Submission to Commissioner for Human Rights Dunja Mijatovic
Tuesday 2nd October 2018

Concerns in relation to British Government compliance with article 2 of ECHR in respect of legacy issues in Ireland.

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The *McKerr* group of cases[1] was adjudicated by the European Court of Human Rights between 2001 and 2003, with definitive findings of investigative failures by the United Kingdom, pursuant to Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), in relation to killings by security and police forces during the Conflict in the North of Ireland.

Since then, and under the continuous supervision of the Committee of Ministers of the Council of Europe, a number of 'remedies' have been proposed, created, and subsequently disbanded amid abject failure to execute the judgments of the European Court.

For background information purposes, a detailed analysis as to the state of affairs with regards to British Government's compliance with those ECtHR rulings per the date of our last attendance on 6th February 2018 and 12th April 2016, is appended hereto.

Notwithstanding a current public consultation on proposed legislation to deal with our troubled past, there currently exists a severe vacuum which serves to undermine public confidence in the administration of justice, in respect of Britain's breach of its internationally binding legal obligations, specifically with regards to the State's approach to its role in our past.

[1] 1. Hugh Jordan v. the United Kingdom (application number 24746/94) [2001] ECHR 327
2. Kelly & Others v. the United Kingdom (application number 30054/96 [2001] ECHR 328
3. McKerr v. the United Kingdom (application number 28883/95) [2001] ECHR 329
4. Shanaghan v the United Kingdom (application number 37715/97) [2001] ECHR 330
5. McShane v. United Kingdom (application number 43290/98) [2002] ECHR 469
6. Finucane v. the United Kingdom (application no. 29178/95) [2003] ECHR 328

INTRODUCTION

Our previous submissions, have focussed very specifically on the broader architecture which the State has proposed to the Council of Ministers, in discharge of the found failings on *McKerr and others*, namely;

- Legacy Inquests
- Historical Enquiries Team (disbanded September 2014)
- Police Ombudsman
- New legal institutions – Historical Investigations Unit, Independent Commission for Information Recovery, as politically agreed at Stormont House Agreement and Fresh Start Agreement.

It would be our respectful contention to approach today's discussion in the context of the current Consultation on Legacy structures by the Northern Ireland Office, but to also provide an update on two aspects of what we characterised as an emergency in February.

UPDATE

We advised Commissioner Muznieks in February, that there was an emergency with regards to public confidence in the Rule of Law, as manifested by issues arising in respect of:

1. The operation and independence of the Office of the Police Ombudsman
2. The funding and resources of Legacy Inquests

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

A High Court judicial review[2] by Retired Police Officers (RPOA) challenging the powers of the Police Ombudsman dominated the news narrative in January 2018. Whereas the Ombudsman had found in 2016 that collusion was a significant feature in the murder of six men, in Loughinisland County Down in 1994, the RPOA challenged the powers of the OPONI, but significantly, not the facts which informed the Ombudsman's findings. The original Judge who heard the case, agreed to step aside from the case following an application from the families, who had raised concerns having learned of the fact that the Judge had represented the same retired police officers who had mounted the challenge to OPONI's powers, on the same point to a previous OPONI report in respect of police failings in their investigation of the Omagh Bomb in 1998 which killed 31 people. The entire case was reheard on 22nd April 2018 before a new Judge and the judgment is awaited.

The outworking of the index judgment is such that the Police Ombudsman's office would be not be permitted to publish public statements. This function has been repeatedly proposed by

[2] In the matter of an application by Thomas Ronald Hawthorne and Raymond White for Judicial Review 26th January 2018 https://judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20judgment%20-%20In%20re%20Hawthorne%20and%20White%20%28Loughinisland%20-%20Police%20Ombudsman%27s%20Report%29%20260118.pdf

the British Government[3] to the Committee of Ministers, Department for the Execution of Judgements of the ECHR, in discharge of the found failings of *McKerr and others*. Indeed, the Police Ombudsman himself, Dr Maguire, has corresponded directly[4] with the Department, in 2014, in respect of budgetary constraints which he faced.

With the disbandment of the HET in September 2014 and the failure to legislate for the HIU and ICIR, per political agreements, this judgment would effectively render a key triumvirate of the Package of Measures, legally incompetent.

The difficulty that the entirety of this episode had caused is two-fold.

a) The event of the challenge has caused serious community confidence in the Rule of Law. That the court would side with Retired Police Officers that an Ombudsman could not make determinations from his observations caused outrage and alarm.
b) The consequence of the index finding in January 2018, was such that OPONI decided that they could not release further reports pending clarity on its powers, as had been exercised since the inception of the office in 2001. This has in turn contributed to and indeed has aggravated the 'Justice Vacuum' for next of kin who have invested their hopes in OPONI, as part of the 'Package of Measures', in expectation of the State discharging its responsibilities under article 2 ECHR.

