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CONSEIL DE L'EUROPE

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Date: 21/08/2019

DH-DD(2019)889

Meeting: 1355h meeting (September 2019) (DH)

Communication from a NGO (Relatives for Justice) (24/07/2019) in the MCKERR group of cases v. the United Kingdom (Application No. 28883/95).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1355e réunion (septembre 2019) (DH)

Communication d'une ONG (Relatives for Justice) (24/07/2019) dans le groupe d'affaires MCKERR c. Royaume-Uni (requête n° 28883/95) **(*anglais uniquement*)**.

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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Gaolta ar son na Córa

Rule 9 submission to

the Committee of Ministers of the Council of Europe

August 2019

Execution of Judgments of the European Court of Human Rights

Group of cases:

McKerr v UK, 2001

Kelly and others v UK, 2001

Finucane v UK, 2003

Hemsworth v UK, 2013

McCaughey and others v UK, 2013

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INTRODUCTION

Relatives For Justice (RFJ) was established in 1991 by relatives of people killed in the conflict. We are a human rights' framed victim support NGO that provides holistic support services to the bereaved and injured of all the actors of the conflict on an inclusive and non-judgemental basis.

RFJ seeks to examine and develop transitional justice and truth recovery mechanisms assisting with individual healing, contributing to positive societal change, and ensuring the effective promotion and protection of human rights, social justice and reconciliation in the context of an emerging participative post-conflict democracy.

As part of our engagement with human rights bodies, RFJ has made several submissions to the Committee of Ministers (CoM) of the Council of Europe (CoE) over the last years, most recently in March 2019. The current submission seeks to provide an update of developments since then. However, it is noteworthy that updates contained herein do not change the overall situation of delay and prevarication by state agents that have been mentioned submission after submission.

Only consistent international scrutiny is likely to encourage the UK to implement its international human rights obligations in respect of legacy issues and Article 2 of the ECHR. It is therefore welcome that the CoM/CoE is maintaining its interest and pursuing its mandate by maintaining regular scrutiny of the UK's record; without this, the UK Government's own approach to dealing with its actions during the conflict would undermine the rule of law and respect for international human rights.

We draw the Committee of Ministers' attention to the fact that RFJ provided information to the UN Committee Against Torture earlier this year for its examination in May 2019 of the UK under the terms of the Convention Against Torture (UNCAT). The Committee's concluding observations[1] indicate that body's concerns about the inability of the UK government to deal with outstanding human rights issues regarding the legacy of the conflict. They called for the speedy implementation of the Stormont House Agreement

[1]https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGBR%2fCO%2f6&Lang=en

(SHA); they contrasted the stated policy of opposition to amnesty for state violations with repeated contrary positions of UK government cabinet members; they expressed concern about the over-reliance on questionable national security grounds in respect of disclosure and open proceedings; they called out the Police Service of Northern Ireland for the arrest of two journalists – Barry McCaffrey and Trevor Birney (see also p. 15 below) – who had publicised leaked documents relating to UK-state knowledge about a loyalist attack in which six Catholics had been murdered in June 1994; they called strongly on the UK government to address the murder of solicitor Pat Finucane; and the Committee asked that allegations of state torture be addressed as part of conflict-related legacy alongside all deaths, as stipulated in the SHA.

It has always been the experience of human rights activists that international monitoring of the UK government's human rights record in the north of Ireland is vital if victims' rights are to be vindicated. There had been some optimism that, with the human rights guarantees set out in the Good Friday Agreement in 1998, a new dispensation might develop. This optimism has been gradually eroded, particularly as the UK state seeks to protect its narrative of what took place during the conflict. The focus on the legacy of conflict has exposed – on a week by week basis – the violations of the UK state, its military and police operatives and its agents within non-state groups, both loyalist and republican. The revelations of extra-judicial execution, state managed assassination of opposition individuals whether directly or through third party groups, the violation of international human rights norms have all undermined the UK state's self-image as a democratic and law-abiding state. In these circumstances, RFJ re-affirms the vital importance of the CoM/CoE in maintaining its scrutiny, particularly at this moment when Brexit places even more pressure on an ailing peace process.

