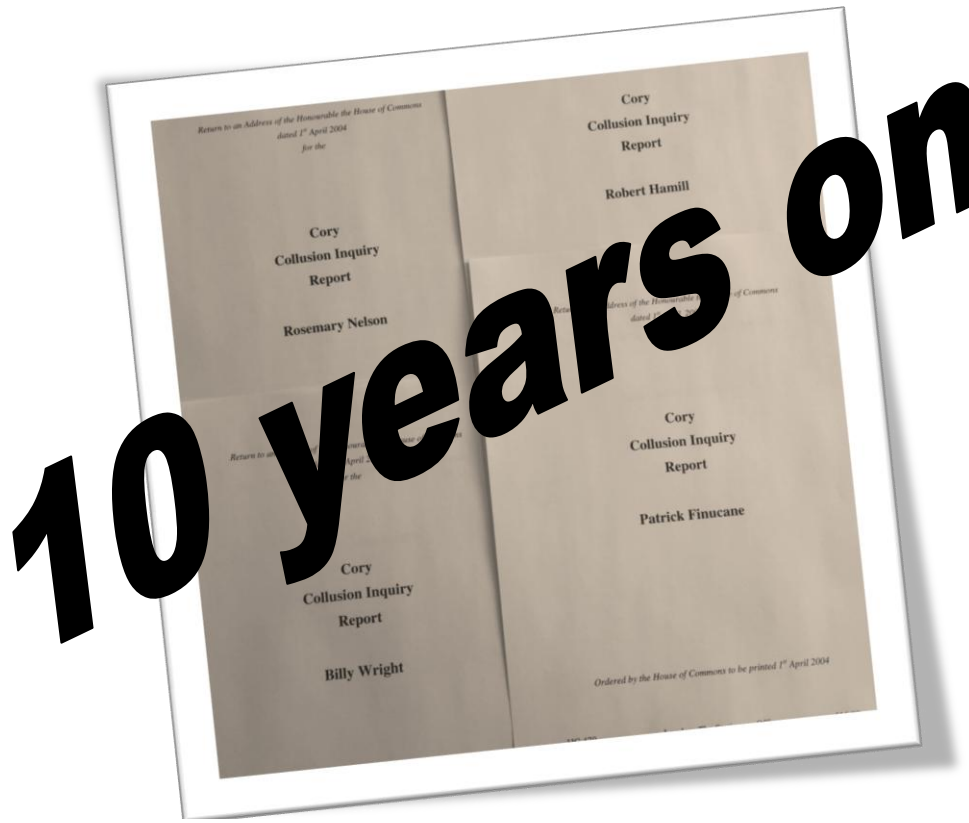
CAJ
Committee on the Administration of Justice
Promoting Justice / Protecting Rights

Ulster University

TJI
Transitional Justice Institute

Covert Policing and Ensuring Accountability: Ten Years on from the Cory Collusion Inquiry Reports, where now?



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Introduction

Synopsis

The conference took place on the 1 July 2014 in the Ulster University Belfast Campus and was organised by CAJ in partnership with the Ulster University Transitional Justice Institute (TJI).

The conference explored the themes of covert policing, particularly the running of agents/informants and use of intelligence, and address contemporary and historic questions of human rights compliance and developing a framework to render such practices lawful and accountable.

The discussion covered perspectives on past covert policing policies in Northern Ireland, and the extent to which they facilitated 'collusion'. It highlighted the powers of current accountability bodies including the Police Ombudsman and Policing Board, the effectiveness the post-Cory public inquires and explored questions of legal-ethical frameworks to regulate the use and conduct of informants and agents. The conference featured presentations on the covert policing controversies in London and Germany, relating to the Stephen Lawrence family and 'National Socialist Underground' cases respectively. It also covered the growing issue of the use of intelligence evidence in 'exceptional' court proceedings and the growth of the 'national security' doctrine, which places many aspects of covert policing, past and present, beyond the reach of accountability bodies.

Background

2014 marks ten years from the publication of Justice Cory's Collusion Inquiry Reports, yet controversy over collusion and seeking to ensure covert policing is conducted within the law and is made accountable rumbles on. Recent revelations in England about the undercover activities of police in relation to the Lawrence family (for which the Home Secretary has announced an inquiry) and the infiltration of environmental protestors, have reopened discussion on the limitations of the Regulation of Investigatory Powers Act 2000 (RIPA), and how it does little to address the key question of regulating *the permitted conduct* of informants and agents. This in particular includes the extent to which informants are to be directed, facilitated or tolerated in involvement in criminal offences, including those constituting human rights abuses. Recent years have also witnessed the growth of a 'national security' doctrine, whereby the powers of accountability bodies are curtailed in their oversight of matters deemed to fall within this undefined concept. The use of intelligence as secret evidence in exceptional court processes has also grown both internationally and at home, with the Justice and Security Act 2013 extending 'Closed Material Procedures' across a raft of civil proceedings.

The post-Cory public inquires, the de Silva Report, declassified archives, the Police Ombudsman's Operation Ballast reports, have all provided further information on the manner in which agents and informants were run in the past.

Documents declassified by de Silva highlighting the *modus operandi* as "*placing/using informants in the middle ranks of terrorist groups. This meant they would have to become involved in terrorist activity and operate with a degree of immunity from prosecution*". Yet there is no exemption in human rights law allowing informants to be involved in killings or other human rights violations, and it is not possible to operate a system which permits this within the law.

The Patten Commission recommended significant reform of covert policing including the downsizing, deinstitutionalisation and integration of RUC Special Branch within the PSNI. Patten also recommended the establishment of a "*Commissioner for Covert Law Enforcement in Northern Ireland"* overseeing surveillance and the use of informants, "to ascertain if covert policing was being used within the law and only when necessary" and the adoption of published legal and ethical guidelines on the handling of informants. This Commissioner was never established, and a manual on handling informants, whilst adopted has not been published. Nevertheless significant reforms have taken place within the PSNI, including following the Police Ombudsman's Operation Ballast investigation, the introduction of a process whereby the involvement of an informant in a crime over and above membership of a proscribed organisation requires an authorisation from an Assistant Chief Constable.

However, from 2007 the primacy for covert 'national security' policing in Northern Ireland was switched to MI5 which sits entirely outside the post-Patten policing accountability bodies, and against whom complaints can only be directed to the Investigatory Powers Tribunal, a court which meets and makes judgements in secret, and never appears to have upheld a single complaint against the agency. A 2012 CAJ report '*The Policing You Don't See'* scrutinised this issue and uncovered that key accountability commitments relating to the MI5 arrangement had not even been implemented. This included the publication of high level Memorandums of Understanding (MoU) on how the agency would operate. Documents CAJ did obtain included however a MoU on national security matters and the Policing Board**.** This document, rather than being a safeguard, contains a list of restrictions on the Policing Board's role including listing the types of information the Chief Constable should not tell the Policing Board, even in confidential sessions. The Policing Board, in addition to rebuking this MoU which they had never formally entered into and regarded as having no legal standing, responded to the CAJ report by taking forward further work examining the accountability framework for covert policing.

Northern Ireland does have one of the most powerful independent Police complaints bodies in the world, yet at the outset of 2014 questions were raised about the remit of the organisation to examine covert policing issues, and in particular complaints of informant recruitment. Notwithstanding some restrictions on the Office introduced by RIPA, the Ombudsman has stated that there is no area of police misconduct that it could not examine. There will of course be limitations when covert operations involve MI5, as the Ombudsman has no standing to investigate the agency. In 2013 the UK 'National Crime Agency' (dubbed the British FBI) was also established. Following concerns from CAJ and others that the NCA was to operate outside the post-Patten accountability arrangements, and instead be answerable to the Home Secretary, the Northern Ireland Executive did not agree to let the

NCA operate in Northern Ireland with full police powers. Ministers confirmed however the NCA could still operate in Northern Ireland using its covert policing powers under RIPA, and the NCA become operational here without any accountability to either the Policing Board or the Ombudsman.

The ethics and operations of covert policing have been global news following the Snowden revelations in relation to mass surveillance, and there are calls for tighter regulatory frameworks to ensure covert agencies operate within human rights law. This conference addressed the same issues in relation to the use of intelligence and activities of agents, at a time when both past and present covert policing practices remain among the most controversial area of policing in human rights terms.

Conference Programme

Opening: Rory O'Connell, Ulster University, Transitional Justice Institute (TJI)

Session I *Collusion and Covert Policing in NI, where now?*

Chair Louise Mallinder Ulster University, TJI

Paul O'Connor, Director Pat Finucane Centre
Deadly intelligence and the rule of law

Daniel Holder, Deputy Director, CAJ
Covert policing and collusion, running informants and the human rights framework

Cheryl Lawther, Queen's University Belfast
Official and Security Force Perspectives on Collusion

Session II *Covert policing and accountability outside NI, where now?*

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Suresh Grover, Campaign Opposing Police Surveillance
Undercover operations of the Metropolitan Police

Fionnuala Ní Aoláin, Associate Director and Professor TJI
The Intersection of Intelligence with Exceptional Courts, Military Commissions and Procedural Exceptionalism

Carsten Ilius – lawyer
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Session III *The oversight mechanisms*

Chair Brian Gormally, Director CAJ

Dr Michael Maguire, Police Ombudsman for Northern Ireland,
The Police Ombudsman's oversight of covert policing

Yasmine Ahmed, Director, Rights Watch UK
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Ryan Feeney, Independent Member, Northern Ireland Policing Board Performance Committee
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Covert Policing and Ensuring Accountability
Foreword to Conference Report

The ethics and operations of covert policing have been global news following the Snowden revelations in relation to mass surveillance, and there are calls for tighter regulatory frameworks to ensure covert agencies operate within human rights law. This conference aimed to address the same issues in relation to the use of intelligence and activities of agents, at a time when both past and present covert policing practices remain among the most controversial area of policing in human rights terms.

We all accept that covert or secret policing has a significant part to play in combating organised crime and terrorism. However, it can also be highly dangerous with the capacity to corrupt police services, undermine the rule of law and corrode trust in state institutions. This happens when police officers fall into the temptations which we may think are endemic to the role: protecting valued informants rather than the public, creating conspiracies to entrap suspects, planting evidence and soliciting false evidence and using counter-gangs against what is perceived as the main enemy.

The reality is that crimes committed by police officers undermine the rule of law much more than crimes committed by criminals, terrorists or whoever. If those who are tasked with upholding the rule of law – and are entrusted with the monopoly of the legal use of force to do it – in fact bend and break the law, the whole structure of the social contract can fall apart. Human rights depend on the rule of law for their codification, interpretation and enforcement and that is why CAJ as an organisation focuses on state crimes and their cover-up.

It is now beyond doubt or argument that during the conflict in Northern Ireland, RUC Special Branch and other secret units engaged in collusion which ranged from the deliberate and targeted use of paid killers, through facilitation and “turning a blind eye” to murder and other crimes to organised cover-ups and failure to properly investigate. Some people are still in various forms of denial but the evidence is now incontrovertible. We should also be clear that when people today try to delay investigative processes, when proper mechanisms are not established, when evidence is destroyed, when witnesses develop selective amnesia or retired police officers refuse to cooperate with enquiries, these are examples of contemporary collusion with past crimes.

Secret policing threatens the rule of law in many countries as the various contributions to this conference demonstrated. International experience shows ideological and practical collusion with neo-Nazi killers in Germany, secret surveillance of victims motivated by racism and organisational protectionism in England and, in many jurisdictions, secret policing leading to secret courts and the corruption of principles of justice.

In Northern Ireland, however, the game is bigger than the general protection of the rule of law in a democratic society because it is clear to all of us that proper oversight and accountability are vital for the continuing peace process as well. The stakes are high – it is not impossible for this place to go back into conflict – if we don't get this right the peace process can be threatened. So we need to examine and test the effectiveness of existing accountability mechanisms, the extent to which they may be undermined by the national security doctrine for example and where there are gaps.

These preoccupations determined the structure of this conference. The first set of contributions examined the evidence for state crimes and collusion in Northern Ireland. The second session heard reports from England, Germany and an international perspective. The final session critically examined some of the accountability mechanisms in Northern Ireland with the contribution of some of those directly involved.

In CAJ we see the process of illuminating past crimes and collusion, opposing all forms of cover-up and examining and testing contemporary accountability as a pro-policing and pro-rule of law agenda. We think it is no contribution to the concept of professional policing to cover up bad policing and we believe that accountable, human rights compliant policing is the best possible policing. The conference reported on here was a significant contribution to this process.

Brian Gormally,
Director of CAJ

Session I

Collusion and Covert Policing in NI, where now?

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Audience question and answer session

Deadly intelligence and the rule of law

Paul O'Connor, Director Pat Finucane Centre

Paul O'Connor is Project Co-ordinator for the Pat Finucane Centre. The Pat Finucane Centre is a non-party political, anti-sectarian human rights group advocating a non-violent resolution of the conflict on the island of Ireland. We believe that all participants to the conflict have violated human rights. The PFC asserts that the failure by the State to uphold Article 7 of the Universal Declaration of Human Rights, "all are equal before the law and are entitled without any discrimination to equal protection of the law", is the single most important explanation for the initiation and perpetuation of violent conflict. It is therefore implicit to conflict resolution that Article 7 be implemented in full. The PFC campaigns towards that goal.

In the Pat Finucane Centre, we provide non party political work on behalf of families, irrespective of their beliefs and in complete confidence. We have has six full time workers, three in Derry, two in Armagh and one in Dublin. We provide an advocacy and support service to families bereaved as a result of conflict. We believe the state's failure to respect human rights and uphold the rule of law was the single greatest cause of the conflict. All parties to the conflict republican, loyalist and state forces committed human rights violations and killed unarmed civilians in our view.

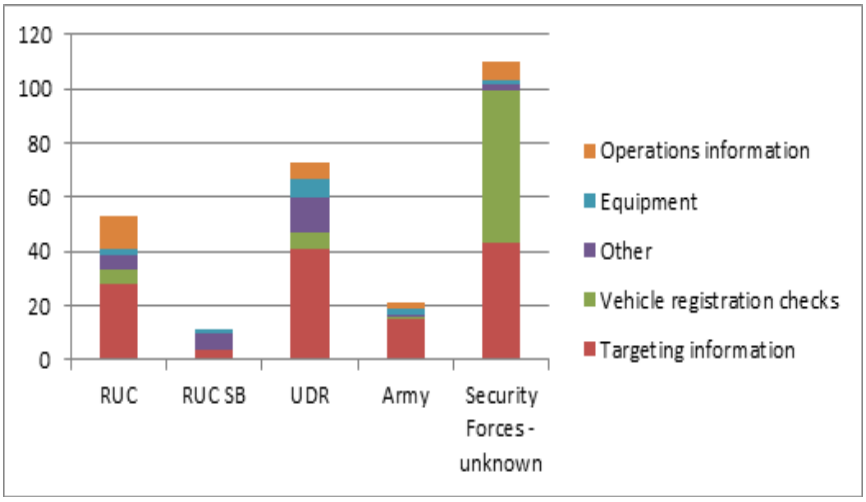
What I want to talk about today is the broad issue of deadly intelligence and the rule of law, 10 years on from Cory.