2. Legacy Inquests[5]

Brigid Hughes' husband was killed at Loughgall in 1987 and as such, the case can come under the scrutiny of the Committee of Ministers, in respect of the supervision of the execution of the judgment of Kelly & Others v. the United Kingdom (application number 30054/96) [2001] ECHR 328.

The application for Judicial Review by Mrs Hughes was lodged on 5th October 2016, and on 6th – 8th December 2016, the Council of Europe Committee of Ministers said that it:

"…strongly urged the authorities to take, as a matter of urgency, all necessary measures to ensure both that the legacy inquest system can be properly reformed, resourced and staffed as proposed by the Lord Chief Justice of Northern Ireland and that the Coroners Service receives the full co-operation of the relevant statutory agencies to enable effective investigations to be concluded."

Interviewed by the BBC on 15th December 2016, the Lord Chief Justice stated that *"the state is under a legal obligation to act as quickly as possible"* in relation to his request for funding

[3] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805dadb0
[4] https://rm.coe.int/16804a5dbb
[5] There are 54 inquests pending in relation to 94 deaths, however there are only 3 inquests listed to be heard in 2018. 46 legacy inquests are still to be progressed with no dates set for hearings as the Coroners Service await the outcome of current political talks to implement LCJ five year plan for legacy inquests which he developed two years ago in February 2016.

and "if the various agencies who are involved in examining this from a political point of view cannot reach an agreement then the danger is that ***the political process will end up frustrating the rule of law".***

On 10th March 2017 the Secretary of State for Northern Ireland, James Brokenshire was reported as saying that the government *"will not release money for Troubles inquests until agreement is reached on all legacy issues"* and that *"funds to conduct dozens of inquests are contingent on a comprehensive settlement".*

During the hearing of the judicial review in January 2018, senior counsel for Mrs Hughes, asserted that the DUP leader and First Minister Arlene Foster had acted unlawfully in failing to permit the Minister of Justice application for funding to be processed, and that the funding had been deliberately denied, with no attempt to conceal it, and that the reason that she didn't want them to be heard, was because she considered that they mostly concerned state killings.

Barry Macdonald QC further stated that "***for political reasons she was prepared to prevent a legal process taking place".***

Sir Paul Girvan QC found in the conclusion of his judgment delivered on 23rd March 2018[6] that:

(6) In the Former First Minister's decision not to permit the MoJ's paper to go before the Executive Committee the FFM was in error in concluding that it was legally proper to defer consideration of the question of seeking additional funding to deal with the systemic delays in relation to the legacy inquest until an overall package was agreed in respect of the outstanding legacy issues. She was in error in concluding that it was legally proper to defer consideration of the funding issue because in the absence of an overall package the provision of additional funds to deal with the systemic delays in the legacy inquests would favour victims who were not innocent as against innocent victims of the Troubles.

(8) The approach of the FFM and the Secretary of State has been infected by the legally erroneous view that dealing with the question of the provision of additional funds to deal with the systemic problems in respect of legacy inquests should await the outcome of an overall package in respect of all legacy issues. Their approach has been infected by the erroneous legal view that there is a permissible linkage between the issues.

(9) This linkage and the present approach disregard the present and on-going breaches of Article 2, Rule 3 and common law in respect of the legacy inquests which require to be addressed and dealt with irrespective of whether an overall package can be agreed.

(10) Whether or not the devolved institutions recommence operations and new ministers are appointed, the on-going problem of breaches of Article 2, Rule 3 and common law in respect of the legacy inquests requires to be addressed."

Notwithstanding the found illegality of the approach, the fact that no State agency appealed the Judgment, the funds have still not been made available to the Lord Chief Justice…

[6] Judgement of Girvan LJ in Re: Bridget Hughes [2018] NIQB 30
https://judiciaryni.uk/sites/judiciary/files/decisions/Hughes%20%28Brigid%29%20Application.pdf

PRESENT SITUATION TODAY

At present as we meet today, there are only two unique investigatory mechanisms in operation;

- PSNI Legacy Investigations Branch – not independent in terms of Article 2 ECHR
- PONI – which is under-resourced and limited in remit to complaints against the RUC
- The Legacy Inquest system is chronically underfunded and is woefully inept.

PUBLIC CONSULTATION ON LEGACY MECHANISMS

The GFA 1998 Declaration of Support states:

"2. The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all."

This is the third consultation on dealing with or policing the past in Northern Ireland following the attempts of the Consultative Group on the Past (CGP) and the Haass/O'Sullivan Proposals which lead to the Stormont House Agreement. It is the mechanisms agreed at the Stormont House Agreement which found the draft legislation currently out for public consultation.