RFJ hopes that the CoM finds the following information of assistance in its continued monitoring of the UK government's obligation to respond to the findings of the European Court in the variety of cases from this jurisdiction. Pursuant to our own mandate, the information we provide focuses on the situation in the North of Ireland with reference to arrangements for dealing with the legacy of the conflict.

OBSERVATIONS AND DEVELOPMENTS AROUND LEGACY

1. Implementation of the SHA and the Consultation on Dealing with the Past

As explained in previous submissions, RFJ welcomed the commitment to implementation of the institutional architecture agreed by all parties and the UK and Irish governments around dealing with the past as part of the Stormont House Agreement (SHA).[2] This included the establishment of an Historical Investigations Unit (HIU), which would be the key element in terms of the UK's international human rights obligations, and would benefit a greater number of victims and survivors from across the community. However, the integrity and credibility of this Agreement is dependent on its effective and expeditious implementation, which has not yet occurred.

Progress towards implementation should have been the task of the UK government through its Northern Ireland Office (NIO). The primary requirement of underpinning legislation in the Westminster Parliament has been clear from the start. Successive drafts of the proposed legislation were produced, yet never progressed. It is now five years since the SHA was concluded.

To create the illusion of momentum, the NIO decided to launch a consultation on the proposals, despite the fact that all-party agreement meant that this was not necessary. The NIO Secretary of State (SoS) Karen Bradley launched the consultation on "Addressing the Legacy of Northern Ireland's Past"[3] in May 2018. Technically and legally no consultation was required; implementing the SHA would merely be a matter of the UK finally adhering to its international legal obligations and its agreement with the parties and the Irish government. The consultation closing date was the start of October 2018

[2] The Stormont House Agreement, p5
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf
[3] NIO Consultation document "Addressing the Legacy of Northern Irelands past"
https://www.gov.uk/government/consultations/addressing-the-legacy-of-northern-irelands-past

and an analysis of the submissions received was promised for December 2018, two months later.

It the event, it was not until July 2019, that a summary of the 17,000 responses received has been published.[4] Collectively, these clearly called for what we already knew; that the agreed legacy mechanisms need to be implemented, the delaying tactics need to stop and that there is no support for an amnesty or statutes of limitations in respect of former state operatives or for all former combatants. The political parties and both governments had already agreed the SHA and the draft legislation, and people have now spoken through the consultation.

In the normal scheme of things, one would have expected the outcomes of the consultation to have provided a set of options or proposals for potential actions. In fact this is not the case. It was also expected that the NIO would establish two working groups – one in Stormont and another one in Westminster – to work on possible policy options, but it has not. What has been published is a mere summary of responses to the consultation rather than any substantive policy development. This only means more delay by the UK government.

It has to be acknowledged that the scale of the response indicates wide public interest and engagement with the issues. The legacy of conflict is clearly of existential societal importance. Whatever about previous delays, it is past time for implementation.

It is noted that the Committee had requested a timetable be provided by the UK Government, outlining when they expect to pass legislation ensuring the HIU's independence in law and practice. This does not appear to have been forthcoming.

The delay exacerbates the human hurt and trauma all bereaved and injured carry and leaves the UK in continuing violation of its Article 2 ECHR legal obligations. Moreover, in RFJ's view, the deliberate delay and inaction by the state constitutes a breach of Article 3 of the ECHR. The mental distress and anguish the unresolved cases cause in relatives and victims could be seen as reaching the threshold for inhuman and degrading

[4] Summary of Responses to the NIO consultation
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814805/Addressing_the_Legacy_of_the_Past_-_Analysis_of_the_consultation_responses.pdf

treatment or punishment. It is equally unacceptable that many of the bereaved relatives, and the injured, are dying as they wait on a process to begin.