What is deadly intelligence?, Well, its intelligence that could and should be used to save lives but isn't, or intelligence which deliberately puts lives at risk - smear propaganda, for instance as was the case with Pat Finucane, where he was smeared before his death, and they said he was an IRA lawyer, or to actually facilitate murder where files are directly passed on to loyalist paramilitaries.

We had the de Silva review in December 2012, which was not one of the Cory recommendations. The Cory recommendations were for a full public inquiry into Pat Finucane's case, and still we had the de Silva review. It wasn't a public inquiry, there was no family involvement or co-operation, it breached Judge Cory's recommendations, and it

came to the view that there was no 'over arching state conspiracy' in the murder of Pat Finucane.

Notwithstanding these flaws the de Silva review did reveal damning new evidence. According to de Silva between January 87 and December 89 there were 270 separate incidents of security force leaks to loyalist paramilitaries. According to the MI5, 85% of the intelligence material in the hands of the UDA came from security force sources.



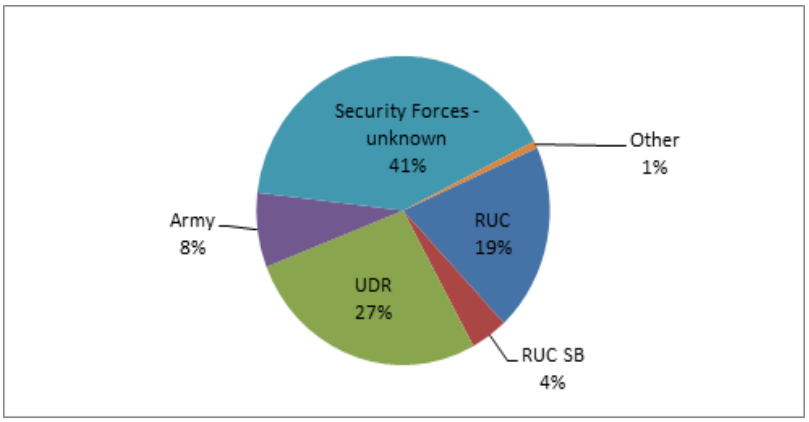
Instances of security force leaks to loyalist paramilitaries by origin and type, 1987-89"

(*Source – The Report of the Pat Finucane Review, The Rt Hon Sir Desmond de Silva QC, December 2012 Vol 1, 253.)*

The question I want to ask today is: Is that surprising, why did that happen, where did this come from?

If we look at de Silva, this is the figure in his own report, we see the sources of these intelligence leaks, the RUC, the RUC Special branch, UDR, Army and unknown security forces.

If we look at this pie chart, we can see that 41% of the leaks – the source was unknown but came from within the security forces and by far the largest identifiable group of leaks came from within the UDR, 27%, this is according to his own report on page 254.



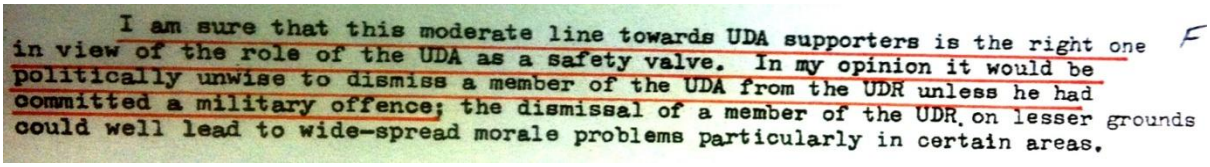
Origin of security force leaks, 1987-89

(Source – The Report of the Pat Finucane Review, The Rt Hon Sir Desmond de Silva QC, December 2012 Vol 1, 254)

So what do declassified documents tell us about the relationship between the British Army and government, and loyalist paramilitaries, which goes to the heart of the de Silva report and I think goes to the heart of the Cory inquiries.

According to the academic, Hugh Bennett, the British Army Commander General Harry Tuzo, as early as 1972, suggested that the growth of loyalist paramilitaries should be quietly promoted. He said, vigilantes whether UDA or not should be discreetly encouraged in protestant areas to reduce the load on the security forces.

In 1972, a memo from British Army Headquarters about the issue of joint membership of UDA and UDR, came to the view – '*I am sure that this moderate line towards UDA supporters is the right one – in view of the role of the UDA as a safety valve It would be politically unwise to dismiss a member of the UDA from the UDR unless he had committed a military offence'*.


I am sure that this moderate line towards UDA supporters is the right one in view of the role of the UDA as a safety valve. In my opinion it would be politically unwise to dismiss a member of the UDA from the UDR unless he had committed a military offence; the dismissal of a member of the UDR on lesser grounds could well lead to wide-spread morale problems particularly in certain areas.

Memo from British Army Headquarters, 1972

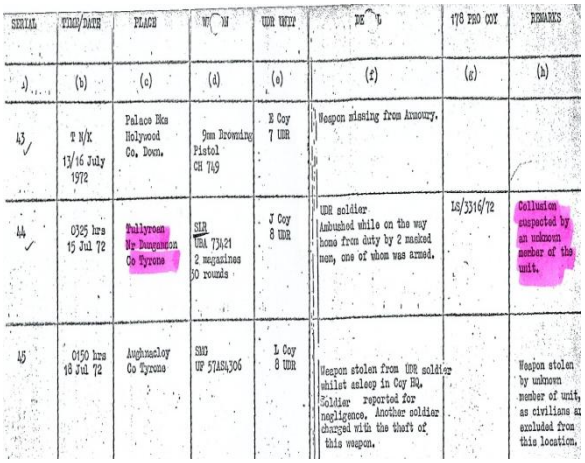
Again in July 1972, we found a freudian slip in different documents, where according to an Army Headquarters report, '*one important, but unspoken function of the UDR is to channel in a constructive and discipline directions protestant energies that might otherwise become disruptive. For these reasons it was felt that it would be counter- productive to discharge a UDR member solely on the grounds that he was a member of the UDA.'*

Now in the summer of 72, when this memo was written, in July and August 1972, those of us, like myself, who are old enough to remember, will know that there was a loyalist assassination in Belfast virtually every 2nd night , and the UDA was heavily involved in these assassinations.

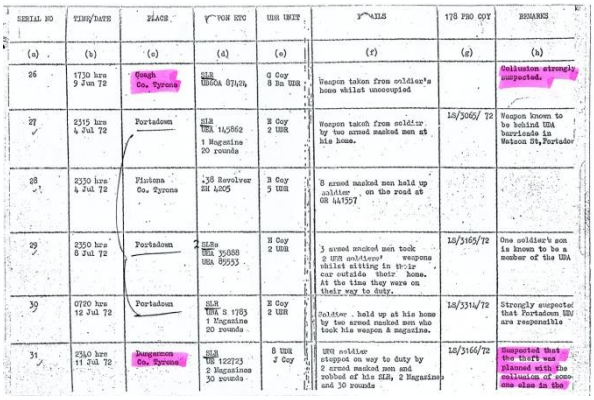
Later that year in November 1972, a memo from the Ministry of Defence in London said '*an important function of the UDA'* is to channel in a constructive and discipline direction protestant energies that might otherwise become disruptive. Was this a freudian slip - UDR or UDA - or did they see no difference?

At this stage, in 1972, the British army was routinely using the term 'collusion' in documents. Many people have since said that this is simply republican propaganda, it only emerged in the 80's and 90's. But as early as 1972 in reports from the British Army, we see lists and lists of weapons 'lost'. We have many more of these lists - all from the public records office. We see one, that is highlighted in the document where an SLR has been stolen in Coagh in Co. Tyrone according to the army report– '*collusion strongly suspected'*.

In Dungannon another SLR goes missing along with rifle magazines, it is '*suspected that the theft was planned in collusion with someone else in the regiment.'*



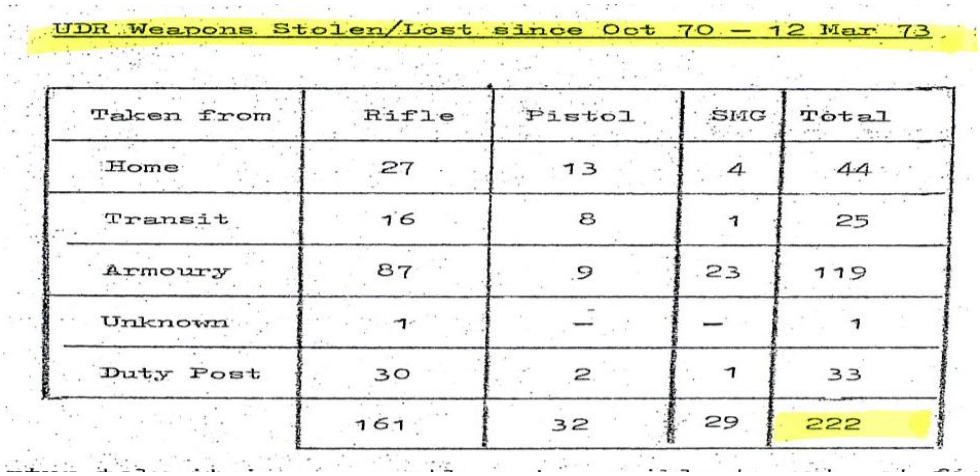
SERIAL	TIME/DATE	PLACE	WEAPON	UDR UNIT	DETAILS	178 PRO COY	REMARKS
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
43	2 P.M/X 13/16 July 1972	Palace Bks Holywood Co. Down.	9mm Browning Pistol CH 749	E Coy 7 UDR	Weapon missing from Armoury.		
44	0325 hrs 15 Jul 72	Fullyrean Nr Dungannon Co Tyrone	SLR UDA 73421 2 magazines 30 rounds	J Coy 8 UDR	UDR soldier Ambushed while on the way home from duty by 2 masked men, one of whom was armed.	18/3316/72	Collusion suspected by an unknown member of the unit.
45	0150 hrs 18 Jul 72	Aughnaloy Co Tyrone	SMG UF 57181306	L Coy 8 UDR	Weapon stolen from UDR soldier whilst asleep in Coy HQ. Soldier reported for negligence. Another soldier charged with the theft of this weapon.		Weapon stolen by unknown member of unit, as civilians are excluded from this location.



SERIAL NO	TIME/DATE	PLACE	WEAPON ETC	UDR UNIT	DETAILS	178 PRO COY	REMARKS
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
26	1730 hrs 9 Jun 72	Cough Co. Tyrone	SLR UDCOA 87424	C Coy 8 Bn UDR	Weapon taken from soldier's home whilst unoccupied		Collusion strongly suspected.
27	2315 hrs 4 Jul 72	Portadown	SLR UDA 145862 1 Magazine 20 rounds	B Coy 2 UDR	Weapon taken from soldier by two armed masked men at his home.	18/3065/ 72	Weapon known to be behind UDA barricade in Watson St, Portadown
28	2330 hrs 4 Jul 72	Plateau Co. Tyrone	.38 Revolver RH 4805	B Coy 9 UDR	8 armed masked men held up soldier on the road at GR 141557		
29	2350 hrs 8 Jul 72	Portadown	2 SLRs UDA 35088 UDA 85553	B Coy 2 UDR	3 armed masked men took 2 UDR soldiers' weapons whilst sitting in their car outside their home. At the time they were on their way to duty.	18/3165/72	One soldier's son is known to be a member of the UDA
39	0720 hrs 12 Jul 72	Portadown	SLR UDA S 1783 1 Magazine 20 rounds	B Coy 2 UDR	Soldier held up at his home by two armed masked men who took his weapon & magazine.	18/3314/72	Strongly suspected that Portadown UDA are responsible
31	2340 hrs 11 Jul 72	Dungannon Co. Tyrone	SLR UDR 122723 2 Magazines 30 rounds	8 UDR J Coy	UDR soldier stopped on way to duty by 2 armed masked men and robbed of his SLR, 2 Magazines and 30 rounds	18/3166/72	Suspected that the theft was planned with the collusion of someone else in the

British Army Reports from 1972 showing collusion was suspected in the theft of weapons

You see during this period a letter from Army Headquarters in Northern Ireland, titled 'Weapons lost between October 1970 and March 1973' a total of 222.



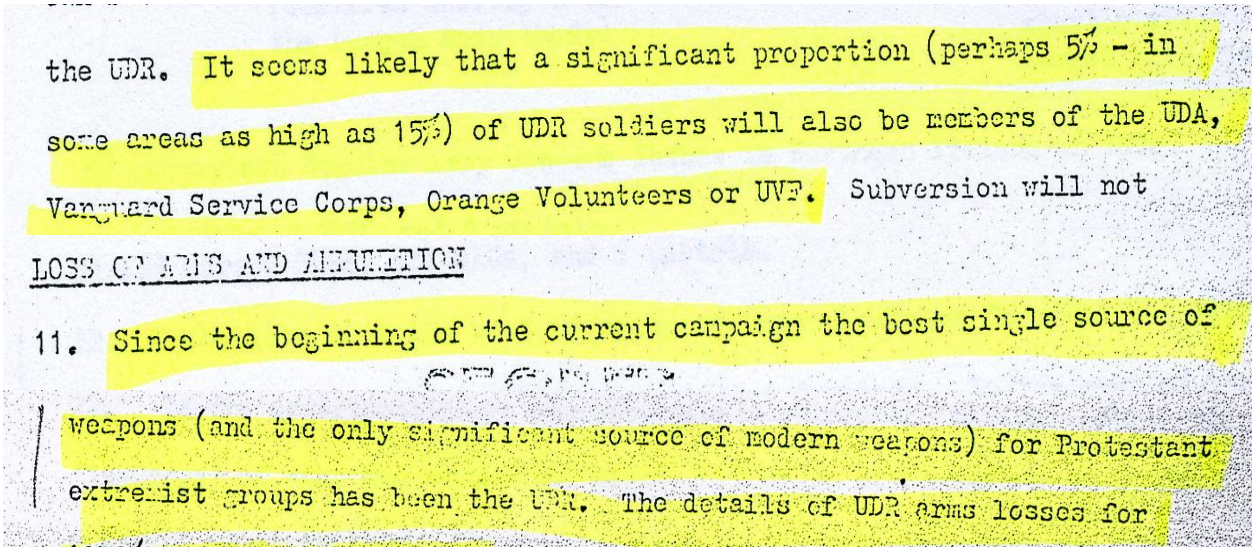
UDR Weapons Stolen/Lost since Oct 70 — 12 Mar 73

Taken from	Rifle	Pistol	SMG	Total
Home	27	13	4	44
Transit	16	8	1	25
Armoury	87	9	23	119
Unknown	1	—	—	1
Duty Post	30	2	1	33
	161	32	29	222

What we also see are the names of people who were subsequently killed and injured with the same weapons. So they were very well aware of what was actually happening.