The guiding principles of the Stormont House Agreement are:

1. Promoting reconciliation
2. Upholding the Rule of Law
3. Acknowledging and addressing the suffering of victims and survivors
4. Facilitating the pursuit of justice and information recovery
5. Human Rights compliance
6. To be balanced, proportionate, fair and equitable

Progress on legacy matters has been painfully slow. Further negotiations in 2015 broke down in large part because of a failure to agree an effective way to balance national security considerations on the part of the state and the right to information being sought by those family members who had lost loved ones during the conflict.

The Fresh Start Agreement of November 2015[7] failed to reach consensus on the legislative framework for dealing with the past but efforts continued (albeit on a stop-start basis) through 2016 and 2017. Finally the long awaited public consultation was launched by the Northern Ireland Office (NIO) in May 2018.

[7] See A Fresh Start: the Stormont Agreement and Implementation Plan
https://www.gov.uk/government/news/a-fresh-start-for-northern-ireland

PROPOSED INSTITUTIONS

The draft legislation proposes legal mechanisms and institutional architecture which will ensure that the British Government complies with its obligations under article 2 ECHR.

Historical Investigations Unit

1. The HIU is intended to take forward outstanding cases from the HET process, and the legacy work of the Police Ombudsman for Northern Ireland (PONI). A report will be produced in each case.
2. The HIU will consider all cases in respect of which HET and PONI have not completed their work, including HET cases which have already been identified as requiring re-examination. Families may apply to have other cases considered for criminal investigation by the HIU if there is new evidence, which was not previously before the HET, which is relevant to the identification and eventual prosecution of the perpetrator.
3. As with existing criminal investigations, the decision to prosecute is a matter for the DPP and the HIU may consult his office on evidentiary issues in advance of submitting a file.
4. When cases are transferred from HET and PONI, all relevant case files held by those existing bodies will be passed to the new body. In respect of its criminal investigations, the HIU will have full policing powers. In respect of the cases from PONI, the HIU will have equivalent powers to that body.
5. The UK Government makes clear that it will make full disclosure to the HIU. In order to ensure that no individuals are put at risk, and that the Government's duty to keep people safe and secure is upheld, Westminster legislation will provide for equivalent measures to those that currently apply to existing bodies so as to prevent any damaging onward disclosure of information by the HIU.
6. HIU will be overseen by the Northern Ireland Policing Board.
7. The necessary arrangements will be put in place to ensure the HIU has the full co-operation of all relevant Irish authorities, including disclosure of information and documentation. This will include arrangements for co-operation between criminal investigation agencies in both jurisdictions and arrangements for obtaining evidence for use in court proceedings. Where additional legislation is required, it will be brought forward by the Irish Government.
8. In order to ensure expeditious investigations, the HIU should aim to complete its work within five years of its establishment.

Independent Commission on Information Retrieval (ICIR)

The Independent Commission on Information Retrieval (ICIR), proposes to build on the precedent provided by the Independent Commission on the Location of Victims' Remains. The objective of the ICIR will be to enable victims and survivors to seek and privately receive information about the deaths of their next of kin.

1. Individuals from both the UK and Ireland will be able to seek information from the ICIR.
2. Once established, the body will run for no longer than 5 years.
3. The ICIR will be led by five members: an independent chairperson who may be of international standing and will be appointed by the UK and Irish Governments, in consultation with OFMDFM, together with two nominees appointed by the First and deputy First Minister, one each appointed by the UK Government and the Irish Government.
4. The ICIR's remit will cover both jurisdictions and will have the same functions in each. It will be entirely separate from the justice system. The ICIR will also be free to seek information from other jurisdictions, and both governments undertake to support such requests.
5. The ICIR will not disclose information provided to it to law enforcement or intelligence agencies and this information will be inadmissible in criminal and civil proceedings. These facts will be made clear to those seeking to access information through the body.
6. The ICIR will be given the immunities and privileges of an international body and would not be subject to judicial review, Freedom of Information, Data Protection and National Archives legislation, in either jurisdiction.
7. Legislation will be taken forward by the UK Government, the Irish Government and the Assembly to implement the above decision on inadmissibility.
8. The ICIR will not disclose the identities of people who provide information. No individual who provides information to the body will be immune from prosecution for any crime committed should the required evidential test be satisfied by other means.
9. The ICIR will be held accountable to the principles of independence, rigour, fairness and balance, transparency and proportionality.

Implementation and Reconciliation Group

An Implementation and Reconciliation Group (IRG) will be established to oversee themes, archives and information recovery. After 5 years a report on themes will be commissioned by the IRG from independent academic experts. Any potential evidence base for patterns and themes should be referred to the IRG from any of the legacy mechanisms, who may comment on the level of co-operation received, for the IRG's analysis and assessment. This process should be conducted with sensitivity and rigorous intellectual integrity, devoid of any political interference.