The HIU architecture must be advanced and implemented as soon as possible and RFJ urge the CoM/CoE to make this point to the UK government.

2. The Legacy Investigation Branch (LIB) and the PSNI

The Legacy Investigation Branch (LIB) of the PSNI is currently tasked with investigating conflict deaths. It quotes a caseload of over 1,432 cases, being reviewed and investigated by 70 officers.[5] There is clear evidence of the involvement of former RUC officers within the procedures of the LIB, and domestic judgements have stated that the LIB lacks the requisite independence required by Article 2 of the ECHR.[6] (Specifically, in the McQuillan judgment, at para. 78, it is reported that in December 2017, 27 of the 55 members of staff in LIB are former RUC personnel and two of the latter were in the notorious Special Branch.) These court cases have been unequivocal about the current lack of independence of the LIB, stating that it is not possible for the LIB, as part of the PSNI, to effectively and independently investigate any conflict-related cases.[7]

In worrying developments, recent cases, however, appear to be setting a lower threshold. Thus, the Court of Appeal in McQuillan[8], outlined the threefold aspects of independence to be considered: institutional, hierarchical and practical. The court appeared to take as read that the Legacy Investigation Branch of the PSNI can now be considered independent from the Royal Ulster Constabulary (RUC) in respect of the first two (institution and hierarchy - this is in spite of the figures outlined above showing a

[5] Information provided to RFJ at a meeting with PSNI Assistant Chief Constable George Clarke and Head of the LIB Superintendent Bobby Singleton, 9th July 2019.
[6] McQuillan's (Margaret) Application [2019] NICA 13 https://judiciaryni.uk/sites/judiciary/files/decisions/McQuillan%27s%20%28Margaret%29%20Application_0.pdf ; Barnard's (Edward) Application [2017] NIQB 82 https://judiciaryni.uk/judicial-decisions/2017-niqb-104; and McKenna's (Mary) application [2017] NIQB 96https://judiciaryni.uk/sites/judiciary/files/decisions/McKenna%20%28Mary%27s%29%20Application.pdf.
[7] See, for instance, paragraph 191 from Barnard's (Edward) Application [2017] NIQB 82: "The ability of the LIB to continue the work of the HET is undermined by the fact that it has (i) less resources, (ii) significantly reduced scope and (iii) is not independent in the manner required by Article 2 and the package of measures."
[8] On appeal from the High Court of justice IN Northern Ireland, in the matter of an application by Mrs Margaret McQuillan for judicial review, Neutral citation, STE10661, *Delivered:* 19/03/2019

disproportionate number of former RUC personnel in the LIB and its chain of command). The question of practical independence remained an issue for the Court of Appeal, but only insofar as this had not been demonstrated to the Court's satisfaction.

The concern arising from this is that the PSNI may feel emboldened to assert their capacity to begin investigating conflict-related legacy cases, rather than seeking the urgent establishment of the HIU under the terms of the SHA.

Disclosure is one area where PSNI behaviour and policy demonstrates their commitment to protecting the supposed reputation of its predecessor, the RUC, and hiding its violations. The PSNI has failed to provide full disclosure to the Office of the Police Ombudsman of Northern Ireland (OPONI) in several cases, including the case of Shanaghan, one of the originating cases along with McKerr & other v. UK). Reports outlining the findings in various investigations where the state conspired with loyalist paramilitaries have been delayed. The latest ongoing crisis emerged after the OPONI identified significant, sensitive information, some of which relates to covert policing regarding the importation of weapons by Loyalists in 1987/88. This was a matter which Desmond de Silva in relation to the Finucane review, and the OPONI in relation to murders at Loughinisland had both publicly reported on previously, without sight of this information. The Criminal Justice Inspection NI (CJINI) is conducting a review of how the PSNI deal with their legal obligations regarding disclosure. We understand that the report of this inspection is due over the summer[9]. However, this issue has aggravated the trauma experienced and delay felt by victims and their relatives and has significantly diminished public confidence in the PSNI's ability to investigate legacy cases.

