resources and funding. This has dramatically impacted the office of the Police Ombudsman and the inquest courts with budgetary cuts despite the increasing caseload²². It is no coincidence that these also happen to be the only functioning mechanisms that have the potential to deliver for families. Now their capacity is hampered. By contrast the PSNI and other agencies have paid out tens of millions of pounds in a range of civil cases in order to forgo having to disclose information about collusion²³.

It is in this overall context that resistance by the UK, supported by political unionism, to addressing the legacy of the past in a meaningful, constructive, independent and legally compliant way must be viewed.

Families using the international courts to assert their rights

As a signatory of the European Convention on Human Rights²⁴ (ECHR) the UK are legally obligated to conduct thorough and independent investigations in accordance with Article 2 of the Convention, the Right to life. Under the Convention States must take measures where life

¹⁹ <https://relativesforjustice.com/?s=stormont+house+agreement>

²⁰ <http://www.irishnews.com/news/2015/11/27/news/flanagan-critical-of-national-security-smothering-blanket--334991/>

²¹ Letter on file with RFJ - <http://www.irishlegal.com/9509/irish-government-criticises-uk-government-statute-of-limitations-plan/>

²² Police Ombudsman caseload is currently 420 cases where police misconduct in investigations and possible collusion exists

²³ <https://www.theguardian.com/uk/2008/oct/24/danny-morrison-northern-ireland>

²⁴ http://republican-news.org/current/news/2012/09/britain_admits_miscarriage_of.html

²⁴ https://www.echr.coe.int/Documents/Convention_ENG.pdf

is potentially under threat ensuring safety, and where life is taken then they must ensure investigation meets the above standards.

In truth the UK, through its 'security' and intelligence agencies, issued threats to citizens, denied them protection, and assisted in every conceivable way those they then sent to kill them. That is the conclusions of the Stevens Enquiries, the De Silva Review and the Police Ombudsman. It is why former UK Prime Minister David Cameron apologised to the Finucane family.

In short Article 2 must govern and be at the heart of any future mechanism to address the past.

This legal obligation – it would appear – has proven hugely problematic for the UK authorities – hence the 'national security' veto, the proposed statute of limitations, and general circling of the wagons. And we know precisely why.

This is best illustrated in in the powerful European body the Committee of Ministers to the Council of Europe (CoM/CoE).

Following the May 2001 European Court on Human Rights ruling in the McKerr²⁵ group of cases, where the UK domestic investigative procedures were unanimously found to have been deliberately prohibitive to establishing the facts and holding to account the perpetrators in respect to State killings including collusion, the Court passed the judgment to the CoM/CoE for supervision.

The role of CoM/CoE is to assist the offending State to remedy the violations by way of ensuring that proper investigative procedures, legally compliant with the Convention, are put in place²⁶.

Since May 2001 the CoM/CoE has refused to sign off on their supervision of the UK having not been satisfied that the UK, through its action-plans, has fulfilled its legal obligations. That is 17 years.

This is testament to what the families face on one level but they also take hope in this vindication of their rights by the CoM/CoE

The need for surviving family members for justice enabling them to move forward

Families want truth, the right to know who precisely were behind the murders of their loved ones - the recovery of historic memory.

It is not acceptable that the State, rather than meet its legal obligations to investigate, would prefer to first deny the truth, then when evidence is revealed delay processes to secure justice and accountability all in the hope that relatives might simply die off – which is happening. But other relatives are picking up the baton, continuing the fight, newer generations, and so families will never give up.

As I said at the outset accountability for human rights violation is central to healing and recovery; it enables the victim to recover that sense of disempowerment often associated with

²⁵ <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c212a>

²⁶ <<http://www.europewatchdog.info/en/structure/committee-of-ministers/supervision-execution-judgments/>>

a wrong committed – righting that wrong is therefore ethically, morally and above all legally imperative not least when the finger – the evidential trail – points and leads directly to those in power - the police, military and government - who carry the duty to protect and prevent wrongdoing but who instead engaged in the practice of murder and cover-up.

In such situations the necessity to ensure justice and accountability is, arguably, all the more.

Implicit in this testimony - there has been no police reform when it comes to dealing with the past - only obfuscation – only Perfidious Albion.

Implicit - families are actively to the fore in public discourse, engaged in litigation and other forums seeking truth and accountability for past violations – having to consistently challenge a State standing in their way.

This work by families is about historic clarification, the dignity of truth, and healing.

The families we are humbled to work with – the families engaged in all this work - are the real heroes of the Irish peace process.

Finally I want to put on record the crucially important international forum these hearings provide to families and NGO's engaged in the promotion and protection of human rights.

These hearings, even twenty years after the peace accord, are necessary in assisting and encouraging a rights based approach within the context of our still developing peace process.

A lot has been achieved but the reality is we are not there yet. Your influence, vigilance and scrutiny therefore have real meaning and impact in the work still to be completed.

In particular I want to acknowledge Congressman Smith for his consistent and dedicated work over two decades in seeking to consolidate and build upon the peace process.

Thank you – Go raibh maith agaibh