1. Promoting reconciliation will underlie all of the work of the IRG. It will encourage and support other initiatives that contribute to reconciliation, better understanding of the past and reducing sectarianism.
2. In the context of the work of the IRG, the UK and Irish Governments will consider statements of acknowledgement and would expect others to do the same.
3. The Body will be eleven strong. Publicly elected representatives will not be eligible for appointment. The chair shall be a person of independent and international standing and will be nominated by the First Minister and deputy First Minister. The other appointments will be nominated as follows: DUP - 3 nominees, Sinn Fein – 2 nominees, SDLP – 1 nominee, UUP – 1 nominee, and Alliance Party – 1 nominee and one nominee each from the UK and Irish Governments.
4. The UK and Irish Governments recognise that there are outstanding investigations and allegations into Troubles-related incidents, including a number of cross-border incidents. They commit to co-operation with all bodies involved to enable their effective operation, recognising their distinctive functions, and to bring forward legislation where necessary.

INQUESTS

Legacy inquests will continue as a separate process to the aforementioned institutions. Recent domestic and European judgments have demonstrated that the legacy inquest process is not providing access to a sufficiently effective investigation within an acceptable timeframe. In light of this, it was agreed that the Executive will take appropriate steps to improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements, however as we have seen from the Hughes judgement, this has not been the case.

Indeed the Government proposals intend to *prevent new* Legacy inquests being opened until the Historical Investigations Unit (HIU) completes it work. There are a number of existing Legacy Inquests which are to commence, and further a number of applications before the Attorney-General for Northern Ireland (AGNI) for fresh or resumed inquests in relation to Conflict related deaths.

The NIO proposals should honour the Stormont House Agreement by explicitly stating that legacy inquests will continue as a separate process to the HIU. And should be funded immediately.

CRITIQUE OF PROPOSED INSTITUTIONS

HIU

- *Appointment* The appointment of HIU Director in absence of The Executive Office will be by the Attorney General, Commissioner for Victims, the Head of the Civil Service & a nominee by the Department of Justice – there is no international role

- *Recruitment* Recruitment overall – around 300 staff in total – investigators section required with criteria preference to former police officers and with wording expressing preference to those who have investigative experience in "NI". This is unacceptable.

There is a commitment that at least one unit of the HIU would not include any officers who have, or could be perceived to have a work-related conflict of interest in respect of any HIU investigation. This would avoid replicating the fault of the PSNI HET in this respect and maintain the integrity of independence. This core commitment must be applied to the all staff including those analysts and 'gate-keepers' of intelligence access including sifting/filtering/redaction. Given our concerns regarding both the definition of National Security and the implicit interpretation of collusion, ***any*** recruitment of former members of the British Security Services including the RUC despite experience in Northern Ireland, must be resisted.

- *Accountability* In terms of the HIU we also must ensure that there is accountable oversight given its key criminal justice role. Suggestions are for using the best elements of existing processes such as Criminal Justice Inspectorate (CJI) and Her Majesty's Inspectorate of Constabularies (HMIC) and Police Ombudsman. We must ensure that there continues to be supervision by the Committee of Ministers.

- Families with completed HET reports will not be eligible for the HIU , though we believe that'd be the first judicial challenge as the HET were not Art 2 compliant

Specific points on the legislation

Clause 3 (5-7) of the draft Bill provides a statutory duty with the purpose or effect of compelling the HIU to employ significant numbers of former RUC officers. This is framed as a duty to ensure a balance of HIU officers who have previous Northern Ireland policing investigative experience with those who have such experience elsewhere - the draft Bill links this duty to the SHA principle that the approach to dealing with the past be 'balanced, proportionate, transparent, fair and equitable'. This proposal is disingenuous.

Schedule 15, Clause 11 of the draft Bill, which deals with the oversight of the work of the HIU, the Northern Ireland Policing Board would have the power to establish an Inquiry on any matter disclosed in a HIU report due to the gravity of matter or exceptional circumstances. However, in the draft Bill, Schedule 15, Clause 11(3), the Secretary of State may overrule the Policing Board if he/she determines that an inquiry should not be held in the interests of National

Security. The ability of the Policing Board to establish an inquiry on matters of gravity revealed or exceptional matters revealed in a HIU report should not be capable of being over-ruled by the Secretary of State based on National Security. ***This clause must be deleted.***

ICIR

- Independent Commission on Information Retrieval (ICIR) has no firewall in the current legislation and means families can go first to this process and then armed with that information find a way to pass it onto the HIU or guide them – this presents a major problem for non-state groupings to the conflict and thus their support for the overall process

OHA

- Oral History Archive (OHA) repository will fall under the remit of PRONI. This will be the deputy keeper, an appointed senior civil servant who will have autonomy, not the sponsoring departmental minister – the Dept. for Communities. This is not a great idea and should be totally independent of government departments and senior civil servants. This requires to be legislated for, enabling more independence.