In all this, it is important to bear in mind that the Chief Constable of the PSNI is facing 900 civil cases in respect of legacy – a clear indication that there is widespread public dissatisfaction with that organisation's approach to conflict-related incidents. While it is no doubt true that the PSNI has a statutory obligation to hold unsolved murder files, its capacity to investigate these in an Article 2 compliant manner remains contested by the families RFJ represents.

[9] https://www.nipolicingboard.org.uk/news-centre/statement-special-board-meeting-legacy-disclosure-failings-1

It is also important to reiterate that the RUC was an organisation that had to be fundamentally transformed and rehabilitated as part of the peace agreement precisely because of its sectarian make up and widespread involvement in human rights abuses including those under examination by the LIB. Further concerns exist as many former RUC officers are employed within the PSNI in a civilian capacity having left with huge financial severance packages to make way for change and new recruits but who merely entered the PSNI shortly afterwards. As civilian workers the Office of the Police Ombudsman has no oversight of these former RUC officers, as they are technically not serving officers.

3. Office of the Police Ombudsman for Northern Ireland (OPONI)

The OPONI is under-resourced, and the lack of funding is having a remarkable impact on that organisation's ability to investigate. Following a legal challenge in 2017, when the relatives of a victim shot dead were told the OPONI's inquiry was not expected to be completed until 2025 at least, the judge criticised the 'systemic and persistent' underfunding of the OPONI[10]. Despite this strong court ruling, the situation remains the same, according to the Office. No further funding stream has been identified nor has OPONI been able to employ more staff.

The Office has continuously requested appropriate funding and resources to effectively accomplish its mandate to investigate legacy issues, but those petitions have been ignored by civil servants and politicians. In a meeting with RFJ in March 2019 the then Police Ombudsman, Dr Michael Maguire informed RFJ that the OPONI has 430 historical complaints to be investigated, but less than 30 members of staff to carry out that job.

Dr Michael Maguire has now retired from post, and a new Police Ombudsman, Mrs Marie Anderson took up the appointment on the 16th July 2019. The Secretary of State (SoS) Mrs Karen Bradley announced her intention to recommend the appointment of Mrs Marie Anderson in May 2019, based on legislation the UK government brought forward in 2018 to enable the SoS to make key public appointments in the absence of devolved government. There is public concern about the SoS's ability to make fair appointments to

[10] Bell's (Patricia) Application [2017] NIQB 38.

posts regarding legacy issues given her comments at Westminster in March 2019 that the "security forces" – including the police – did not commit any crime when they killed people, were only following orders and acted in a "dignified and appropriate" manner.[11] The decision to appoint Mrs Anderson, is to be challenged by the daughter of a man injured in the 1992 loyalist attack on Sean Graham bookmaker's on Belfast Ormeau Road. This inappropriate appointment process will mean more delay for the bereaved and injured of the conflict.

In considering the approach of the new Ombudsman, RFJ will be mindful of the fact that a previous incumbent (Al Hutchinson, who preceded Michael Maguire) adopted a style and method which sought to downplay historic misconduct and criminality on the part of the RUC. Any attempt to rehabilitate the reputation of the RUC will undermine what confidence the Office of the Ombudsman has been able to accrue since Mr Hutchinson's departure.

