

SUBMISSION

**To: Committee on Foreign Affairs, US House of Representatives,
Washington DC
Subcommittee on Africa, Global Health, Global Human Rights and
International Relations
Subcommittee on Europe, Eurasia and Emerging Threats**

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NORTHERN IRELAND - DEALING WITH THE PAST

1. Introduction

As a former Police Ombudsman (I established the Office and ran it from 2000 - 2007) and former Irish Special Envoy for Conflict Resolution, working currently in various areas of peace and justice across the world (see attached CV), and as a Member of the House of Lords, I wish to comment primarily on investigation aspects of dealing with the past in Northern Ireland.

In 2010, with Mr. Richard Harvey, a senior British barrister specializing in international human rights, currently working in the Yugoslavia War Crimes Tribunal, I established the Independent Monitoring Panel for the PSNI investigation of Ulster Volunteer Force (UVF) criminality, known as Operation Stafford. Operation Stafford is consequential upon my Police Ombudsman for Northern Ireland (PONI) investigation into a complaint made by Mr. Raymond McCord about the death of his son Raymond Jr. and associated matters, known as Operation Ballast (see www.policeombudsman.org). Mr. Harvey and I were appointed at the behest of both the PSNI and the victims and their families, and have worked closely monitoring the PSNI investigation of many hundreds of UVF crimes, ranging from murders, to attempted murders arson, intimidation, kidnapping, assaults etc.

We have managed to retain the confidence of the families and the police, having access to huge volumes of investigative and intelligence material. This paper also reflects the experiences which we have had in the Independent Monitoring Panel.

I will not comment here on matters such as resources for victims, memorials etc in this submission, though I do have views on these.

2. The current situation with regard to investigation of the past:

Four offices currently deal with the investigation of historic Troubles cases in Northern Ireland:

- HM Coroners (who have a very limited investigative function);
- The Historical Enquiries Team (HET), which is a unit of the PSNI, tasked only to review, but not to investigate, historic cases;
- PSNI C2 (Crime Investigation Dept) which receives historic cases from HET for investigation where there are outstanding investigative opportunities. If PSNI identify any case in which the conduct of a police officer may have resulted in a death, or in a number of other serious cases, the PSNI must refer that matter to PONI for investigation;
- PONI deals with all allegations, current and historic, against members of the PSNI. Where PONI is aware of allegations of criminal behaviour by civilians (non police officers) the Police Ombudsman must refer that matter to the PSNI for investigation.

3. Defects in the current system:

i. The current system results in repeated investigation of the same case by the various investigative arms of the criminal justice system. Cases may come to investigation in a variety of ways:

- HET review;
- Citizen complaint to the PSNI;
- PSNI investigation;
- Citizen complaint to PONI;
- Initiation of investigation by the Police Ombudsman;
- Referral by the Minister for Justice, the Director of Public Prosecutions, a Judge, the Coroner and other possible routes.

ii. Each time one of the investigative bodies embarks on an investigation, it must first review and where necessary re-investigate any previous investigation. This means that there is significant waste of resources as the same tasks are undertaken repeatedly by different organisations.

iii. There are strict rules in relation to investigations which require the protection of the rights of accused persons. If the Police Ombudsman is investigating he must protect the rights of any accused or suspected police officer. He must also treat witnesses, police and non-police, in accordance with the law. A person may be a witness for PONI, and simultaneously a suspect for the PSNI, since only the PSNI can investigate civilians, the military etc. This will inevitably lead to complications as the Police Ombudsman, investigating a case in which a police officer is alleged to have colluded in criminal activity with, for example a paramilitary, cannot take evidence as to that paramilitary's criminal activity, but must instead report it to the PSNI for them to investigate.

iv. Similarly the PSNI will have to treat current and former police officers, under investigation by the Police Ombudsman as witnesses, rather than as suspects, even though they are suspected of wrongdoing. If PSNI becomes aware of grounds to suspect particular types of wrongdoing by police officers they must refer the officers to the Police Ombudsman for investigation.

v. The problems with the structure, remit and some of the working practices of the HET have been documented by HMIC and others.

vi. Access to Special Branch intelligence is subject to gate-keeping by a Legacy Unit which employs former Special Branch officers. This is not calculated to secure the trust of those affected by the arrangements.