IRG

- Implementation & Reconciliation Group (IRG) is the overarching group from which information from the other three groups will go to in order to report on themes, patterns, policies etc. However the IRG is restricted to analysing only information emerging from other three bodies and not from other source material such as domestic and international court rulings/judgments relevant to here, Stevens reports, Cory, De Silva, Bloody Sunday Inq., UN reports, families, even police reports and Police Ombudsman reports. The opportunity for the evidential base should be extended.

GENERAL OBSERVATIONS

Victims and Survivors

- No pension for the seriously injured or bereaved families – reparations – however, Victims Commissioner examining this area at request of NIO to include physically and psychological injuries for pension. Bereaved need included

- That there can be no hierarchy of victims and the Victims and Survivors (Northern Ireland) Order 2006 is unaffected by any implementation of these proposals

- That survivors must have recognition and a role – and that there claims to investigation be fulfilled in compliance with the obligations arising following a breach or violation of Article 3 ECHR in parallel to the law and jurisprudence in relation to investigation following a breach or violation of Article 2 ECHR. This would include all survivor of attempted murder, torture and serious Injury.

Inquest Funding

The importance of the inquest investigation being one mechanism of inquiry through which the British government can discharge its obligations under the ECHR cannot be dismissed and demands careful consideration as a widely accepted investigatory mechanism to discharge outstanding human rights obligations toward families of victims and survivors.

Following the request for funding for inquests made by the Lord Chief Justice of Northern Ireland, that funding should be immediately released so all Legacy inquests can now proceed unhindered

Litigation

The relationship between litigation and the mechanisms proposed under the NIO Consultation must be considered: there can be no limitation, ouster or closure, to legitimate challenges by way of litigation. To so would be a dangerous interference with the separation of powers which is core to the constitutional arrangements of the UK.

National Security will be an issue of conflict or contest between the HIU and the state. National Security has never been subject to statutory definition and therefore its interpretation is always subjective, and not constrained by temporal imitation.

"The term 'national security' is not specifically defined by UK or European law. It has been the policy of successive governments and the practice of Parliament not to define the term, in order to retain the flexibility necessary to ensure that the use of the term can adapt to changing circumstances"[8]

Any application of a National Security consideration within the context of the out-workings of the Legacy of the Conflict and in the context of the General Principles (transparency) and with regard to human rights compliance standards must be viewed through the prism that as the past determines the present and the future in and for Northern Ireland.

National Security in terms of operational matters is historic and its application hard to justify save in terms of protecting the right to life which can be achieved through a variety of mechanisms.

National Security cannot be used as an excuse for the tolerance of impunity or the legitimation of secret justice.

The deliberate leaking of draft legislation that would ultimately put the legacy mechanisms on a statutory footing confirmed that the UK government had inserted a 'national security' veto effectively torpedoing the entire legacy section of the agreement.

[8] www.mi5.gov.uk/about-us/what-we-do/protecting-national-security.htm

For their part the Irish government, through Minister Charlie Flanagan, described this as a '*smothering blanket*[9]*'* and that it was completely *'unacceptable'.*

In preliminary observations following a country visit to the jurisdiction the UN Special Rapporteur on Truth, Justice, Reparations & Non-Recurrence, Mr. Pablo de Greiff said[10],

'Although everyone must acknowledge the significance of national security concerns, it must also be acknowledged that particularly in the days we are living in, it is easy to use "national security" as a blanket term. This ends up obscuring practices which retrospectively, it is often recognized (unfortunately, mostly privately), were not especially efficient means of furthering security. In particular, national security, in accordance with both national and international obligations, can only be served within the limits of the law, and allowing for adequate means of comprehensive redress in cases of breaches of obligations.'

The government's insistence of a 'national security' veto is viewed as an attempt to trump victims' rights to know the truth concerning the killing of their loved ones

Key questions arise

- why won't the UK government provide full disclosure, in compliance with international obligations, having initially committed to doing so, and
- why would they have need to use a veto in killings carried out by non-state actors, as is the case currently concerning many of the 56 legacy inquests involving almost 100 deaths.