4. Legacy inquests

The funding for legacy inquests has been subject to political interference rather than the upholding of citizens' rights in accordance with the state's legal obligations. This was confirmed in the Hughes case, when the court found that former first Minster, and DUP leader, Arlene Foster had failed to take into account the obligation on State authorities to ensure the Coroners Service could effectively comply with Article 2 of the ECHR, irrespective of an overall package being implemented.[12]

RFJ welcomed the decision of the government in February 2019 finally to release funding for historical inquests, almost a year after the Hughes judgement[13]. However, that

[11] BBC report regarding Karen Bradleys comments and calls for her resignation. Includes footage of her comments at Westminster https://www.bbc.co.uk/news/uk-northern-ireland-47471469
[12] Hughes (Brigid) Application [2018] NIQB 30
https://judiciaryni.uk/sites/judiciary/files/decisions/Hughes%20%28Brigid%29%20Application.pdf
[13] The case was bought by the widow of Anthony Hughes, a civilian killed in the Loughgall ambush. The European Court of Human Rights will know this case as **Kelly & other v. UK**, one of the cases which led to the CoM/CoE supervision of **McKerr & Others**.

decision came after years of illegal delay and a series of court decisions finding the UK Government in default of its ECHR Article 2 obligation.

There is concern that even with the funding being released, it may only be provided on a drip-feed basis with the decision having to be renewed every year. The allocation of the funding has further been delayed as the PSNI's LIB announced its intention to make an application for funding and then held up the process by submitting its application quite late on.

The Presiding Coroner, Mrs Justice Keegan held a "state of readiness" event on the 7th June 2019, stating that her hope is to begin dealing with Legacy inquests in April 2020.[14] She has specifically asked the PSNI, the OPONI and the Ministry of Defence to give assurance that all potentially relevant information has been identified and disclosed to the Coroner by identifying all databases and archives where materials relating to legacy matters are stored. It remains to be seen if each of the institutions will comply with this request.

In the meantime, Mrs Justice Keegan has drawn up a schedule of 41 legacy inquests into 70 conflict-related deaths. Over the course of three weeks from 16th September through to 3rd October, she intends to review each inquest to assess the preparedness of the parties, the readiness of witnesses and issues around disclosure with a view to developing an indicative timetable for hearing all the cases. Included in these inquests are the shoot-to-kill cases (McKerr & others) and the Loughgall case (Kelly & others), both of which formed part of the original European Court of Human Rights ruling in 2002[15], the execution of which forms the basis of the current CoM considerations.

Notwithstanding these positive developments, given experience to date and on-going concerns around resources and slippage on disclosure, we respectfully submit that this matter is kept under scrutiny by Com/CoE until the legacy inquest plan is indeed up and running and delivering to victims and their relatives.

[14] https://judiciaryni.uk/sites/judiciary/files/media-files/Presiding%20Coroner%27s%20Statement%20-%20State%20of%20Readiness%20Event%20-%207%20June%202019.pdf
[15] *McKerr v United Kingdom* (2002) 34 EHRR 20

5. Issues regarding disclosure of information by the state

The current State approach and increasing resistance to disclosure is deeply problematic and it denies victims and their relatives their right to seek and receive information. The latest decision to suspend the release of certain files has been taken by the Public Records Office of Northern Ireland (PRONI) on the basis it has no authority to release closed files due to Stormont's power-sharing crisis, but that is not the only issue. (We have already addressed the matter of PSNI attitudes towards disclosure of sensitive information.)

There are currently three judicial review cases against the PRONI and their unwillingness to release court and inquest papers relating to legacy cases. One of them challenges the difficulties and obstacles in the process prior to the release of records, where the Information Commissioner's Office (ICO) has agreed with the concerns RFJ raised. According to the ICO, the process was inappropriate and did not meet the requirements under the Freedom of Information legislation, as PRONI were usurping the powers of the Minister by obstructing access to public documents. However, there is no Minister at present, and the North of Ireland is stuck at a political impasse. This is causing severe delays in victims' and relatives' legitimate search for truth and justice and hence exacerbates their pain.