vii. The current arrangements create significant difficulties for the PSNI, the HET and the Police Ombudsman when any case is being prepared for submission to the Public Prosecution Service, because of the conflicting remits of the three bodies and their legal responsibilities in matters such as disclosure of information at interview, discovery, handling of evidence, and primacy over witnesses, crime scenes and evidential material.

viii. These difficulties inevitably create significant additional costs and can require significant additional resources and actions by the various units.

ix. As already indicated, Coroners have limited investigative capacity and a very specific function.

x. There is, in various communities within Northern Ireland, significant distrust of the current systems. During my term as Police Ombudsman, NISRA statistics demonstrated significant faith in the PONI system, despite its lack of powers to

investigate soldiers, paramilitaries or civilians. However the ongoing problems and lack of trust in some communities, both loyalist and republican, of the current processes are well evidenced.

xi. For this reason I do not think that retaining the status quo and simply providing a monitoring panel for the HET would address the trust deficiencies which now exist with regard to HET.

Moreover, it is my opinion that the suggestion by the Attorney General, that Northern Ireland should cease all enquiries, investigations and inquests into deaths which preceded the Good Friday agreement, whilst superficially attractive, is not tenable.

The current revelations of “an invisible process” through which some 200 people received letters from the Northern Ireland Office or 10 Downing Street, the contents of which are not currently known, has caused high concern. The letters were revealed when one of them, issued to Mr John Downey, resulted in the collapse of criminal proceedings against him in connection with the 1982 Hyde Park bombings. The explosion killed four soldiers of the Blues & Royals at Hyde Park, Seven of the Blues & Royals' horses also died in the attack. One seriously injured horse, Sefton, survived and was subsequently featured on a number of television programmes and was awarded "Horse of the Year". It is reported that Sefton's rider suffered posttraumatic stress disorder and in 2012 committed suicide after killing his two children. In a second bombing at Regent's Park seven bandsmen of the Royal Green Jackets died.

The revelation of the existence of these letters and the consequence of one of those letters in the collapse of the Downey case has massive implications for trust in the criminal justice system. There are currently three Inquiries into the matter : one by a judge, yet to be named and to be appointed by the Prime Minister; one by the Northern Ireland Affairs Committee of the House of Commons, Westminster, and one by the Northern Ireland Policing Board.

The content of each letter, its recipient, and its potential impact on future criminal proceedings has yet to be established.

For our country, emerging from decades of violence there is an obvious need to build our future on sound foundations, which include full compliance with the Rule of Law.

4. A possible solution: An Independent Commission

The American Poet and Writer, Maya Angelou, says that, *'History with all its*

wrenching pain cannot be un-lived. If faced with courage it need not be lived again.'

The challenge for Northern Ireland is to find a way to deal with the past so as to enable the present and the future. Any solution must be fully compliant with the Rule of Law and all national and international obligations.

I have therefore suggested:

- i. The establishment of one totally independent investigative fully empowered and fully resourced body [for these purposes to be called The Investigation Commission, the IC] to operate in accordance with all established national and international standards of investigation), with a remit to examine any Troubles related cases involving death up to 2006, the date of the St. Andrew's Agreement, in which there is a complaint by victims, family members or where there is a reference by Government, by a Judge, by the Coroner, by the Director of Public Prosecutions or any other agreed body such as the Criminal Case Review Commission, or where the IC itself thinks that investigation is necessary in the public interest.
- ii. If it transpired that a referral did not fall within the remit of the IC then it would be transferred for investigation in the normal way by either the PSNI or the Police Ombudsman.
- iii. The PSNI would cease to investigate any case involving Troubles-related deaths occurring before 2006. The HET would cease to exist. PONI's historic Troubles-related investigations would cease to exist and all the work would be transferred to the new IC. PONI would retain a non-Troubles-related historic investigative capacity so as not to damage confidence in that Office and in policing.
- iv. The IC would have to be established in a totally transparent manner, and could be required to be accountable to Parliament in respect of cases which predates the devolution of justice, and to the NI Assembly in respect of cases which may have occurred post devolution.
- v. Such a system would require flexibility and imaginative and co-operative working processes between the two legislative bodies, something which exists already in the context of the allocation of control over matters such as the UK's national security interests, international human rights responsibilities, the operation of the CCRC etc.
- vi. Accountability, transparency of working procedures and openness would, in any event, be vital to the ability of the IC to attract and maintain public confidence and trust.