Indeed the European Commissioner for Human Rights, Nils Müznieks [11] noted the fact that the European Convention on Human Rights has a particular resonance here, stating specifically with regards to National Security:

"I urge the UK government and other parties concerned to return to negotiations on mechanisms for dealing with the past in the Stormont House Agreement, including setting up the Historical Investigations Unit, as soon as possible. ***Disagreements over the national security veto concerning disclosure of information need to be resolved****."*

[9] Irish News 27th November 2015

[10] In a speech delivered on November 18th as talks concluded for implementation of the SHA
Full statement of Preliminary Observations and Recommendations on the country visit to the UK:
http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16778&LangID=E

[11] "Forthcoming reforms on Human Rights law must not weaken protection" – Nils Muznieks 22nd January 2016
http://www.coe.int/en/web/commissioner/-/uk-forthcoming-reforms-to-human-rights-law-must-not-weaken-protection

NGO Relatives for Justice have observed regarding National Security and the institutions

"In the legislation it is not the case that families will have an automatic right to appeal. Families who will find themselves in such circumstances must first go through all the pre-stages of launching an appeal from trying to fund the case, which can be costly, to also then having to demonstrate unreasonable grounds by the Secretary of State for withholding the information and even then, if leave is granted to take a challenge, the process of adjudication will be conducted under the Justice and Security Act (JSA) and under closed material proceedings (CMP) with access only by special advocate lawyers approved by the UK. The reality is that lawyers who did/do represent families, or who tend to represent families, are by virtue of their endeavours excluded from the UK governments list of lawyers suitable for seeing such sensitive material.

Another point on the appeals procedure is that the court cannot quash the secretary of state's decision – it is a veto. If the judge finds in favour of the HIU director/family, the matter goes back to the Secretary of State to make a new decision. Families have 28 days to appeal the Secretary of State for withholding information about the killing of their relative yet the Secretary of State would have 60 days should they be asked to reconsider by a court that found withholding information unreasonable; this noting that any such judicial decision is not enforceable.

We think the real purpose of the legislation is to get secret courts centralized into legacy.

Therefore whilst the draft legislation does not overtly contain a statute of limitations (amnesty) for state forces the smothering blanket of 'national security' however does act as a de-facto form of extending amnesty/impunity not only to state forces but also their agents within non-state groupings to the conflict.

There is a concern that the 'national security' veto, described by Irish minister Charlie Flanagan, who helped negotiate the agreement that includes the HIU, as a 'smothering blanket to conceal the sins of the UK', will cover not only the actions of UK soldiers who killed citizens and intelligence agencies involved in killings through collusion, but also those very agents within illegal paramilitaries working for them."[12]

[12] Relatives for Justice https://relativesforjustice.com/consultation-on-dealing-with-the-past-launched-initial-thoughts/ (11th May 2018).

CIVIL LITIGATION AND CLOSED MATERIAL PROCEDURES

In the absence of state initiated mechanisms to give effect to the State's obligations under the Convention, many families have sought recourse to civil litigation as a means to access truth recovery and accountability.

Deprived of the opportunity of a criminal trial or an Inquest, the PSNI Chief Constable has sought disproportionate recourse to applications that disclosure obligation be heard in arcane circumstances whereby families lawyers are excluded during a Closed Material Procedure, which represents a *'carve out from basic principles of equality of arms and open justice'*[13] by allowing courts to consider any material, the disclosure of which would be "damaging to the interests of national security".

Whereas our submission in February of this year, deals with the genesis and facts of CMP in great deal, a summary will advise that the original intention of Parliament on review of Hansard was that this repressive anti-terror legislation, was the new world order response to the 'War on Terror'.

However the facts of the matter in practice are somewhat different to the lofty Parliamentary intentions, and as is often the case, repressive measures are often invoked immediately in our jurisdiction to preserve the interests of the State in concealing their involvement in murder and other crimes. It is a fact that in the 5 years since the inception of this legislation, only 41 such applications have been made anywhere in Britain, yet 15 relate to matters in the north, and NONE of them relate to the War on Terror.

15 out of the 41 applications have been made in relation to the British Government's intelligence interests in relation to their role in the conflict in Ireland, 36%.

[13] Turning out the lights? The Justice and Security Act 2013 – Tom Hickman. .
http://ukconstitutionallaw.org/2013/06/11/tom-hickman-turning-out-the-lights-the-justice-and-security-act-2013/

CONCLUSIONS

In April 2016, we concluded our meeting with the following observations and request:

Starved of resources, bona fides cooperation, openness, transparency and subject to repeated interference with independence, the Legacy infrastructure in the North of Ireland, such as it currently is, has consistently failed to execute the judgments of the European Court in spirit as well as letter.

Violations of treaty obligations at the international level cannot be remedied effectively unless they are effectively remedied at the domestic level. Victims and their families' demands for full truth and accountability cannot remain insulted ad nauseam. Such insults defeat the very purpose of the ECHR itself.