RFJ held a recent meeting with the Northern Ireland Office regarding files that should have been or are about to be released under the 30-year rule. Under the Public Records Act, government departments are obliged to identify records of historical value and transfer them for permanent preservation to an archive within 30 years of their creation. Our understanding is that files are currently being put through a filtering process by the Northern Ireland Office, prior to their transfer to the UK National Archive at Kew in England. This has resulted in a number of files being closed for an extended period of up to 70 years, outside of the jurisdiction where it is more difficult for families to seek access. That the NIO were sifting through files on killings by the British army and RUC, and presumably ones involving collusion, whilst in the very same building (Stormont House) simultaneously negotiating legacy proposals completely smacks of bad faith. Two of the

closed files relate to the fatal shootings of a 14-year-old schoolgirl, Carol Anne Kelly, and 15-year schoolboy Paul Whitters.[16]

6. The use of 'national security' and secret courts

'National security' is being used to close off investigations into criminal acts of state agents. There is no statutory definition of 'national security', and there has been a dramatic extension of 'national security' exemptions made to investigatory powers. The term is deliberately kept flexible. Indeed, the government uses it as a veto, trumping victims' rights to know the truth concerning the killing of their loved ones and allowing a de-facto form of state impunity.

Secret courts provide another mechanism to conceal human rights violations. The world of 'Closed Material Procedures' (CMPs) excludes civilian parties and their legal representatives from hearing any evidence designated as national security related. The Justice and Security Act 2013 extended this system to civil proceedings and there has been an increasing reliance on them to prevent transparent scrutiny of conflict-related actions. 36% of the total number of CMPs have taken place in relation to the British Government's intelligence interests regarding their role in the conflict in Ireland, a disproportionately high figure.

Many civil society actors have denounced the CMP as a 'carve out from basic principles of equality of arms and open justice'[17] by allowing secret courts only to consider any material, the disclosure of which would be "damaging to the interests of national security". The reality is that these repressive measures are invoked immediately in this jurisdiction to preserve the interests of the State in concealing their involvement in murder and other crimes.

[16] https://www.relativesforjustice.com/families-of-children-killed-by-plastic-bullets-dissatisfied-following-meeting-with-karen-bradley/
[17] Hickman, Tom; 'Turning out the lights? The Justice and Security Act 2013' http://ukconstitutionallaw.org/2013/06/11/ tom-hickman-turning-out-the-lights-the-justice-and-securityact-2013/

7. The case of Pat Finucane

In 2001 the British and Irish Governments agreed to the establishment of inquiries concerning collusion. Only one of these, the public inquiry into the killing of human rights solicitor Pat Finucane in 1989, has not yet been held.

In February 2019 the Supreme Court in London ruled that – notwithstanding the various examinations of the facts surrounding the murder by the police, the Stevens enquiries and the de Silva review – investigations into Patrick Finucane's murder have not been effective and that, to date, there has not been an ECHR Article 2 compliant inquiry into the case.[18] The court made clear that the state needs to decide "what form of investigation, if any is now feasible, is required in order to meet the requirement".[19] The British government in response was less than fulsome as mentioned in our last submission.[20] Rather than act to comply with the court's pronouncement and establish a public inquiry, which we would submit is the only currently available means of discharging the state's legal obligations in this case, the SoS has sought to delay taking action, and has entered into an unnecessary exercise, i.e. simply reviewing previous reviews and flawed investigations. It is our understanding that this has been done without input or engagement with the Finucane family, surely a further breach of the procedural requirements of Article 2, which demand state engagement with the victim's family in respect of all developments related to the investigation of a state violation.

This matter is one repeatedly commented on as a most grave matter that remains outstanding by all of those concerned with implementation of previous peace agreements and the application of human rights standards. We noted above that, in May 2019, the UN Committee Against Torture urged the UK government to address the matter. RFJ would strongly urge the Committee to support this international consensus.

[18] Judgement in the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland) [2019] UKSC 7 27 February 2019 - https://www.supremecourt.uk/cases/docs/uksc-2017-0058-judgment.pdf
[19] At para. 153.
[20] "Government continues to press for Finucane murder inquiry despite UK court ruling – Family wins declaration that effective investigation into killing has not been carried out", Irish Times (27/02/2019) https://www.irishtimes.com/news/ireland/irish-news/government-continues-to-press-for-finucane-murder-inquiry-despite-uk-court-ruling-1.3808038 accessed on July 2019.

and reopen its supervision of the individual measures in the Finucane case. The UK government's lack of compliance with its obligations has gone on too long. For the Committee of Ministers to continue to tolerate it, is in our respectful submission, no longer tenable.