In 1973, the British Army prepared an intelligence document called Subversion in the UDR, it was prepared for the Joint Intelligence Committee in London and for the Prime Minister - it was a 20 page report.

According to the report,
'it seems likely that a significant proportion perhaps 5%, in some areas it says 15% of UDR soldiers would also be members of the UDA, Vanguard Service Corp, Orange volunteers or UVF' and that they 'were the *only significant source of modern weapons for protestant extremists groups.'* They were very aware of what was happening.



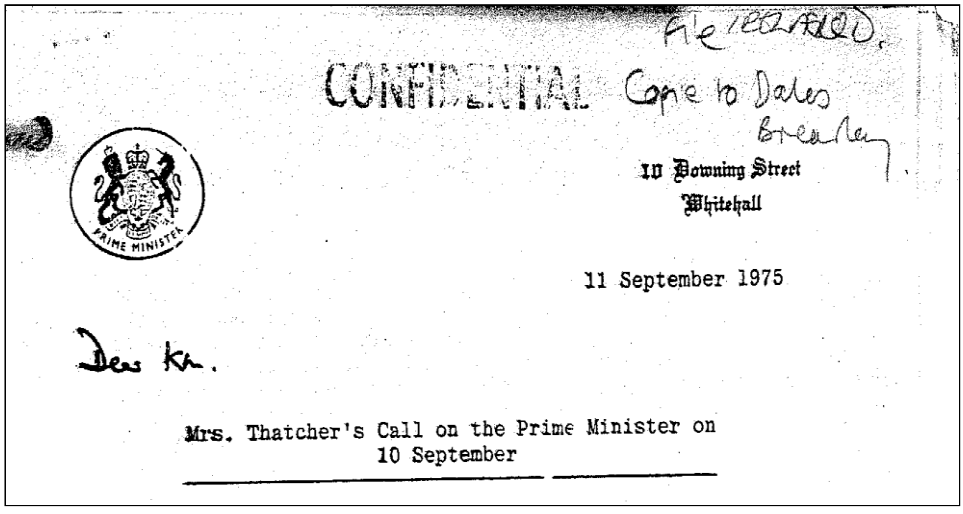
the UDR. It seems likely that a significant proportion (perhaps 5% - in some areas as high as 15%) of UDR soldiers will also be members of the UDA, Vanguard Service Corps, Orange Volunteers or UVF. Subversion will not

LOSS OF ARMS AND AMMUNITION

11. Since the beginning of the current campaign the best single source of weapons (and the only significant source of modern weapons) for Protestant extremist groups has been the UDR. The details of UDR arms losses for

Subversion in the UDR, British Army Report 1973

In 1975 Margaret Thatcher, then the leader of the opposition accompanied by Airey Neave, visited the Prime Minister and the Secretary of State Merlyn Rees, and she was told that there were certain elements in the police who were very close to the UVF and were prepared to hand over information, for example to Mr. Paisley. The Army's judgment was that the UDR was heavily infiltrated by extremist protestants and that in a crisis situation the UDR could not be relied on.



CONFIDENTIAL Copy to Dales

10 Downing Street
Whitehall

11 September 1975

Dear Ken.

Mrs. Thatcher's Call on the Prime Minister on 10 September

The Secretary of State said that he was more worried by the current sectarian murders than by the bombings in Belfast. Unfortunately there were certain elements in the police who were very close to the UVF, and who were prepared to hand over information, for example, to Mr. Paisley. The Army's judgement was that the UDR were heavily infiltrated by extremist Protestants, and that in a crisis situation they could not be relied on to be loyal.

Excerpt from notes of a meeting between Margaret Thatcher, leader of the opposition, Airey Neave MP and the Secretary of State Merlyn Rees

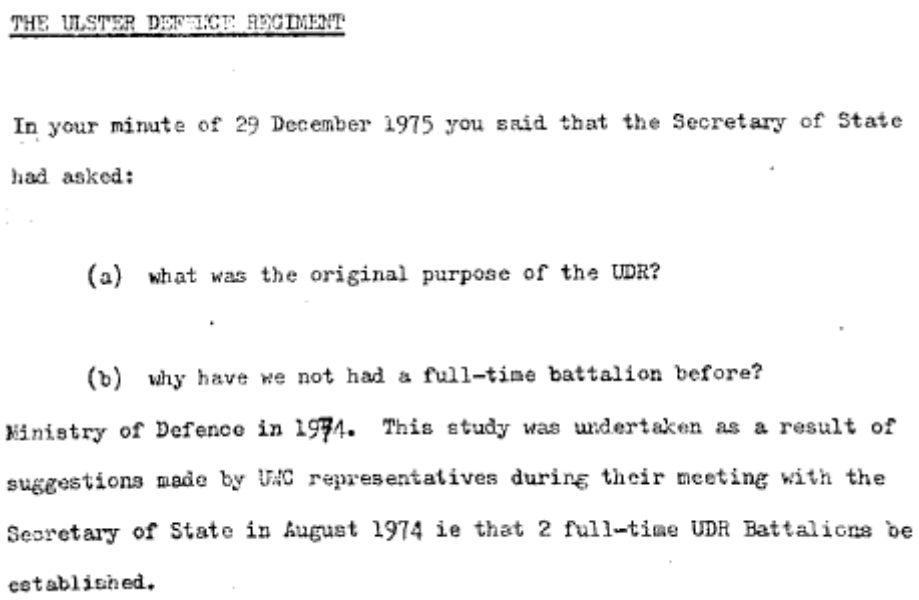
This was just over a month after the Miami Showband massacre, where both the Irish and British governments were aware that members of the UDR had been involved in the massacre. Two UDR were subsequently prosecuted, one was actually killed at the scene, but it has since emerged that at least six members of the UDR were involved in that massacre in July 1975.

So by the mid 1970's the Prime Minister and the cabinet were fully aware of the intelligence reports that show that the largest regiment of the British Army, the UDR, is heavily infiltrated by loyalist paramilitaries, cannot be relied upon in a crisis, and is a vital source of weapons from the UDA and the UVF.

So what did they do - how does the government respond to this? Well how they responded was by creating full time battalions of the UDR, up until that time it was largely a part time regiment.

In a memo the Secretary of State for Defence asked what the original purpose of the UDR was and why had full time battalions not been set up before? The response from Army headquarters was that this study decision was taken as a result of suggestions made by Ulster Workers Council representatives during a meeting with the Secretary of State back in August 1974, i.e. that 2 full time UDR battalions be established.

We have the minutes of that August 74 meeting, and it was attended by the UDA, Red Hand Commandos and the UVF. They suggested to the British Government that they should be a full time UDR battalions, and the MoD followed through and established full time battalions.



THE ULSTER DEFENCE REGIMENT

In your minute of 29 December 1975 you said that the Secretary of State had asked:

(a) what was the original purpose of the UDR?

(b) why have we not had a full-time battalion before?

Ministry of Defence in 1974. This study was undertaken as a result of suggestions made by UWC representatives during their meeting with the Secretary of State in August 1974 ie that 2 full-time UDR Battalions be established.

They also suggested that the vetting procedures for recruits be lowered. The other development was to create an intelligence role for the UDR as they didn't have such a role up to that stage.

The internal MoD memos proposing an intelligence role are fascinating in their use of language. The memos refer to an "intelligence gathering role for the UDR concerning intelligence on terrorist activities".
The memo continues, there is '*no intention of recruiting or encouraging members of the UDR to become informers on subversive elements within the UDR although subversion within the UDR is a cause for concern'.* This is from the Vice Chair of the General Staff. So they are quite clear that 'terrorism' concerns the IRA while 'subversion' concerns loyalist paramilitaries. And we see this right through the 1970's.

You are aware of the publication "Lethal Allies". In that book, we detail extensive involvement of members of the UDR and the RUC in the so called Glenanne gang, leading up to over 120 murders on both sides of the border including the Dublin and Monaghan bombings. The government was aware of UDR and RUC involvement in these attacks at this time.

I'll give one example, as this had very real consequences for people; Deadly intelligence and the Step Inn bombing in August 1976. It is a matter of established fact from the official reports that RUC special branch knew in advance of plans by a group of UVF, RUC and UDR members to plant a car bomb. The bomb factory was in an RUC man's farm which was under surveillance as the bomb was being prepared.

The gang themselves knew they were under surveillance but carried out the car bomb attack anyway. Gerard McGleenan and Betty McDonald were killed and many were injured. The farm wasn't raided for another two years. The RUC bombers were not arrested and remained police officers until separate investigations several years later.

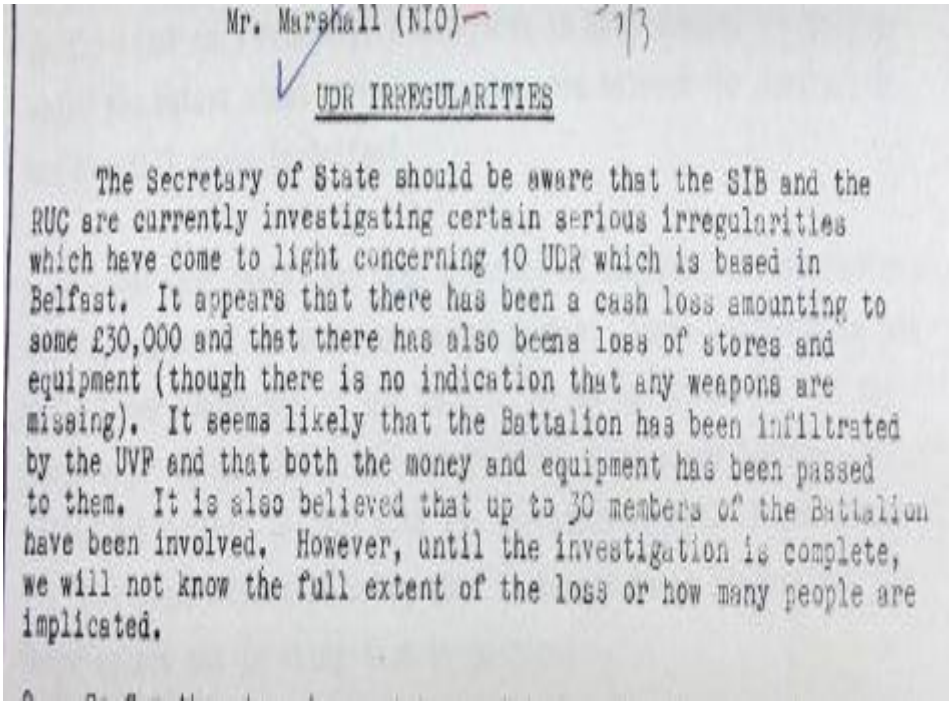
In the 1980's Chief Constable John Hermon asked for the file on the Step Inn case and then sent it back into storage. No one was ever prosecuted for this attack despite known RUC and UDR involvement. Deadly Intelligence.

Another example. Deadly Intelligence and the Good Samaritan bombing in a much later stage in Derry 1988. RUC Special Branch and MI5 knew in advance that the IRA planned to booby trap a flat and draw the security forces in to be murdered. The area surrounding the flat was declared, secretly, out of bounds to the security forces but the neighbours were never warned.

Six days later neighbours climbed in the window to check on a missing neighbour who had been kidnapped as part of the IRA plan to lure security forces into the area. Three people died as a result of the explosion. The families of the deceased were not informed that Special Branch had full control of the situation and allowed the device to explode. The IRA, RUC Special Branch and MI5 all showed shocking disregard in this case for civilians in what was truly a dirty war.

In 1978, we find several documents about a security investigation that was carried out into 10 UDR, the Belfast based battalion. Details of this investigation were never made public, ever.

The public and the press were totally unaware that this investigation was carried out. According to this Army Intelligence report the Battalion, 10 UDR here in Belfast, had been infiltrated by the UVF and both money and equipment has been passed to them. It was believed that up to 30 members of the battalion had been involved. 70 members of Belfast battalion have subversive traces according to intelligence reports.



Mr. Marshall (NIO)

UDR IRREGULARITIES

The Secretary of State should be aware that the SIB and the RUC are currently investigating certain serious irregularities which have come to light concerning 10 UDR which is based in Belfast. It appears that there has been a cash loss amounting to some £30,000 and that there has also beena loss of stores and equipment (though there is no indication that any weapons are missing). It seems likely that the Battalion has been infiltrated by the UVF and that both the money and equipment has been passed to them. It is also believed that up to 30 members of the Battalion have been involved. However, until the investigation is complete, we will not know the full extent of the loss or how many people are implicated.

Excerpt from security investigation that was carried out into 10 UDR

As the investigation progressed it emerged that there was a hard core group of 15 UVF members in Girdwood Barracks who had been in position for several years.

Just as a passing footnote on this, you have 15 members of the UVF known to the Army serving as UDR at Girdwood barracks, at the height of the murder campaign by the Shankill Butchers most of whose murders took place within one mile of Girdwood Barracks.

The other interesting thing about this is that documents showed that the 10 UDR Belfast Battalion was the only battalion of the UDR which had special permission to volunteer for service at the weekends in rural areas. At a time when it was heavily infiltrated its members were volunteering to serve on weekends elsewhere in the North. Who knows what consequences that had.

In 1980 a meeting was held at army headquarters about the future re-organisation of the UDR. It's quite a revealing document. We are coming into the period of de Silva, the period leading up to the murder of Pat Finucane and others. The weapon that was used to kill Pat Finucane came from 10 UDR. According to this document in eight areas of the North, the UDR provided front line support to the RUC. They have been allotted Tactical Areas of Responsibility on a continuous 24 hour basis under the command of the Brigade

Commanders. The document noted that the UDR Battalion Commander was the local military commander and any regular troops deployed came under UDR command.