The Commission and the Agencies of the European parliamentary infrastructure are therefore called upon to raise awareness of the serious concerns amongst Member State's with the purpose of encouraging the UK to urgently discharge its obligations under Article 2 of the ECHR, to promote:

a. Public confidence and trust in the Rule of Law,

b. Integrity between Member States regarding the Council of Europe's standards requiring the prompt and effective execution of judgements.

Whereas the above sentiments are as relevant now, as they were two years ago, as outlined above, we are in the midst of an emergency. We would of course, welcome you back to Belfast to observe and engage with key stakeholders in our justice system, including we would respectfully submit, those are denied access to justice before our courts. We further suggest that you might consider some further practical steps.

a. Seek prioritisation of the Kelly & Others v. the United Kingdom (application number 30054/96) [2001] ECHR 328 before the Committee of Ministers;
b. Ask that the Council of Europe endorse or publicly call for increased damages for consistent breaches of the convention;

Prioritisation of Kelly & Others v. the United Kingdom [2001] ECHR 328.

The system of the Committee of Ministers allows for a decision to be taken to prioritise a case. This procedure is known as the 'enhanced supervision procedure' which in essence enables priority attention to some specific cases. Given the fact that Kelly & Others v. the United Kingdom (application number 30054/96) [2001] ECHR 328 identified systemic failings within the Coronial investigation, yet nearly 17 years on and an effective inquest has not been held requires prioritisation. The failing is incumbent upon the failure to properly resource the Inquest system and has given rise to the victims having to issue fresh domestic proceedings to seek compliance with the Article 2 ECHR procedural obligation.

The criteria for placing a case under the enhanced procedure is that the case requires urgent individual measures, or that the case has revealed important structural or complex problems. We respectfully submit that Kelly is such a case.

If a case is placed in the enhanced supervision procedure, the Secretariat will engage in more intensive and pro-active discussions with the respondent state which can result in expert assistance in the preparation of action plans, seminars to discuss the underlying issues. These cases will ultimately always be included in the Committee's human rights meeting agenda.

The index ECtHR judgment is now some 17 years old, and as such the UK have been allowed to be in perpetual breach continuously throughout that period without any recourse. The collective and corrosive nature of the crises as outlined above, leaves many observers clear in their opinion, that the UK government are simply ignoring the judgment of the Court in the *McKerr* group of cases.

Increased Damages

It is an established fact that the ECtHR does not endorse significant damages (as just satisfaction) save for exceptional cases. However, the Court has on a number of occasions in recent years increased the ceiling where there is evidence of continuous and flagrant breaches.

Given the fact the domestic Court is currently adjudicating on this issue, a statement to this effect from the Commissioner would be of persuasive assistance. Enhanced damages are now necessary to ensure that the respondent UK state retreats from the current position whereby it is comfortable to be in perpetual breach of the Convention with no threat of any substantial or significant award of damages being made against them.

This approach was recognised in the decision in ***Vermeire*** *(12849/87)*, which arose out of a failure to execute the ***Marckx*** judgment and the refusal of the Belgian courts to compensate for the absence of measures by the legislature. In the ***Vermeire*** case, the Court did not understand why the Belgian courts were refusing to enforce a rule about which "*there was nothing imprecise or incomplete."* In an almost identical position, there is nothing unclear about the numerous requests for the UK state to put in place the appropriate prerequisites of an Article 2 compliant inquest system.

"The freedom of choice allowed to a state as to the means of fulfilling its obligation under Article 53 cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed, to the extent of compelling the Court to reject in 1991, with respect to a succession which took effect on 22 July 1980, complaints identical to those which it upheld on 13 June 1979."

This can be directly read across to the current situation in our jurisdiction.

Finally, the Committee of Ministers retain the power under article 8 of the Statute of the Council of Europe to seek the UK's exclusion from the Convention for the flagrant and consistent breaches.

SPECIFIC CASE – THE ARRESTS OF TWO JOURNALISTS – 31st August 2018

A key case which we have adverted to above, relates to the Police Ombudsman's investigation into the murder of 6 men in Loughinisland, County Down in 1994. The PONI report highlighted shocking depths of state collusion in mass murder. That the police had elevated the eminence of intelligence to a higher importance than the rights of murder victims.

Such was the international resonance of the report, an Oscar winning documentarian Alex Gibney was moved to make a documentary about the atrocity, and the role of the state in the murders and the subsequent cover up. Gibney worked closely with Belfast based journalists, Trevor Birney and Barry McCaffrey to produce the film, *No Stone Unturned.* It was received with the highest box office for a cinema release for any documentary in the history of the north, although local broadcasters have refused to screen the film.

The families are proud of the film, and the sensitive yet hard hitting manner in which it documents the totality of their experience. Indeed the families consider themselves privileged that the facts of their case are crystallised so professionally and comprehensibly so as to be the exemplar means by which the state's policy of collusion can be instructed to the uninitiated observer.