8. Political campaign opposing trials of former British army soldiers

The campaign by British political representatives criticising the fact that former members of the British army are being investigated continues. MPs from the Conservative party and north of Ireland-specific Unionist parties are regularly in the media articulating a confused message that it is unfair that people who were "serving Queen and country" should not have to face investigation and trial – apparently on that ground alone.

Recent additions to the list of such interventions have been both candidates for the leadership of the Conservative party (and therefore the next British prime Minster) Jeremy Hunt and Boris Johnson, current Minister for Defence Penny Mordaunt, previous Minister for Defence, Gavin Williamson, and prominent former soldier John Mercer. Most recently, the Westminster Defence Committee has published a report on 22nd July 2019 entitled ***Drawing a Line: Protecting Veterans by a Statute of Limitations***. This represents a direct attack on both the rule of law and the system of international human rights. The report also contains an assault on the independence of the criminal justice system. Thus the press release issued by the Committee Chair, Dr Julian Lewis, MP, contained the following: "The Committee's report warns that the European Court of Human Rights has gone far beyond the original understanding of the European Convention on Human Rights (ECHR), and that its rulings have stretched the temporal and territorial scope of the UK's Human Rights Act (HRA) beyond Parliament's original intentions."[21]

That a handful of prosecutions brought in the north of Ireland in the face of enormous evidentiary and public interest hurdles should dominate British public discourse to this

[21] See www.parliament.uk/defcom

extent is further evidence of the toxic nature of British military practice in the north of Ireland during the conflict.

The campaign against the impartial exercise of the rule of law to the benefit of former soldiers has also led to heightened community tensions over the marching season with visible and provocative shows of support by the Protestant community during coat-trailing displays by the Orange Order. Banners in support of the only soldier to be charged in connection with the murder of 14 civilians in 1972 in Derry in the incident known as Bloody Sunday have been erected across major thoroughfares in towns across the north of Ireland. Regimental paraphernalia related to the Parachute Regiment (which committed the Bloody Sunday atrocity) have been displayed or worn during Orange marches.

Thus at the very moment when the legacy of impunity for state agents in the military and the police has begun to be addressed – if only minimally and incipiently – an increasingly toxic discourse has emerged from the British establishment and the Protestant community in the north of Ireland. It can be imagined the impact this has on the relatives of the victims killed in controversial circumstances by the soldiers involved.

FINAL OBSERVATIONS

This report brings together relevant evidence about deficiencies in the current mechanisms tasked with uncovering the truth about human rights violations in the North of Ireland. The evidence does not support a conclusion that a 'package of measures' is being deployed in good faith by the UK Government, only held back by the complexity of the issues, cost and lack of consensus among politicians. Rather, it points to a common purpose between the UK Government and elements within the security establishment to prevent access to the truth and maintain a cover of impunity for state employees and agents.

Examining each mechanism or phenomenon on its own may create an impression that obstructionist activities are institution specific or aberrational. Yet the emergence of patterns across a number of mechanisms suggests a concerted effort by some to prevent damaging facts about state involvement in human rights abuses coming to light and those who were responsible for such abuses (or for covering them up) being held accountable.

In addition to all that, families seeking accountability for the killings of their loved ones are being regularly vilified by sections of the press and former state combatants, with the governmental cover for it. So too are the lawyers and NGOs supporting them. For families this appears to be a combined and convenient strategy to undermine their legitimate attempt to seek accountability by the very people responsible for the taking of lives.