Most of us presumed that the UDR was always under the command structure of the regular British army. In fact by 1980 in most of the North the UDR were in charge of the regular British Army. That was quite a surprise to us. In this same document it is admitted that deployment of part timers has,

"*enabled civilians, largely protestants who have long been accustomed to the existence of some form of part-time security force to play their part in combating terrorism - this has acted as a political safety valve for the government by reassuring some protestant politicians. Conversely it has meant that apart from its first two years, the regiment has been regarded by the SDLP and other Catholic politicians as a sectarian force drawn mainly from one side of the community*."

It is quite interesting that they refer again to the 'safety valve function' of the UDR which was first mentioned in 1972.

Returning again to the central theme – what is deadly intelligence?

Intelligence that could and should be used to save lives but isn't. Or intelligence that deliberately puts lives at risks, as smear propaganda or to facilitate murder. The question that we put at the beginning, are the de Silva findings surprising, is the level of deadly intelligence really surprising, and we see through the documentation, you are only getting a brief glimpse of the many documents, that there is official toleration even encouragement of loyalist infiltration of the security forces from the early 1970s, that the perception of loyalists as allies in a counter insurgency campaign is widespread and that the growth intelligence lead policing is then subverted to the rule of law.

Back again to de Silva, one glaring omission from his report, an omission pointed out by Paddy Hillyard sitting with us here today, is the omission of the Walker report. By the early 1980's Sir Patrick Walker, later the director of M15, drew up guidelines on intelligence lead policing, decisions on the recruitment of informers, running of agents and possible prosecution of agents. This Walker report essentially subverted CID – any idea of normal policing and the rule of law, and created a powerful force within a force, with the RUC special branch reporting directly to the security service M15.

So what did de Silva conclude:

- Deadly intelligence led to deadly propaganda,
- that MI5 was itself involved in propaganda initiatives
- that MI5 propaganda legitimised Patrick Finucane as a target for murder,
- that Special branch was aware of the false information being generated,
- that the security services was linking defence solicitors to the IRA, with respect to solicitors Oliver Kelly, and Paddy McGrory, father of the present Director of the PPS, that they were also being smeared in this M15 campaign.

His key finding in relation to the RUC was that they proposed Patrick Finucane as a target and provided deadly intelligence to the UDA. That RUC Special Branch protected Brian Nelson, a key agent and key UDA member and that he was involved directly in 4 murders and 10 attempted murders and they failed to warn Patrick Finucane, Oliver Kelly and Paddy McGrory of death threats. They provided a UDA Brigadier with protection and assistance, they withheld information from CID about agent involvement in the murder, the source of the murder weapon, which was 10 UDR, tried to recruit one of the murderers and they then destroyed his taped confession.

They mislaid, lied to and withheld evidence from the Stevens Inquiry, the Attorney General, the Director of Public Prosecutions and the Prime Minister.

His key findings on the British Army Force Research Unit was that they ran Nelson as an agent, and provided him with deadly intelligence , they mislaid the Steven investigation and Inquiries, and claimed that they didn't run agents. They withheld vital documents and intelligence from the Steven inquiries and they trained Brian Nelson in resisting interrogation techniques.

The key finding on MI5 was that it supported Special Branch's decision to take no action concerning the threats to Pat Finucane in 1981, and appeared to make no attempts to prompt them into taking action in 1985. They failed to take proportionate steps to protect the life of solicitor Paddy McGrory in July and October 1989 and that they deliberately disseminated false rumours to loyalist paramilitaries that Patrick Finucane, Oliver Kelly and Paddy McGrory were IRA members.

de Silva concluded that a series of positive actions by employees of the state actively facilitated Pat Finucane's murder and that in the aftermath there was a relentless attempt to defeat the ends of justice.

Covert policing and collusion, running informants and the human rights framework

Daniel Holder, Deputy Director of CAJ

This presentation will contrast 'counter-insurgency' and 'law enforcement' models of covert policing in relation to the use of informants within paramilitary groups, examining and critiquing what is known of the models used by RUC Special Branch, the PSNI and MI5. The presentation will content that the current legislation (the Regulation of Investigatory Powers Act 2000- RIPA) does not provide a sufficient basis to regulate the permitted conduct of informants within paramilitary groups, in particular in relation to controlling agent criminality. The status of recommendations for oversight of covert policing in the Patten Report will be critiqued and the presentation will look at what would be needed to develop an effective human rights and accountability framework for informant handling.

This is a very emotive subject but as with all our work what we are focusing on here is the framework in international human rights law. To be clear from the outset there is nothing in the human rights framework that states police services cannot or should not run informants. All of them do it, in fact if you look back the state and indeed non-state actors were using informants well before the first modern police forces were created. The question from the human rights framework is not can and when informants can be used, rather it is are informants being run in a human rights compliant manner, are they being run within the law, in particular in relation to permitted conduct and behaviour. What are informants actually allowed to do when they are effectively acting as agents of the state? What is the state allowed to do as regards recruiting informants is another key question. Many persons feel aggrieved about attempts to recruit them, but there is nothing breaching human rights about an approach to recruit someone as an informant *per se*, yet there could be if the approach put someone's life at risk. Approaches involving threats or bribes may also breach internal rules of conduct of police services.

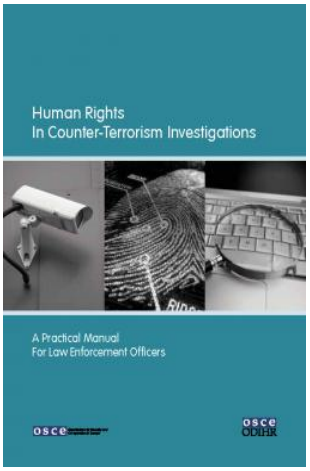
We have used the term covert policing for this conference – covert policing is obviously much broader than running informants. The Patten Commission Report described covert policing as covering "interception, surveillance, informants and undercover operations." The Regulation of Investigatory Powers Act 2000 (RIPA) covers: interception of communications, surveillance, as well as the use of agents and informants.

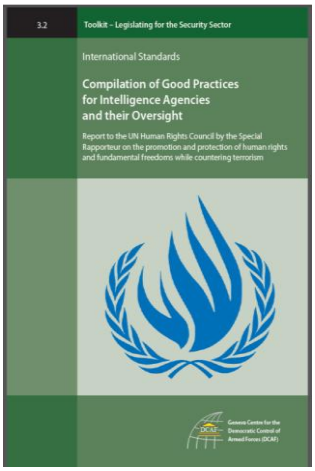
A lot of the human rights discourse in recent years has been on another element of covert policing, namely the use of surveillance and the interference in private and family life that this can pertain when disproportionate. The area of informants is somewhat more neglected in bringing forward a more robust human rights framework within which states can lawfully operate. The 2012 CAJ report '*The Policing You Don't See'* picks up on a lot of these issues. What we looked at was that a lot of the gains which had taken place in making covert policing more accountable in this jurisdiction over the last decade had been dealt a severe blow by the transfer of primacy for the most human rights sensitive area of policing – i.e. covert "national security" policing of paramilitary groups out of the PSNI to MI5. This area of policing was being put in a place where it is fair to say that nothing is accountable. MI5 does have its own accountability framework but it is extremely weak.

Running informants and the human rights framework

We are yet to find an overarching model in international law that covers the issues of running informants. There are some elements – take the UN Special Rapporteur Martin Scheinin 'compilation of good practices for intelligence agencies and their oversight' this provides for example that:

- "Oversight institutions have the power, resources and expertise to initiate and conclude their own investigations, as well as full and unhindered access to the information, officials and installations necessary to fulfil their mandates.
- Powers and competencies [of intelligence agencies to be] outlined in law and the use of subsidiary regulations which are not publically available should be strictly limited"





This therefore makes clear that what covert policing bodies are allowed and not allowed to do should be something that is set in to the public domain. It also makes clear that oversight agencies are bodies that are to be 'over' those who they are holding to account, and have 'sight' of what they need to see to do their job.

It would be a perverse situation if the agency itself can decide what its own oversight body is going to see and when. There is also Organisation for Security and Cooperation in Europe (OSCE) guidance on Human Rights in Counter Terrorism Investigations which contains some snippets of information relevant to the permitted conduct of agents in stipulating that Informants/agents "must also be familiar with the rules that govern their own conduct when the possibility arises that they might commit an illegal act." Whilst these standards are relevant it appears a more comprehensive framework dealing specifically with this area of covert policing is yet to be codified.

You can find within general human rights law are a range of provisions which are relevant to this area of policing. In terms of the European Convention on Human Rights (ECHR) the issue of permitted conduct, what agents/informants are and are not allowed to do is qualified in terms of Article 6 (right to a fair trial) where it is fairly settled case law that agents/ informants cannot act as *agent provocateurs* i.e. cannot create crimes which otherwise would not have existed, cannot entrap people. In relation to the most fundamental right for all, the Article 2 right to life duty, there is not necessarily informant-specific case law but is fairly straightforward what the implications of this Article are from other court decisions. There are a number of limbs to this duty. The first is regards the prohibition on taking lives. Put simply agents of the state are not allowed to kill people, and are not allowed to take lives except in the most tightly defined of circumstances in self defence against imminent loss of life. There is nothing that states you can set that principle aside to allow informants to take lives on the states behalf. The second limb refers to the duty to take reasonable steps to protect all life in the jurisdiction, the *Osman* test is often referred to in this context. You can't have a situation whereby particular persons are protected as they are close to the state and its interests at the expense of other lives being seen as dispensable and not being protected. The third limb is the duty to investigate, effectively and independently from those involved, all killings. Again there is nothing in the ECHR or its jurisprudence which suggests this duty can be set aside to not effectively and independently investigate killings as they involved informants. There is nothing that says you can withhold information from detectives, nothing that states you can withhold information from prosecutors, or withhold information from the courts, because an informant was involved. There is therefore a human rights framework in this sense which places parameters on running informants.

Counter insurgency v Law enforcement approaches to running informants

As 'ideal types' I want to tease out two approaches to running informants, one of which is human rights compliant and one of which is not. The first is the 'law enforcement' approach whereby informants are used to gather all available evidence which is then used to save lives, protect all lives equally and to bring people to justice. This is the type of approach you would expect in a democratic society.

By contrast there is the 'counter insurgency' approach whereby the use of informants and intelligence is more to manage a conflict towards a political goal, namely defeating an insurgency *outside* of the law. This approach involves strengthening paramilitary elements whose objectives align with those of the state and to weaken paramilitary groups whose objectives do not. This clearly is not human rights compliant. These approaches are teased out more in the following table:

Article 2 framework	Law enforcement	Counter Insurgency
Take steps to protect all lives	Take all steps taken to warn and protect all those in danger	Selective or discriminatory protection
Duty not to take lives	Informant involvement in serious crime prohibited	Informants permitted, facilitated or directed to be involved in killings
Duty to investigate deaths	Effective and independent investigations to enforce law	Protection and impunity for agents of the state

Under the law enforcement approach, steps are taken to warn and protect all those in danger, informant involvement in killings and other serious crime such as punishment beatings, which if otherwise undertaken by an agent of the state would constitute a human rights violation is strictly prohibited, and there would be effective investigations to ensure the law was enforced. Effectively no one would be above the law.

If you take the converse approach, the counter insurgency approach, there is either selective, or in the context of an ethnically divided society, discriminatory protection, where some lives are protected more than others depending on which group people belong to. Certain people are regarded as dispensable within this framework and informants are given a green light by either being permitted, facilitated or directed to be involved in killings. Rather than the law being enforced and due investigations taking place there is instead protection and impunity for agents of the state. There in effect are certain people who are seen as above the law. Quite clearly that type of 'counter insurgency' approach is not compatible with human rights standards within a democratic society, rather it is a blueprint for collusion and a dirty war.

To the extent such a 'counter insurgency' model has been used here or elsewhere you do sometimes get undertones that, yes, elements of this were used but were justified by the circumstances. The argument made is that it was not possible to engage in a 'law enforcement' approach and diverging from it was the only way to bring conflict to an end. If there are proponents of this who feel it is legitimate then let's hear it argued in the open, which we generally do not as the approach is known to be unlawful. At CAJ in any case we would take entirely the opposite view, like all types of human rights violations the state operating outside of the law in that manner plays a very significant part in provoking, prolonging and exacerbating conflict here and elsewhere. It is therefore essential to expose where 'counter insurgency' approaches to running informants have been deployed, and hold those responsible to account to prevent recurrence, as such approaches are only likely to be otherwise used again. The key to preventing this is also found in a robust accountability framework.

Informants and an accountability framework

The question is how do you prevent a 'counter insurgency' approach creeping in or being designated as part of policy? As part of our work we have teased out a framework which could achieve this and ensure running informants is undertaken in a human rights compliant manner. This does not make it 'transparent' obviously, as by its nature covert policing cannot be done openly, but it does make it accountable. There are a number of elements. I will focus on three in the following table:

Element	Description
Strict Rules	Legislation and policy manuals set strict rules for informant conduct and handling;
Paper Trail	The law provides for strict processes for a paper trail to record all activity;
Robust accountability bodies	Robust independent oversight and complaints bodies to ensure rules enforced;

The first element would be the adoption of very strict rules that regulate the permitted conduct of informants, and prevent informants being involved in serious crime that constitutes human rights violations. An important part of this framework is that the overarching rules, setting general boundaries of permitted conduct, are in the public

domain. This clearly does not mean each and every circumstance of permitted conduct should be made public, but the general ethical boundaries, including non tolerance of involvement in acts that otherwise undertaken by state agents would constitute human rights abuses should not be permitted. The second element is the need for a strict paper trail to ensure all informant activity is being recorded so that you can be sure the rules are being kept too. Third you need robust accountability bodies which can independently verify the above is being adhered to. First you need an oversight body which examines compliance on a continuing basis. Secondly you need an independent complaints body which can ensure that the rules are enforced and maintain public confidence in the system. There are other elements to an accountability framework including developing a human rights culture, and addressing matters of personnel, structure and composition, but given the pressures of time I am going to focus on how this jurisdiction has measured up in relation to the above three elements.

Informant handling in Northern Ireland during the conflict

What we know about the *modus operandi* of informant handling here from the 1980s on is becoming clearer from official documents. We do not have the 'Walker Report', which was the 1981 blueprint for the covert policing model implemented within RUC Special Branch. The PSNI have a copy but, despite the passage of time, cited permitted yet notorious blanket exemption for documents originating from MI5 as a reason for withholding it under freedom of information (what is less known is that MI5 have also managed to get an exemption from fair employment monitoring). But the snippets of the report which were put out by the *Sunday Times* do seem to indicate it advocated a counter insurgency approach including provisions that "records should be destroyed after operations" and "that Special Branch should not disseminate all information to Detectives in CID..." If you look at other declassified documents which set out what the *modus operandi* of informant handling was, minutes of an RUC-NIO meeting on the 13 March 1987 state the practice was of "*placing / using informants in the middle ranks of terrorist groups. This meant they would have to become involved in terrorist activity and operate with a degree of immunity from prosecution*."