The film names the suspects arrested but ultimately protected by the police. The families know that the film strikes a raw nerve in the security establishment and are proud that they benefit at least from this empowerment after years of being without a voice. The film has provided them with a loud and unimpeachable voice.

It was with a deep sense of hurt that the families woke to hear the news on Friday 31st August 2018, that Birney and McCaffrey had had their homes raided and that they had been arrested.

The families had indeed hoped that the film would inspire and motivate arrests. Those of the murderers who had ruined their lives in June 1994, as the film demonstrated that there exists ample evidence to arrest and prosecute them.

An Attack on The Principle of Free Speech

"*Quis custodiet ipsos custodes*," written by Jevenal a couple of thousand years ago. It means *"Who will guard the guards themselves,"* and the idea was also explored by Plato, who is associated with the need to speak truth to power.

It is a centuries-old question that when we give authority and power to people to order our society, we need to ask who watches over them? In a modern democracy, where official checks

and balances often mean the system regulating itself, the value of a robust free press, is never more important.

Churchill himself said

"A free press is the unsleeping guardian of every other right that free men prize; it is the most dangerous foe of tyranny"

The arrests of Trevor Birney and Barry McCaffrey was nothing more or less than a crude attack on the personal lives and work of two journalists who exposed an uncomfortable truth.

The film No Stone Unturned, represents the pinnacle of the two men's distinguished careers in journalism. They were motivated to excavate the unvarnished truth, which had been denied to the families of those murdered in Loughinisland, for decades.

That the only investigative actions arising from the facts exposed in the film, are the arrests of those who exposed, rather than those who are suspected of committed the murders, is a matter of public importance.

These men are not thieves, as alleged. They have not handled stolen goods. They have exposed the facts of a case that had been buried for so long, and try as the police might, they cannot arrest the truth.

Journalists must be free to investigate and expose issues of public concern. Few subjects could be of more significant public concern than the mass shooting of civilians and the alleged collusion of the police in assisting those responsible to evade justice.

It is a genuinely held by concern, that these arrests and the search of the offices and homes of these men, are an attack on public service journalism, much less a vicious attack on their reputations.

The company is one of the most successful independent documentary companies in the UK or Ireland, having made films for CNN, Netflix, Amazon and HBO. No other company has done more to create jobs and inward investment. Mr Birney has been nominated for an Emmy Award at a ceremony to be held in New York City on 1st October[14]. Barry McCaffrey was awarded the Overall Justice Media Award by our local Attorney General in the Attorney General's Justice Media Awards[15].

[14] http://www.northernirelandscreen.co.uk/news/northern-ireland-film-elian-nominated-emmy-award/
[15] https://www.thedetail.tv/articles/justice-reporting-award-presented-to-the-detail-s-barry-107c0f55-50e0-45aa-b3f4-a76a6dd69449

NUJ CODE OF CONDUCT

The NUJ code of conduct was first established in 1936 and it is the only ethical code for journalists written by journalists. The code is part of the union rules; members support the code and strive to adhere to its professional principles. It states:

"A journalist at all times upholds and defends the principle of media freedom, the right of freedom of expression and the right of the public to be informed."

The union's code also compels journalists to do their *"utmost to correct harmful inaccuracies"* and it repeatedly highlights the importance of the *"public interest"*. Furthermore, it calls on journalists to protect the identity of their sources who supply material and information in confidence.

In addition to the code, the union strongly believes that it is the duty of journalists to hold the powerful to account.

The chilling effect on journalism of these arrests is impossible to quantify - we cannot know how many whistle blowers will decide not to contact journalists for fear of their identity becoming known. Some of the most important revelations uncovered by journalists in UK history may never have come to light and the wrongdoing uncovered therefore would have stood little chance of ever being rectified if the current climate had been in place

Legal Context

It has been established in ECHR jurisprudence that there is a right to the truth in regard to human rights violations[16] .

Article 10 (Freedom of Expression) of the European Convention on Human Rights protects the right of journalists to collect and use even secret information. In a recent case[17], the European Court of Human Rights said:

"The press exercises a vital role of 'public watchdog' in imparting information on matters of public concern… In previous cases concerning gathering and disclosure by journalists of confidential information or of information concerning national security, the Court has consistently considered that it had been confronted with an interference with the rights protected by Article 10 of the Convention."

The police have arrested those who have exposed the truth, but they cannot arrest the truth, yet their reckless actions have deepened a crisis in community confidence in policing.

[16] El-Masri v Former Yugoslav Republic of Macedonia (2012) [GC], application no. 39630/0, para. 191.
[17] GÎRLEANU v. ROMANIA (Application no. 50376/09), 26 June 2018