These attacks have also been directed to journalists investigating past events and police collusion, posing a direct threat to the right of freedom of expression and the right of the public to be informed. Two journalists were arrested on the 31st of August 2018 – and their documents and computer equipment seized – over the alleged theft of documents that were used in the documentary 'No Stone Unturned', an investigative work about the (still unresolved) Loughinisland Massacre and police collusion.[22] The film exposed the failure of police to properly investigate the killings of six people in 1994 and bring suspected killers to account, but the only police response was the arrest of the journalists.

The pair, who remained on bail without charge until June 2019, challenged the legality of the search warrants in a judicial review and they won the case. The High Court judges ruled that search warrants issued against the men were "inappropriate" and rebuked police for the highly contested case. The police had to drop the investigation against the journalists and return the seized material. The PSNI Chief Constable nevertheless still sought to justify the actions of his officers and the officers from Durham in England who had been brought in to take the investigation forward.

All in all, the commitment to prevention or ending of impunity is the single greatest signal to victims and survivors that society and the state are committed to upholding their rights and willing to address their suffering. For decades family members of people killed and

[22] The OPONI admitted there was 'evidence of collusion' in this case. See https://www.bbc.co.uk/news/uk-northern-ireland-36486779

those who have suffered gross violations have lived with the impunity of the actors who caused them harm and systemic cover-up of those crimes. The UK government has signed and ratified human rights conventions and treaties and it has legal obligations. It is therefore incumbent that the UK government adheres to the rule of law, and it gets openly and honestly involved in the development and implementation of comprehensive transitional justice mechanisms in the North of Ireland.

All the above mentioned has a huge impact on victims and survivors, not only regarding their rights for truth and justice, but also on their suffering and health. It is said that 'justice delayed is justice denied', but also, the legacy of the interminable failure to deliver rights to those who suffered harm serves only to compound and exacerbate their trauma. As an NGO providing holistic support services to victims and survivors of the conflict, RFJ constantly witnesses the mental distress and anguish the bereaved and injured suffer as a consequence of this extreme delay and frustration in effectively dealing with the past.

The Human Rights Committee, the European Court of Human Rights (ECtHR) and the Inter-American system have all recognised that mental anguish can be as distressing as physical pain, and they have considered mental anguish suffered by relatives of victims of human rights abuses can result in the relatives themselves suffering ill-treatment at the hands of the state, in violation of human rights provisions prohibiting torture and cruel, inhuman or degrading treatment.[23] According to the ECtHR,

> *'whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include (...) the involvement of the family member in the attempts to obtain information (...) and the way in which the authorities responded to those enquiries. The Court would further emphasise that the*

[23] See Human Rights Committee, Communication No. 107/1981, Views of 21 July 1983; *Kurt v. Turkey,* European Court of Human Rights, Application No. 24276/94, Judgement of 25 May 1998; *Urrutia v. Guatemala*, Inter-American Court of Human Rights, Judgment of November 27, 2003; *Laureano v. Peru*, Inter-American Court of Human Rights, Communication No. 540/1993, Views of 25 March 1996; *Villagrán Morales et al. v. Guatemala* (the 'Street Children' Case), Inter-American Court of Human Rights, Series C No. 77, Judgement of 19 November 1999; *Bámaca Velásquez v. Guatemala*, Series C No. 70, Judgement of 25 November 2000; *Humberto Sánchez v. Honduras*, Series C No. 99, Judgement of 7 June 2003.

> *essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct.'*[24]

This report cannot offer an elaborate and detailed analysis on this subject, but considering all of the above mentioned, there is sufficient and solid ground to state the UK Government is in breach of both Articles 2 and 3 of the ECHR. This is a matter of absolute human rights, and its relevance and the gravity of the situation require a shift on the UK Government towards an unconditional, immediate and honest commitment to human rights and transitional justice, to adhere to its international legal obligations and the rule of law.

August 2019

[24] *Çakici v. Turkey*, Application No. 23657/94, Judgement of 8 July 1999, paragraph 98.