There is also what we know from official inquires and investigations into covert policing which would include the three police enquiries by John Stevens (1989-2003); the Collusion Inquiry Reports by Justice Cory (2004) and subsequent public inquiries; Police Ombudsman investigations most notably Operation Ballast 2003-2007; and the de Silva 'Review' into killing of Pat Finucane (2012). There are a number of patterns which emerge in these reports.

Stevens asked questions about sectarian bias, namely were nationalists and unionists warned about threats in equal measure, he concluded they were not. He also concluded "*Informants and agents were allowed to operate without effective control and to participate in terrorist crimes. Nationalists were known to be targeted but were not properly warned or protected*."

De Silva concludes that "steps were 'often' not taken to protect persons considered, in the words of an intelligence document, to be a "thorn in the side" of the security forces." Cory concluded that [an attitude] persisted within RUC Special Branch and the British Army's Force Research Unit (FRU) "*that they were not bound by the law and were above and beyond its reach*." In terms of one of the public inquires that did take place on Justice Cory's recommendation, the Billy Wright Inquiry, a former Assistant Chief Constable introduced the concept of 'plausible deniability' in relation to Special Branch as *"...a practice or culture that existed in an organisation where the members did not keep records, so there was no audit trail... at times it would appear that it allowed people at a later date to have amnesia."*

Don't legislate for collusion? What de Silva reveals

There is an interesting narrative within the de Silva Report. The report, whilst it in no way got to the bottom of what happened to Pat Finucane, is quite revealing on a number of other matters, particularly in relation to what rules RUC Special Branch was operating under. There were rules. The Home Office had guidance which dated back to the 1960s which reigned in informant criminality. It is made clear however that RUC Special Branch and MI5 set these rules aside. Special Branch stated the system they operated involved holding back information from the judicial process and they conceded this was 'technically' in breach of guidelines and therefore called for 'more realistic guidelines' which would permit paramilitary informants to take part in serious crime under the supervision of a senior RUC Officer. This would have effectively formalised such a system and it looks very much like what the RUC were looking for was legal cover for what they were already doing. The idea of putting into legislation or policy this type of system was met by what is described in the report as a 'not overly enthusiastic' response by the Northern Ireland Office (NIO). The RUC responded in turn by acknowledging that this was a 'hot potato' for the NIO but did point out that "the fact that what actually goes on is known or assumed" and in any case, the RUC argued, the NIO were not being asked to approve agent criminality beyond what was *already* the case. Some guidelines were drawn up which ministers did not sign off on and in fact did not formalise the system the RUC were advocating. The Solicitor General in 1992 regarded the thrust of one key passage as, in effect "Don't get caught", and hence was "unpromising territory for Ministerial approval." It is recorded a Senior RUC Officer regarded gist of the response from government as "carry on what you're doing but don't tell us the details."

The Belfast/Good Friday Agreement and consequent independent commission on policing (Patten Commission) whilst largely silent as to why the Special Branch system required overhaul reform, did nevertheless recommend significant reform.

Towards accountability: the Pattern Commission and Operation Ballast

Reform recommended by Patten	Status of implementation
Full implementation of Police Ombudsman model	Implemented, complaints of any PSNI misconduct and criminality
Commissioner for Covert Law Enforcement in NI	Never implemented (RIPA bodies more limited role)
Ethical and legal guidelines on running informants be published;	Apparently adopted but not published;
Downsizing, deinstitutionalisation and integration of RUC Special Branch within PSNI	Reform took place, but rollback in transfer to MI5 and rehiring;

The Pattern Commission made a number of recommendations on this issue, there were gaps too but it called for the full implementation of the Police Ombudsman model which had come from the earlier Hayes Report. This was implemented. The Ombudsman can deal with any complaint of PSNI misconduct and criminality including the running of informants. The Ombudsman can hold informant *handlers* to account, although cannot arrest and question informants themselves in investigating handler misconduct and is paradoxically reliant on the police themselves to assist in this role.

Patten also recommended the establishment of a Commissioner for Covert Law Enforcement in NI, this was a completely separate body from the Ombudsman and was not to deal with complaints but rather had the general oversight role of ensuring informants would only be run where necessary, proportionate and within the law. That institution was never set up. It was recommended by the Pattern Commission but never happened, it was envisaged it would not just have overseen the PSNI but also MI5 and other bodies who were using those powers. There were bodies set up under RIPA but they are much more limited in role.

Patten also recommended that the rules be put into the public domain. It was clear that of course operational details could not be put in the public domain but it stipulated the ethical

and legal guidelines for running informants be published. They have not been. Patten also recommended the downsizing, deinstitutionalisation and integration of RUC Special Branch within PSNI, which to an extent did happen but has since been significantly rolled back by both the PSNI rehiring scandal and the transfer of primacy to MI5.

The UK government brought in RIPA which on the one hand was the first ever regulatory framework in law for covert policing, but on the other hand itself contains elements of rollback. De Silva concedes that RIPA does not address any of the issues of informant conduct which were the main issues in this jurisdiction. The RIPA framework is therefore weak in that regard. It introduced another complaints mechanism in the Investigatory Powers Tribunal (IPT), a court which operates in secret and insofar as we know has never upheld a single complaint against MI5 or any covert policing agency. To some extent, not necessarily successfully, RIPA has also tried to usurp some of the powers of the Police Ombudsman. For example it prevents the Ombudsman conducting a *thematic* investigation into the areas of covert policing covered by RIPA, albeit that this does not prevent an investigation initiated by a complaint. It also usurped the role of the courts by providing that persons who had a complaint against covert policing breaching their ECHR rights could not take it to the normal courts but rather had to take it to the IPT. There is a risk that even if we get reform of RIPA it will be used for further rollback.

At the time of the first Police Ombudsman's 2003-2007 Operation Ballast report, serious concerns persisted in relation to the handling of informants by the police. Ballast documented Special Branch collusion with a unit of the UVF in north Belfast, some of the investigations findings included:

- failures to arrest informants for crimes to which those informants had allegedly confessed;
- subjecting informants suspected of murder to lengthy sham interviews and releasing them without charge and falsifying or failing to keep records and interview notes;
- the report concluded that such practices, far from being isolated, were likely to be systemic

A significant outworking of this investigation whilst it was ongoing was the instigation by the PSNI in October 2003 of a 'major review' of informants known as the CRAG Review. As a result of this a quarter of all informants were let go, half of them as they were deemed "too deeply involved in criminal activity." The PSNI also established policy that informant involvement in criminal activity beyond membership or support of a paramilitary organisation had to be approved by the Assistant Chief Constable (ACC) and that all criminal activity by paramilitary informants had to be strictly documented and controlled. It also led to new procedures, training requirements and written policy standards.

Of particular significance was this policy requiring ACC authorisation for informant involvement in crime, which at times has been referred to as a 'CODA authorisation'. There are always allegations that a blind eye is turned to allow informant participation in areas of crime, whether that be drugs dealing, racist violence, punishment beatings etc. Such an allegation was made in 2013 by Edwin Poots MLA, the health minister, that involvement of UVF members in drugs dealing was being tolerated in exchange for information. Clearly it would not be human rights compliant to tolerate or facilitate paramilitaries to abuse the rights of others in exchange for reducing or managing the real or perceived threat they present to unrelated state objectives and interests. The PSNI on this occasion strayed from the usual police practice of neither confirming or denying covert policing practices to issuing an official denial that this was or would ever be the case. This sets somewhat of a precedent in relation to clarifying that authorisations are also not issued to allow informant participation in other areas of crime, for example the aforementioned areas of racist (including sectarian) violence and punishment beatings. The point is however with the new accountability framework it should be possible for oversight mechanisms to test the accuracy of the PSNI denial and to also check just what activity is being permitted. The Ombudsman in response to a complaint could check these authorisations to be assured that authorisations had indeed not been issued to allow participation in the drugs offences alleged. On an ongoing basis a general a oversight mechanism could routinely check ACC authorisations to ensure participation in serious crime was not being officially sanctioned, in particular the bottom line that participation in activities that if otherwise undertaken by an agent of the state would constitute a human rights violation. It is not clear if the Policing Board through its human rights advisor, Special Purposes Committee or otherwise routinely tests or samples these authorisations for human rights compliance or indeed if the Office of Surveillance Commissioners, whose formal role focuses on the stipulations of RIPA, ever cross checks ACC authorisations as relevant to their work. There is no indication that any of this was done in relation to Mr Poots allegations. But the point is it could have been as there is at least a framework within the PSNI now where there are safeguards where it is at least possible to test such allegations. Unfortunately the same cannot be said of MI5, who it is impossible to verify whether they are running informants within the law.

This is highly significant as at the same time, in the context of Operation Ballast, that measures were being progressed to ensure human rights compliance and accountability for covert policing within the PSNI, the UK government took the decision in 2005 that it would transfer primacy for covert 'national security' policing out of the PSNI and into MI5. The transfer took place in 2007 and is the subject of CAJs aforementioned '*Policing You Don't See'* report, which highlighted that even some key, yet modest, safeguards in relation to the transfer committed to under the 2006 St Andrews Agreement had not been implemented. The area MI5 has now taken primacy for is the most controversial area of policing focusing on the infiltration of paramilitary groups.

At the time it was officially stated the 'national security' remit meant only focusing on republicans rather than loyalists. It is not clear whether this is still the case, but if it is it does mean we now have two parallel covert policing systems for paramilitarism on opposite sides of the community one with a significant level of accountability and one with virtually none. In contradiction to Patten we have moved from what Stalker termed 'a force within a force' to one of 'a force outside a force'. Whilst the role of MI5 is often unspoken or downplayed, they have an estimated 500-600 officers based here who must be doing something. This figure would constitute around two thirds of the strength of RUC Special Branch at the time of Patten. The only complaints mechanism they are subject too is the notorious Investigatory Powers Tribunal. Beyond the stipulations of RIPA, which even de Silva agrees did not address the issues of regulating permitted informant conduct, it is entirely unknown what rules, what ethical and legal guidelines, if any, MI5 operates under. There has also been a concerted effort to legislatively debar any accountability bodies resultant from the peace process, from the Police Ombudsman, Human Rights Commission and others, from using their powers to investigate or otherwise hold to account MI5, the body which is now in charge of the most human rights sensitive area of what was mainstream covert policing. The following table contrasts the framework now in the PSNI and MI5:

Area	PSNI	MI5
Rules and paper trail	Rules adopted but not published	Unknown beyond RIPA
Complaints body	Independent Police Ombudsman	Very weak, IPT and other bodies restricted
Oversight structures	Policing Board, no Commissioner for Covert Law Enforcement	Most bodies restricted re oversight
Interworking	Some Key Safeguards promised at St Andrews not delivered;	

Whilst there has been significant progress within the PSNI towards accountability in its informant operations it is worth reemphasising that it still falls short of what was envisaged by Patten in a number of ways. This is not just in the failure to establish a NI Commissioner for Covert Law Enforcement. Another area is the non publication of binding guidelines and rules, which has a knock on effect on complaints.

Whilst there is an independent complaints mechanism in the form of the Police Ombudsman complaints are obviously limited to where the police have broken the rules, i.e. misconduct and criminality. You cannot complain that there was an attempt to recruit you as an informant *per se* as this does not fall into this category. There may be scope to complain about the manner and context in which the approach was conducted, or indeed about the conduct of an alleged informant. Herein lies a serious problem however. Whilst the independent complaints body is there, you can only complain about breaches of the rules. Yet unusually in this instance we do not know what the rules are. The ethical and legal guidelines on covert policing that Patten said should be published have been kept confidential, thus any complaint is essentially blind. You have to complain that the rules have been breached, in the absence of knowing what the rules are. This is a serious gap that needs redressed.

It is important to also highlight that to complicate the picture even further we now have the National Crime Agency (NCA, often dubbed the British FBI). Whilst in the absence of legislative consent (a matter directly related to the Home Office refusing to date to allow the NCA here to be accountable to the post-Patten accountability structures) the NCA does not have powers of constable in Northern Ireland. The NCA can however already exercise powers under RIPA and hence can also run its own informants in Northern Ireland. We do not know if it is yet doing so, but it certainly has the power to do so without any oversight by the Policing Board or Ombudsman.

To summarise if we return to our framework for ensuring human rights compliance in the running of informants, we have a situation whereby the PSNI have engaged in significant reform, they are not quite there as there are significant gaps including the ethical and legal guidelines being kept confidential, yet we have seen significant progress towards compliance. In terms of MI5 however there is no way of being able to safeguard against the agency operating outside of the law.

Official and Security Force Perspectives on Collusion

Cheryl Lawther

In light of the failure of the Haass' negotiations in December 2013, this paper engages with one of the most problematic legacy issues for pro-state actors – collusion between members of the security forces and loyalist paramilitaries. This paper seeks to examine official and security force perspectives on findings and allegations of collusion. Based on the author's empirical research, it argues that resistance to evidence of collusion, and a broader process of examining the past, is bound up with notions of national imagination and blamelessness, the politics of victimhood and the tension between traditions of sacrifice and the fear of betrayal.

I was asked to come today to speak about official security force perspectives on collusion – largely based on my PhD research - I wrote a book recently on that, in which I look at pro state opposition to both existing mechanisms for truth recovery in Northern Ireland and the establishment of a formal truth process.

So today I want to use that background to try and map out the reaction of the security forces to findings and allegations of collusion. Then bringing that up to date given the failure of the Consultative Group in the Past in 2009, and then Dr Richard Haass's recommendations at the end of last year, how that leads on to the creation of a more formal truth process.

In terms of investigating collusion, I've listed here some of the main investigations and the bodies involved in investigating allegations of collusion, or in the case of the Consultative Group in the Past and the Haass recommendations, had they been established, would they have also been active in this area, amongst other legacy related issues.

This list is not entirely conclusive and it's obviously not going to be any surprise to most people in this room, but the point really being that there has been this whole host of investigations, inquiries and reports over a specific length of time and that is likely to continue.