The Haass proposal for an Historical Investigations Unit meets some but not all of the requirements which I consider to be fundamental:

- i. It is not stated to be independent;

- ii. It is not clear what it is a unit of. It is thought in some circles that it will be a unit of the PSNI;
- iii. it suggests that it will report to the Northern Ireland Policing Board (NIPB) but the NIPB is responsible for the delivery of effective efficient policing, and has therefore an interest in the issues, which I consider could constitute a conflict of interests;
- iv. the consequence of this is that it is unlikely to secure cross community support which is vital.

vii. **5. Composition of the IC.**

The IC should be headed by at least three Commissioners. Measures must be taken to ensure a sound practical and historical understanding of the complexities of the NI conflict, and a firm grasp of international and national human rights standards for investigating, prosecuting and reporting on violations of fundamental rights.

An international perspective increases the public perception of objectivity. I therefore recommend that one or more of the Commissioners should come from outside the UK.

6. Functions and Powers of the IC

In conducting investigations the IC must operate according to Article 2 ECHR standards for investigation and accountability. Their processes must be effective, as timely as possible, involve families, report back to families etc. It would also require as part of its capacity the ability to engage with perpetrators, and their families.

The IC would require full police powers and privileges, including:

- i. Staff vetted in accordance with UK standards, with some personnel vetted to the highest levels to enable access to all systems for intelligence handling, management and storage, and other material etc.
- ii. Full powers of arrest, search and seizure;
- iii. Full powers to access and seize documentation or property, including all previous Inquiries such as those conducted by Stalker, Sampson, Stevens, Cory, the PSNI and the Police Ombudsman;
- iv. Powers to compel witnesses, as in many international investigative systems. This would obviate the current problem of witnesses who refuse to

give evidence which would assist an enquiry, even when it in no way implicates them in wrongdoing. The rights of these witnesses would have to be protected in accordance with the law;

v. Powers to access all intelligence and associated data systems;

vi. Powers to secure any incident scene or scenes;

vii. Resources to use all necessary ancillary support e.g. legal, specialist forensic scientists, photography, analysis, medical evidence etc.

viii. An unspecified lifespan. Investigation can be a very protracted process - in one case as Ombudsman it took me nine months to track down one critical witness who had gone out of the jurisdiction. The case Mr. Harvey and I are monitoring has been under active investigation for over three years and the investigative process may continue for at least another two or more years.

ix. Security systems to protect staff, the integrity of investigations, witnesses, buildings etc.

7. Prosecutions, Reports and Recommendations

Prosecutions

i. In reality very few cases would go to prosecution, for a variety of reasons but generally because there would not be a reasonable prospect of conviction (to apply the normal test for prosecution), because of the multiple factors would give rise to a break in the evidential chain etc.

ii. Where prosecutions appear appropriate, however The IC would have the capacity to present cases to the Public Prosecution Service for decision on prosecution.

iii. The decision as to prosecution would be made by the DPP in the normal way.

iv. The matter would then proceed through the courts if so directed by the DPP in the normal way.

v. Sanctions on conviction would be determined by the judge in accordance with the law.

vi. The IC's report on the case would be published after the Prosecution.

Reports

i. Where sufficient grounds for prosecution are not found to exist, in each case the IC would produce and publish a Report on their findings.

ii. The Report should be published in a timely manner, redacted only to the extent necessary to protect life and critical investigative or national security matters. Such redaction should be a capable of challenge before a court.

iii. Matters which are private to the family of the deceased such as details of final moments, messages sent by the deceased to their families etc, would not be for general publication but would be transmitted to the families.

Recommendations

The IC's investigations would inevitably reveal linked crimes and themes such as those I identified in Operation Ballast, and my various investigations as Police Ombudsman. Given what we know thus far, these are virtually certain to reveal collusive activity, significant intelligence handling failings, failures to investigate, and many other problems. All of these should be examined and reported on with a view to ensuring that lessons are learned. Where appropriate the IC should make recommendations.

7. Conclusion

This paper sets out in the briefest possible way one solution to the problem of dealing with unresolved Troubles-related deaths. It provides an opportunity to use tested and established investigative processes which satisfy all the national and international legal requirements on the United Kingdom.

The United Kingdom as a whole, and Northern Ireland in particular, must as constitutional entities, ensure that our future is built upon robust transparent processes which are compliant with the Rule of Law and which complement all that has already been achieved in terms of peace making.

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