- British Irish Rights Watch (1999).
- Lawyers Committee for Human Rights (2002).
- Stevens Inquiry 3 (2003).
- Cory Collusion Inquiry Reports x6 (2003-2004).
- Jowitt, Richardson and Evans (2010). Interim report.
- MacLean, Coyle and Oliver (2010).
- Morland, Strachan and Burden (2011).
- De Silva (2012).
- Smithwick (2013).
- Office of the Police Ombudsman for Northern Ireland.
- *Consultative Group on the Past.*
- *Haass recommendations.*

In terms of the findings of the research, I talked to: Former members of the security forces or existing members, or Unionist political elites, about collusion or other problematic aspects of policing during the conflict.

Their responses fell within four different lines, which I have mapped out according to Stan Cohen's (2001) work on denial:

1. Literal denial – the simple argument that there was no collusion, and that was basically it.

2. Isolation – collusion that was restricted to a small % of so called 'bad apples'.

3. The use of contextualisation: you cannot judge the actions of the past by the standards of today – that interviewee very clearly made that point; and finally

4. Advantageous comparisons were frequently made between what was deemed to be the role of the RUC in upholding law and order and preventing the slide into further conflict and then the comparison between the law abiding or law upholding role of the security force and the actions of paramilitary organisations.

What might more interesting and maybe more useful for the purposes today, is to look at how these objections fit within the broader ideological, political and sociological world view of the security forces and then how that maps out with respect to the creation of a more formal truth process.

I have identified 4 big broad themes that I want to talk to you about today:

First theme then that I identified is what I have called collusion, identity and the imagined community and to think just very briefly without turning this into a history of the RUC, and if you think of something about the identity and collective memory of the RUC, it's shaped around this idea that the force was a law bound, disciplined public service, it was about

delivering policing as a public good and as a key part of a liberal democracy which the state had a commitment to and to the rule of law.

That's very closely tied to the denial that the security forces play a role in the actions or the events of the conflict or escalated that in any way and so therefore when you set it against this background and you talk about investigating collusion or other aspects of the past, you immediately start to challenge and undermine that sense of identity and ultimately undermine that argument that it was the actions of the republican paramilitaries that were at the route of all the problems in Northern Ireland.

You can see that very clearly in 2008 when Archbishop Robin Eames and Denis Bradley began their work as co-chairs of the Consultative Group on the Past, and they made one of their first public speeches and they stated that one of the difficulties for the Consultative Group at that time was the fact that certain sections of society had to begin to recognise their own ugly truths and that the state sometimes acted outside the law and then there was that immediate backlash against the group at that very early stage of their work.

There are a couple of other factors here as well which are important:

The first is that Northern Ireland is part of liberal democracy and because of that it can be difficult to see human rights violations that the legal architecture of the state should have made impossible - because they are well organised under legal radar screens but also they are more confident that this is a liberal democracy and therefore how can this possibly be happening?

So if you add that together to the previous thoughts on identity and blamelessness, you come to this argument that talking about dealing with the past, talking about collusion or whatever, it's about blaming the security forces for the conflict. It becomes that one way process, but the immediate flip side to that when I was interviewing people was the argument that in fact if you were going to talk about the past, then you should do that in the opposite one way, it's about dealing with republicanism and seeking their repentance. That was one interviewee's perspective on what the Consultative Group in the Past should in fact have been doing.

To take that further and it ties in as well with what we often see as a very linear focus on accountability, and what often comes across is the unswerving belief in the judicial system, and this continued emphasis on the relationship between victims needs, dealing with the past and getting criminal prosecutions – however unlikely the reality of that actually is.

This notion of blamelessness therefore links really closely into the argument that unionists in the security forces are the supposed 'real' and 'innocent' victims of the conflict. And as you know, and you obviously don't need any introduction to, the question of who is the victim or survivor of the conflict - it is so contested and so politicised with the unionist political elites and the security forces, or those bodies most closely associated with the RUC anyway, very much rejecting the Victims and Survivors Order and the inclusive definition of victimhood that is contained within that, and very much expressing a clear preference for

hierarchy of victims, and which at times, it actually appears that security forces rise to the top of that hierarchy.

You will see this expressed clearly in the following quote

> *"…security service personnel who were murdered for doing their duty, for simply putting on their uniform, do have a higher standing, or should have a higher standing when it comes to any recognition of victimhood in Northern Ireland. Why? Take the impartial view – a police officer in New York who is gunned down in the line of duty dies a hero. Why? Because he is, because he put on a uniform and was killed solely because he was a police officer. A police officer in Northern Ireland should be afforded no less and I take the view that that needs to be established in the minds of people, that if you are doing your job, which happens to be protecting the citizens of a nation, no matter what those citizens background might be, no matter what their religion might be, you are protecting them, serving them and if you are killed for simply doing that job, you deserve a heck of a lot more standing as a victim than this notion of someone who has died as a result of the troubles and who was a participant in those troubles...The short answer is, is there a hierarchy of victims? I actually think there is"* (interview, 12 September 2009).

So obviously claiming innocence it may be imperatively correct, or is often a natural reaction to pragmatic loss but their innocence and claiming innocence victimhood is also a way to clear legitimacy and to evade responsibility.

And now from a security force perspective, to start to complicate what they refer to as rather rigid definitions of victimhood by talking about collusion for example, not only challenges their identity and that link to a blameless past but it also perceives and undermines their experiences of loss – writing their experience out of the historical narrative.

What I think is particularly problematic from a security force perspective is they argue that it creates a moral ambivalence between what they tried to serve and then sacrificed for as members of the security forces and those who were setting out to plan murder. So when you take that further in respect of a formal truth process, these arguments are directly reflected in the argument that if you examine security force and paramilitary narratives in the same space, then you are putting those two bodies on the same page, and you are treating them exactly the same.

Disrupting what some argue - is what should be a hierarchy of views on the past - just as there should be a hierarchy of victimhood, there is also an implicit argument that there should be a hierarchy of truths as well.

And then finally, it also leads to opposition to the use of either an amnesty or limited immunity from prosecution, regardless of the fact that the Consultative Group on the Past or Richard Haass or John Larkin have recognised the practical benefit of such a measure and it has also been suggested several times that members of the security forces would be quite keen on such a measure being put in place.

The third thing then, which pretty much follows on from these - that I wanted to talk about, really layers on to these narratives of denial and victimhood and it is probably one of the most longstanding and most well rehearsed oppositional discourses to anything about talking about dealing with the past, and as I mentioned earlier it is the idea that dealing with the past provides a platform for republican propaganda or it would provide an opportunity for republican politicians or republican combatants to simply re-write the past, to justify their own activities and demonising those of the state and ensuring that only the state and its security forces are held to account.

So the key issues here that have been problematic obviously for the security forces are the fact that public inquiries and the Office of the Police Ombudsman have, by definition, focused on the activities of the state and also the argument that there is so much more documentation available on state actions and inactions, that inevitably dealing with the past is interrupted as this one way process or an imbalanced process.

But there were two differences of opinion which I wanted to share with you – and the first of these came from a senior member of security forces, and you can see from his quote, he was much more open to the idea that if there were problems to do with the past, then they should be investigated.

> *"There is an expectation that government and agents of government will actually operate within the law...and it is not unreasonable that people come up and say 'well in actual fact you were not playing by the rules'...The public inquiries and the inquests are now examining that, it is more detailed than that, but basically you didn't play by the rules. Is that unfair? It might be, but then the manifestation of the state is that you will play by the rules...and if people don't play by the rules then there is a framework there to hold them to account"* (interview, 4 August 2009).

Secondly, and you can see from the quote below, this actually came from a member of the Consultative Group on the Past, and they were making a very clear attempt to try to allay security force concerns over investigating the past and what documentation is out there. As to whether a statement such as that can have any purchase in real world term is obviously a different issue, but there were a couple of differences of opinion in and around this point.

> *"The Stevens material is all about, in people's minds, collusion, police, army collusion. I can say that the Stevens material will tell us as much, maybe more, about republican activity than it would tell us about security service activity, but even telling people that isn't enough.*

> *So there is something about trying to break in people's minds the view that the only truth that can be uncovered is truth about the state and its broad activities. Unless you can break that in people's minds, then they are going to understand it to be a kind of republican project"* (interview, 10 June 2009).

The final theme I want to talk about concerns sacrifice and betrayal and if you look again at the corporate memory or the history of the RUC, sacrifice and betrayal are very much tied together and are ever present.

Very much focusing on the physical sacrifice that was given by members of the security forces during the conflict, often through death or injury and in a sense that that sacrifice is being betrayed in the post conflict era, and I thought for our purposes today and what would be most interesting is the suggestion that to talk about wrong-doing, it's about portraying that self-identity of the security forces as the upholders of law and order, so to talk about collusion, or what one interviewee went on to describe as the illusion of collusion, then it becomes a betrayal – a betrayal of the brave men and women who served in the security forces.

But to go further than that, and to the narrative of the security forces, its loyalty, its sense of loyalty, and so if you are going to talk about wrongdoing, or considering wrongdoing then that it is in fact the opposite of loyalty which is in fact disloyalty.

Again, you can see that really emotional deep connection in the following quote;

> *'You feel this visceral attachment to these guys who put themselves in harm's way for us, rightly or wrongly we stand by them' (interview, 23 June 2009).*

So inevitably then these themes of sacrifice and denial have mapped on to attitudes towards establishing a formal truth process, largely coalescing under the top argument that dealing with the past and talking about collusion and whatever else, is part of the broader attempt to blame the RUC for much of the conflict and so that also tied into a sense of betrayal then from the British state that they haven't recognised or adequately recognised the sacrifice and service of the security forces because - from the security force perspective there hasn't been enough criminal prosecutions, that there is a burden on former RUC officers to come back and serve inquests and inquiries, but also the argument that to call all aspects of the past into account questions, challenges their identity, and their organisation memory, and therefore it challenges or questions the meaning of their death and so basically to talk about wrong doing - it undermines everything that they stood for.

Session II

Covert policing and accountability outside NI, Where now?

Chair Brian Gormally, Director CAJ


Suresh Grover, Campaign Opposing Police Surveillance
Undercover operations of the Metropolitan Police

Fionnuala Ní Aoláin, Associate Director and Professor TJI
The Intersection of Intelligence with Exceptional Courts, Military Commissions and Procedural Exceptionalism

Carsten Ilius – Lawyer
Covert policing and the National Socialist Underground cases in Germany.

Police Spying and Racism: an endless legacy?

Suresh Grover

Director of the Monitoring Group (UK)

and

Former co-ordinator of the Stephen Lawrence Family Campaign

My subject today is looking at the whole Stephen Lawrence case. I want to put it in a context before I discuss the reviews conducted by Mark Ellison QC on how the Lawrence campaign and specifically the family created and developed public opinion on this issue. Remember we are talking about 1993 and at that time where Stephen was killed on the 22nd April in South East London, that area was known as the racist murder capital of the UK. Steven wasn't the first to have been murdered in that manner. Rolan Adams was killed in 1991 outside the BNP HQ and that area had witnessed an increase of something like 1000% increase in racial violence in the 4 years before 1993.

So how is it possible that this experience, far from being unique for a young black person in London became a focus that began to shape just public opinion in England Wales and Scotland, possibly in NI. It created for the first time a discussion in academia, in communities, in the policy units of different departments and amongst opinion formers of both what the context of racism was and how to make the police accountable. I think the context has to be that the Lawrence campaign was not radically different from other campaigns but it had a number of qualities which were unique and these were created neither by the state nor the state authorities, but by the families who had struggled for justice for 20 or 30 years in London itself.

Before we came to the point of the Inquiry headed by William Macpherson in 1998 the Lawrences' had experienced a number of serious problems reflected by a litany of failures by the police to respond to this racist murder. That year the Crown Prosecution Service had decided there was no evidence to charge anyone and the law began to look at other precedents that could be developed. They pushed for the first time as a campaign and a family to create a condition and develop a private prosecution against the suspects.

This had never taken place in the UK before, never mind for a racist murder or a murder itself. It failed as the Old Bailey judge said that the information and the evidence by the chief witness of the murder Duwayne Brooks, a friend of Stevens, was contaminated, I will return to this.

The families also worked with the Inquest process and pressed for a trial by jury to address the question of the death being an unlawful killing but also racist. The jury not only found a verdict of unlawful killing but they said very categorically that this was a racist murder. As a result of that the then Home Secretary was asked to launch a public inquiry. We only got the Public Inquiry because the then opposition spokesperson for the Labour Party, Jack Straw, in the run up to the election in 1997 said they would hold a Public Inquiry if Labour came into power. When they came into power the demands became even more vociferous.

These were unprecedented actions, never tested before and never done before by the families, the campaigners and the legal teams. They developed a process against the backdrop of a media which always saw black as a problem but then they began to see for the first time there was an issue that needed to be discussed and debated. This was so much so that the *Daily Mail*, a right wing tabloid most of you know, began to support the family's cause. There is not space here to discuss why that happened, and their shift was not about justice but the development of law and order issues. The media could not ignore Nelson Mandela's visit to the family in May 1993 a month after the murder. They could not ignore his statements on racism in the UK when Mandela said after visiting the Lawrence family that 'Black lives were as cheap in the UK as they were in South Africa'. That statement generated a campaigning vehicle, a space for the family to develop its litigation and allowed for a debate on the issue of racism.

What became apparent was that the family became the face of a greater tragedy of other families who had suffered in a similar manner before but who had not had justice or had not had remedies or relief in the courts. Therefore Stephen Lawrence became a cause célèbre, a campaign for racial injustice and police accountability.

There were a number of factors that made the inquiry unprecedented and important. For the first time the family were able to forensically examine the motives of the Metropolitan (MET) police and why the litany of failures took place. Every single police officer who had been in charge of the investigation as well as the MET police commissioner Paul Condon was interviewed. Their motives were questioned, the suspects were called into the inquiry and we were able to physically show the failures of the police. I do not want to give you examples but one of the issues that was very important was the issue of police corruption and that will come up again later and the role of example of ES Davidson. It is now become clear as a result of the Lawrence's inquiry that Davidson had a relationship with one of the suspect's fathers, Mr Norris. The prosecution failed because of Davidson's statements on

Duwayne's evidence where he said that Duwayne didn't identify the suspects. The second element of the public inquiry which was important was that the inquiry chair and its advisor didn't agree with the police submissions that they were incompetent. This is what they put forward in the first year of the inquiry as the basis of the failure. We argued that they had to consider and put in perspective why these glaring omissions by police were taking place and we put forward arguments about institutional racism and corruption. Macpherson did not entertain the arguments of corruption at all. He did find institutional racism. The inquiry categorically said that the three failures that they believed that led to police failures was lack of police leadership, incompetence and institutional racism. And that is the legacy of the Stephen Lawrence inquiry.

Let's look at the chronology and how the current situation has developed. Soon after a review took place of the murder in 2012 two of the suspects were finally convicted of Stephen's murder. As a result of information that came out during the murder case the media through its sources began to read police information which said a number of things about police corruption. Firstly that Scotland Yard had files at the times of the inquiry in 1998 alleging corruption of Davidson, which were never examined properly and there were another claims by another police officer, a former detective admitting acting corruptly with Davidson and others. It was said that Davidson had admitted to a corrupt relationship with the father of David Norris, but that was never actually passed on to the inquiry itself. As a result of the media reports there was a review done by the MET on the 31st May 2012 and they concluded, internally, that MET had given all available material relating to officers concerned to the inquiry. They said that none of the allegations made by the media post the sentencing were new. A campaign took place after this review, instigated by the Lawrence's that the Home Secretary should set up a new public inquiry. Instead she decided that an independent review would take place led by Mark Ellison QC who was the chief prosecutor in the murder case in January 2000 and an internal inquiry take place by another chief superintendent from another area by the name of Mark Creedon. The terms of the inquiry were:

- Is there evidence, providing reasonable grounds for suspecting that any officer associated with the initial investigation of the murder of Stephen Lawrence acted corruptly?
- Are there any further lines of investigation connected to the issue of possible corrupt activity by any officer associated with the initial investigation of the murder of Stephen Lawrence?
- Thirdly was the Macpherson Inquiry provided with all relevant material connected to possible corruption?

Unconnected, in 2002 a book came out called *Undercover*, written by two *Guardian* journalists in which an undercover officer revealed the extent the collusion and spying on a number of campaigns including Stephen Lawrence's as well as environmental campaigns. They suggested that undercover officers had been tasked to gather intelligence to smear or discredit the Lawrence family in 1993 and that this issue had deliberately been withheld from the inquiry in 1997/1998. The terms of reference for the Ellison Inquiry were changed to look at the consequences of the new revelations by the undercover officer who called himself Peter Francis. One of the consequences of book in the Stephen Lawrence case was the extent of the intelligence and surveillance activity carried out by the police force nationally was exposed. In respect of the Macpherson Inquiry what was the extent and purpose of authorisation of any the surveillance of their solicitor? What did Ellison find? He said that there was not enough evidence but intelligence existed that Davidson may have corrupted the Stephen Lawrence investigation. Ellison said that not all lines of enquiry were pursued in relation to corruption and that an inquiry should be opened. However due to the lapse of time, loss of records and documents (and you're talking of a van load of documents which were shredded while Ellison is conducting his review), it's very difficult of gaining evidence of corruption. Was Macpherson provided with all relevant material? He said there were serious concerns that relevant materials were not provided to Macpherson and that intelligence suggested that Davis was corrupt and the content of Putman's debriefing should have been used by Macpherson and that if evidence emerged supporting Putman's facts that the issues of criminal proceedings should need to be considered.

On undercover policing Ellison finds that there was undercover deployment at the time of the inquiry which reported back personal details of the Lawrence family and the decisions made by the Lawrence's in connection with the inquiry. Information regarding undercover policing was withheld from the inquiry, which was unable to make definitive findings concerning undercover policing from 1990 onwards. He said that a public inquiry should now take place given his findings. What about the extent of intelligence and surveillance nationwide? He says that some research must be conducted on the behaviour on a number of individuals. He names these individuals not openly but to the Home Secretary. What was the extent of the intelligence and surveillance extent and purpose of Duwayne Brooks? He says that such activity was neither necessary nor justified but it was not unlawful, an issue that we need to discuss properly.

Now, the Herne Inquiry which was the internal police inquiry, headed by police superintendent Mark Creedon, carries out its own investigation. Creedon says that despite claims by Peter Francis that the report should not breach the principle of Neither Confirm Nor Deny (NCND) and he will not confirm or deny whether Peter Francis was ever an undercover officer or a police officer. No evidence has been discovered that Peter Francis was tasked to monitor the Lawrence family or the campaign and that Operation Heron was focused on the cross contamination of Peter Francis credibility and cannot be substantiated.

Now Ellison reaches a totally different conclusion. Whereas Heron says, it's a whitewash, it is there to discredit the only whistleblower in this case Peter Francis is the only source who has come out in the British Isles, who has openly said that he himself was undercover and given information on how he and others, at least 30 other undercover officers have spied on campaigns like the Lawrence's. Therefore the Home Secretary, as I said, has announced an inquiry. Now one of the specific issues that have come up in Ellison is the nature of spying on black communities and activists. For the first time there is confirmation that justice campaigns like the Lawrence's, I don't know if you know the cases of Ricky Reel and Michael Menson, these are cases of racial murders where the families are pursuing and forcing a police investigation. That is actually what the campaigns are about there's nothing more to it, just forcing them to investigate properly and if they don't investigate properly an open transparent external inquiry into why they have not done so.

Ellison confirms that Francis goes further and lists around 13 campaigns that he spied upon specifically and he says that the objective of the unit that he was part of, the Special Demonstration Squad, created in 1968, post the anti-Vietnamese War campaigns and which existed until 2008, all those years actually were tasked to spy on so called subversive groups. His position and the states' position, was that once they entered the realm of black minority, Irish, Asian communities they began to spy on these justice campaigns. But there is specific confirmation that Special Demonstration Squad developed not just intrusive but purposeful sabotaging of defence campaigns one of which was just to support families. Ellison says for example objective operatives had specific tasking in Afro-Caribbean groups during the time of the Stephen Lawrence's murder investigation and the concerns of the community afterwards. Some of them may have risen from the concern of senior police officers however the governance of tasking the specific objectives is not known and is not clear from the documents obtained from interviews taken by different detectives.

Another source says in October 2010 that targeting black campaigns which had been formed in response to deaths in police custody, including serious racial assaults committed by officers - that once the Special Demonstration Squad had got into an organisation it was effectively finished, thus effectively making justice even harder to obtain. In other words they do not just go into spy but actually finish off the campaign as soon as it starts. Now there is confirmation that they were spying on black meetings, there is confirmation that they were sabotaging, there is confirmation that the Special Demonstration Squad's role changes from not just spying but to creating a deployment practice not just linked to current activities of justice campaigns but building a forecast of what they will be doing in 15 to 20 years time. So officers claimed that they were spying on individuals and groups and began to understand how these campaigns will be in 15 or 20 years time. So the purpose of this spying wasn't just contemporary but over a longer period of time, even assessing who the leadership of this campaign would be in 20 years time.

So where are we now? What will happen? What is the position in terms of the inquiry? What are the Terms of Reference? What are the discussions that are taking place around the Lawrence campaign? Obviously we have to put the context in of race and racism properly not only do we have an issue of spying but of deaths in custody which have gone up and up, there are only a few judgements which have confirmed that the police are responsible for these deaths in custody. You have shoot to kill policies, the case of Mark Duggan is an example of that.

You also have the extent of racial violence taking place and the whole discourse of race has been smeared in the public domain. Also in terms of policing, as far as the state in concerned there is post 9-11 and 7/7 the link with terrorism and extremism and not having a definition of extremism. What has happened with the Special Demonstration Squad is that is has now become the National Public Order Intelligence Unit and the National Domestic Extremist Intelligence Unit. Not having the clear definition of extremism means that, as even the inspectors report admits and confirms, groups who had no intent of using violence would be subject to this spying, surveillance as well as criminalisation. Secondly the debate in the UK is consent or coercion, and unfortunately or not the context of spying and surveillance is going to be seen in this context. I am not saying that is how it should be, there is not a discourse on whether there should be a regulatory framework of undercover policing or informants. That discussion has not taken place in the way it has, as I understand it, in the way it has in Northern Ireland.

It is clear to us that involved in justice campaigns that there are many connections between us and the Northern Ireland experience. When the 1981 and 1984 police act took place, it came as the result of Kitson's book on low intensity operations and the emergence of the kind of view of criminalised communities and creating sterile areas where it was believed criminal activities took place and they needed to be subjected not just to intelligence activities but hard hitting police action. There you have the consequences in Tottenham, Brixton, Southall etc being spied upon and being criminalised, use of stop and search and hard policing etc. Those policies he argued in low intensity operations were directed and developed on the Northern Ireland experience and he gave examples of intimate body searches that which became incorporated in the 1984 Act that had been used in Northern Ireland.

Also we have a direct connection in how race has developed by the state and especially by the MET police under John Creed, who became the director of the race violence task force using intelligence operations. This came from the experience of Northern Ireland and his purpose was purely to gather intelligence and get convictions. Little did we know he was spying on the campaign. Again we see how the Northern Ireland experience of building coalitions and learning from each other becomes absolutely paramount.

The Intersection of Intelligence with Exceptional Courts, Military Commissions and Procedural Exceptionalism

Fionnuala Ní Aoláin,
Associate Director and Professor TJI

This paper will address the essential synergy between intelligence gathering and exceptional legal process. Based on comparative analysis of military commissions and exceptional courts across multiple legal systems the analysis demonstrates that the expansion of intelligence gathering has been intertwined with the growth of due process exceptionalism in legal systems post 9/11.

As a result, the protection of covert sources and methods is integral to the operation of the rules of evidence, and the regulation of courts that interact with the closed and secret state. Examples from the United States and the United Kingdom, including the expansion of closed material procedures will be used to illustrate trends and practices. Ultimately the paper will show the centrality of a 'protective principle' to intelligence gathering and intelligence-based evidence in the Courts. The implications for human rights treaty obligations are also addressed.

My brief today is to talk to you all about a body of research that I have been engaged in for a number of decades which is fundamentally about the relationship of law to exceptionality. My comments today draw on a book that I recently finished which undertakes a comparative analysis of exceptional courts and military commissions. My co-author Oren Gross and I looked at a range of these courts and exceptional processes, in part driven by the sense that while much attention has been garnered by Guantánamo Bay, Cuba in the last decade, plus, Guantanamo is not that unusual.

In reality, states regularly resort to exceptional courts, exceptional methods and even the routine use of military commissions feature in a number of advanced democracies as they address terrorism and counter terrorism, violent actors and others.

What also informs my conversation today is a large body of empirical work that has been carried out more recently at the Transitional Justice Institute by Professor Colm Campbell, a colleague of mine. Professor Campbell has thoroughly addressed the latter end of the Diplock Courts' functioning. My own ongoing research on the Irish Special Criminal Court (SCC) is also relevant. Some of you may recall that the only study on the functioning of the Special Criminal Court in the Republic was carried out by Mary Robinson in the 1973. In our current work we are processing a dataset which looks at the functioning of the SCC from 1973 onwards. We seek to understand more about how democratic states use and harness cores processes to do the work they want to do when they perceive themselves to be under threat. As many will be aware there is a large body of scholarly work from this jurisdiction by Paddy Hillyard, Tom Hadden, Kevin Boyle, Stephen Greer and Dermot Walsh and Northern Ireland is really unusual because while democracies have frequently resorted to the use of exceptional courts in fact there is very little data analysis of usage, effects and long term consequences of such deployment. This jurisdiction is rare in that not only do we have data but we have consistent data from the early 1970s onwards and what that gives us is an insight into what I have termed in my work as 'due process exceptionalism'.

What I mean by due process exceptionalism? The definition I give here is that it functions as an umbrella concept capturing a variety of state irregular practices. I should underline that the states I am talking about are democratic states because as we know, although it may not appear so, democratic states are constrained in ways that non-democratic states are not in addressing violent challengers. When we observe due process exceptionalism what I observe is a bundle of practices, where the executive and legislative branches of the state significantly modify ordinary, well-accepted, and long-established due process rules, particularly in the criminal justice arena. The criminal justice arena becomes absolutely central to democratic states response to violent challengers or to perceived internal threats. That is particularly important because the courts and the associated mechanisms that are attached to the courts become crucial to managing the states' responses. When we examine the actions of courts I suggest we need to triangulate our discussion about covert intelligence. Specifically, we need to take the use of that intelligence in the context death (extrajudicial or other) and into the multitude of ways that the activation, gathering and deployment of intelligence serves to fulfill other myriad functions of the state. While I accept that addressing intelligence gathering in the context of Article 2 of the ECHR and the right to life there are a range of other rights that are implicated by the deployment of intelligence, particularly covert intelligence.

To contextualize these multiple uses of intelligence gathering and intelligence material I now turn to some of the scholarly literature that helps us frame our understanding of the multiple uses of these sources and techniques.

The overall scholarly literature in terrorism and counter terrorism is captured by an earlier book of mine co-authored with Oren Gross, called Law in a Time of Crises, a book that identifies three sorts of static responses or response capacities by the state.

The first is "business as usual." What do we mean by business as usual? We mean that even when challenged by an extremity, either internal or external although primarily focused on internal, the state can use its ordinary law. This means that the ordinary law and regular procedures are sufficient to deal with the needs of the state challenged by crises. The "business as usual" model, I think none of you in the room would be surprised to hear, is rarely deployed in practice. States sometimes say they do, but in fact when one looks closely and empirically examines the practice of staying within the ordinary rules we find a variety of modifications to accepted, ordinary and routine legal practices. Some of those modifications are legislative but they do not need to be. Some modification are actually modifications of actors (police, military, judges) as they function within the legal system.

The second is the model that predominates in democratic state responses to crises and that is the "exceptional powers model". What this model assumes is that the ordinary laws are insufficient, that the states' resources under the normal rules when facing a threat are insufficient. The state then has to modify or adapt those rules or extend those rules to function in the context of crises. The key questions here for human rights lawyers and activists is the extent of which those modifications restrain the democratic state. This includes the state's own self definition of being a democracy as well as how those same modifications adhere to the states obligations under international law, particularly international human rights law.

The third model is one of which I will only briefly address but some of you in the room will recognise its salience to the contemporary moment and historical moments of Northern Ireland. This is, the "extra legal powers model", namely where a state acts outside of the law. One of the interesting challenges we see for democratic states and where this model is pertinent to the discussion of intelligence gathering is, in fact that the democratic state there is a tension between the regular as it were, use of exceptional powers and the enticement to moving to extra-legal powers, and thereby operating outside of the law. Because even when the state makes major modifications it will not be entirely convinced the work needed to be done will be done.

An earlier work of mine which some of you may be familiar with addressed the use of force. This was a book called *The Politics of Force* and I hope it demonstrated that in the context of the use of force in Northern Ireland, that state action was significantly operating under an

extra-legal model. Moreover the state operated in the assumption that there would be tolerance of that action.

There are key questions that arise when considering the powers that are being deployed and particularly in the secondary category, the resort to exceptional powers. That once you go into an exceptional powers model you cannot in fact ever separate the exceptional response from the ordinary legal response. Despite that reality, the idea of separation is often integral to the argument that the state makes to use exceptional powers, meaning 'this isn't going to affect you or I, this is actually aimed at those really bad people doing really bad things'. As we know in the context of the removal of the right to silence initially on a basis of very narrow class of use in operations but of course extended way beyond that, these claims of separation are rarely sustained. Instead we see seepage from the extraordinary into the ordinary and that seepage is really important to keep in mind as we discuss intelligence gathering and is particular pertinent in the context of the Stephen Lawrence inquiry where you see what looks like a restrained kind of action by the state in terms of certain types of crime and seeps into 'ordinary law'.

So let us think a little about intelligence and courts and why I think courts are such an important site in the operation of intelligence. Intelligence gathering has always been an integral part of the way domestic democratic systems have worked. If we go back to look at the creation of law enforcement mechanisms across a number of classic democracies, let's start with France which as early as 1700s we have the creation of the specialised unit called the NAME which had a clear information gathering function within the establishment of a policing framework. In the UK we can see from the mid 1800s onwards attempts to create a centralised police force . This went hand in hand from 1881-1887 with the establishment of the special perhaps not unexpectedly "Irish branch" which was using large scale undercover intelligence covert gathering techniques to control the then perceived threat, Fenian activism. The USA again another example of detective bureaus emerging in the late nineteenth century almost emerging at the same time as organised policed forces were gathering.

So with that idea in mind when I say intelligence has been intertwined with policing and that this is a long historical relationship. Undoing it would be very difficult and engaging human rights all the more so. That historical pedigree given, we have nonetheless seen a rapid expansion of this post 9-11 and that rapid expansion has not only been directed by domestic imperatives but also aided and abetted by increased trans-national cooperation around intelligence gathering through Counter Terrorism Committee of the United Nations (CTC). These claims around the need for intelligence in courts are often located in security and protective discourses and in that context it is fair to say that this language is saying that the state has to be given a certain amount of leeway because we face such exceptional threats that the protection of the state becomes its primary goal.

I think what this creates for us is the need to interrogate those assumptions about both security, asking whose security is being enhanced and also whose protected and who is not protected within these frameworks? This brings me to borrow a concept from Professor Campbell's work which is captured by the idea that courts and intelligence gathering and the particularly the operation of intelligence gathering within courts is a site where the "open and the closed" states meet.

If you think of that idea for a second, the idea that particularly when you harness intelligence for the purposes of court process, then there is both the exposure of the intelligence itself but also of the apparatus that produces the intelligence. That apparatus is one that we rarely see in democracies. It exists subliminally in a way that is not conscious at all, and hidden in public and institutional discourses. This brings me to address some of the functions of intelligence. It is particularly clear that the protection of covert sources and methods is integral to intelligence operations. So where the rubber often hits the road in terms of legal process is how we challenge these sources and that is primarily through the vehicle of evidence rules and evidential inferences. Again recalling the motif of the 'open and closed' state it narrows down to that point where one can understand procedural rules regulating the intersection of these two parts of the state. We have a range of examples from Northern Ireland and elsewhere to illustrate how that tension plays out. We have seen this in the context of public interest immunity certificates where the state is both seeking to utilise the benefit of intelligence gathering to procedural ends but has to deploy certain logistical devices to get prosecution or accountability work done but are also constrained by that dimension. We have seen the example of the use of Closed Material Proceedings in the UK. Similar tensions are to be seen by expansion in the United States of the operation of FISA courts. Moreover, those of you who follow the Guantanamo Bay litigation through the Supreme Court and the DC circuit will know that this question of again of regulating of information is absolutely central to the interface of and control of the relationship between two parts of the state.

I can certainly speak of this in the context of the data work we've been doing in TJI around the Diplock courts and Special Criminal Court. The first insight comes from understanding not just the relationship between intelligence as necessary to enabling judicial outcomes but also seeing the relationship between detention, interrogation, intelligence gathering and courts because exceptional courts do not function without exceptional detention practices and all the attendant pieces of the game outlined here. Exceptional Courts are like the trains tracks, and if you get on the detention track, then the deployment of evidence, the production of evidence, and intelligence interface all follow. It is also clear that one of the research challenges that face this tension between the open and closed states is a controlled space and its one which is also controlled by the states which use due process exceptionalism.

In a world which intersects extended detention with the use of intelligence sources gathered in a variety of ways there are consequences. We see inadequate access to legal advice, we see intrusions into lawyer client confidentially, we see extended detention, we see psychological and physical ill treatment in custody. All of these elements stand in relationship to the deployment or gathering of intelligence. Interestingly, when we closely examine cases address sub-issues about such matters as access to lawyering it may look like you litigating access to lawyering but in fact the subtext of what a lawyer may also be litigating is the intelligence use of that access. This is because the state is not only regulating access to lawyers it is also attempting to regulate the access to information. One of the questions we have looked at in our data gathering is how do we see that when we look at court records how do we understand the operation of the closed state in its intelligence function. The phrase that we use is that we seek traces of the closed state. Where do we look for those traces? We look at the process of that which leads up to the defendants' arrest , surveillance, informers, the point at which a person is picked up. For example, we can make certain assumptions about the intelligence relied on that leads to arrest and therefore see traces of the closed state operating as that person is being brought into custody.

As you can gather searching for the closed state/ the secret state/ the intelligence state an elusive phenomenon and as researchers we do not sit in the interrogation space. Ultimately, what we have looked at in court documents is a limited terrain from which to navigate the presence of the closed state in this exceptional trial process.

One of the claims that I would make here is that that work is enormously important and lawyers litigating these cases are conscious of the array of state interests that are involved not just the particular withholding of a specific right but also the way the intelligence and information gathering is central to the overall legal process. What does all this mean for fair process for human rights protections? Well at the very least and the lawyers in the room know this from here is that the presence of the notification of the presence of intelligence information is key to safeguarding equality of arms under the equality of terms in the European Convention. So not knowing that intelligence is being used or the non statement of that use places the defendant at a considerable disadvantage vis-a-vis the state. It is also central to the full and fair trial. . One of the things I would add is that the use of intelligence material has received much less attention in litigation processes than other things like the right of access to a lawyer. And I would make a claim that these two things are often interlinked. When you are litigating the right of access to a lawyer you are often in fact, whether you know it or not, litigating intelligence gathering. I think it's important to make those claims more explicit, particularly in a post 9-11 context, the insertion of accountability into the intelligence gathering space in trial and detention process.

I also think that we are seeing challenges to intelligence gathering and the challenge is that even that due process is a non-derogable right under many human rights treaties but not all, international courts are increasingly treating it as if was derogable. The Inter-American court of human rights for example have specifically said for example that these are de facto non-derogable rights because the implications of limiting these rights are such that would have consequences that require them to be treated as non-derogable rights. We also have UN Security Council resolutions which broadly address about the need to comply with human rights norms while countering terrorism. That includes for example, detention and fair trial and I think we are simply seeing more scrutiny to these bodies. For example the FISA courts in the USA these courts have come under sustained assault particularly from privacy rights advocates and we have new statutory regulation pending so at the domestic level, not generated by a counter terrorism narrative but a broader concern about data and secrecy can have, I think, implications for this.

Covert policing and the Nationalist Socialist Underground cases

Carsten Ilius

The presentation will focus on problems and consequences of the collaboration of police/secret services and Nazi informants in Germany based on examples from the so called NSU case.

The NSU case is a case of neo-Nazi terrorism involving an unprecedented failure of law enforcement authorities and the domestic secret service over a period of 13 years, between 1998 and 2011. During that time a group of three persons, calling themselves National Socialist Underground (NSU) committed 10 murders (8 persons of Turkish origin, one of Greek origin and one police woman of German origin), 3 (nail) bomb attacks aimed at migrants (wounding 23) and 15 bank robberies to finance their operation.

At least 10 Nazis being in close contact to the group worked as police or secret service informants. Despite the fact that many of these informers had hinted during the years of 1998 till 2001 at the whereabouts of the three person cell (but not at their crimes) the information had not been acted on and not been shared among the agencies.

My topic for today is a kind of comparison, of course on a completely different level. It is a case about a Nazi underground group in Germany and it is a case that shows that the reputation of Germany as a country of strong democratic accountability is a myth or from the German government's perspective, a lie even, I would say.

A short overview:
Probably most of you have not heard about the so called National Socialist Underground (NSU) yet, because so far this group is not so well-known in a foreign context. Therefore, I would like to start with a short introduction to the NSU.

Afterwards I would like to show in detail why the topic of today is very closely connected to the NSU case. I am going to touch the following aspects: state security informants and the NSU, the existing or not existing legal frame work in Germany and finally the parliamentary inquiries and the court proceedings which are going on in Munich at the moment.

The theory of the public prosecutor has always been that the NSU is a cell consisting of three persons only: the supposed murderers of ten persons, Uwe Mundlos and Uwe Boehnhardt, who finally killed themselves, and Beate Zschaepe, who is on trial at the moment in Munich.

We assume that there have to be a lot more members of the group whom we do not know yet because of the covering up by the security services and especially the secret services in Germany.

What is my connection to the case?

In Germany we have a quite strong system of co-plaintiffs, which does not exist in the UK or in Northern Ireland. It means that victims of serious crimes can engage a lawyer who represents them at the trial against the suspect. These lawyers have nearly the same procedural rights as the public prosecutor and the defendant lawyers, which is quite different from the Irish and the UK system. I represent the wife of one of the victims as a co-plaintiff at the NSU trial in Munich. My client is the widow of Mehmet Kubaşık, who was murdered in Dortmund in 2006.

The Development of the NSU:

The NSU group developed since 1995. They had connections mainly to two networks. One was a very strong, at this time (1995 to 1999) the strongest regional Nazi group in Thuringia, one of the states in East Germany. The other connection was to “Blood and Honour”, a network operating in Germany and Europe-wide. It was actually exported from the UK. There, “Blood and Honour” had developed an own concept of so called leaderless resistance and set up a group, named Combat 18 (18 for the 1st and the 8th letter of the alphabet, the initials of Adolf Hitler), that developed techniques to go underground and to fight for the “primacy of the white race”.

Uwe Mundlos, Uwe Boehnhardt and Beate Zschaepe, all of them born in the 1970s in East Germany, go underground on 26th January 1998, when the police detect a garage, where they are about to construct bombs. They had used bombing devices before 3 or 4 times, but none of them had exploded. They go underground also because Uwe Boehnhardt faces a verdict of two and a half years.

That is why they leave Jena, the city in East Germany, where they had lived until then. As we know now, they then live in different places in the Saxonian cities of Zwickau and Chemnitz.

Between 1999 and 2011 they commit at least (that is what we know so far) 10 murders, 3 bombings and 15 bank robberies. Nine of the 10 victims are of a Greek or Turkish migrant origin, the tenth is a police woman of German origin. The murders and the bombings take place all over Germany.

They stay undetected until 4th November 2011, or at least until then officially nobody knew about the existence of the group.

On 4th November 2011, Uwe Mundlos and Uwe Boehnhardt try to commit another bank robbery. This time the police is about to detect them in a caravan which they were using to escape. Before the police can actually get hold of them, they shoot themselves; i. e. Mundlos first shoots Boehnhardt and then himself. At least that is the official version and what I believe according to the evidence we have seen so far.

Later on the same day, Beate Zschaepe, the third member of the group, sets fire to the house, in which Boenhardt, Zschaepe and Mundlos had lived at that time. The house was situated in Zwickau, a city about 100 kilometres away from the place of the bank robbery. Afterwards, Beate Zschaepe is travelling around for four days and finally surrenders herself to the police.

In the caravan and in the apartment the police find the weapon used for the first nine murderers (it had always been the same weapon, a Česká), the weapon of the killed police officer, the weapon of her colleague who was injured and money from different bank robberies. The police also find a DVD or a CD with a film and a confession of all the ten murders and two of the bomb attacks. This evidence links all the crimes to this group.

All of the victims of the murders (with the exception of the police woman) were little shopkeepers. For this reason in the media the murders were called the Doener murders, which is in itself racist. The bomb attacks were also targeted at people of foreign origin, one at an Iranian origin family and one at a street in Cologne where 95 % of the shopkeepers are of Turkish origin.

Very important is that the police investigations focused completely on the victims and their environment in a very structurally racist way. So, for example, the family of the first victim in Nuremberg, the Şimşek family, for ten years was faced with the allegation that they are guilty themselves and that the killed father of the family had been involved in some kind of criminal activities.

The more murders happened, the less convincing this theory became, because there is no kind of relationship between the victims, i. e. none besides the use of the same weapon. In addition, there were several very interesting profiler reports by the FBI and by different German institutions saying that it might be racist attacks. Nevertheless, the murders and bombings are never linked to that.

For the bombing attack at Keupstrasse in Cologne a bomb with 700 nails of ten centimetres length was used. Many people were heavily injured, luckily nobody died. There was a report by Scotland Yard linking this attack to an attack in London by Combat 18 in 1999, were the same metal and the same technique had been used. What the Cologne police said is, “That is true, but David Copeland, the perpetrator in London is in prison. So this cannot be the perpetrator here, so we do not have to follow this.”

After a report from the Secret Service saying it could be a rightwing attack, the police researched if somebody in Cologne could do such an attack. They concluded that this was not possible and stopped investigating in that direction, whilst the investigations against the families of the victims went on. Thus the families were destroyed first by the murder and then by the police investigation. There are only four families out of the ten, who still function in a certain kind of way. The rest are destroyed and not ready for any kind of resistance and do not feel able to attend the NSU trial in Munich.

The role of the police and the secret services

For the first two years after going underground Mundlos, Boehnhardt and Zschaepe lived in Chemnitz, in the most active Nazi scene in Germany and the most active “Blood and Honour” network at that time. We know that the police and the Secret Services knew that they lived in Chemnitz. Somehow they had information about them being there, but still they could not find them. The NSU group moved around in public on bicycles, they played video games with very active Nazis, they wrote for Nazi papers using different identities, but still the police was not able to find them. Then they moved to Zwickau before they commit the first murder, because in Zwickau they still had connections, but not as strong as in Chemnitz. They stay there until 2011. It was fortunate for them that they lived in Saxony in connection with covering up their whereabouts. Because Saxony is the opposite of a best practiced example for transparency.

The structure of the German authorities in charge of security is a little different from the one here in the UK, where the competences have been transferred to the MI5. In Germany, the main competence for information gathering lies with the domestic secret services (one in every of the 16 federal states of Germany and one on federal level), which are separated from the police authorities.

This is because after 1945 the Allies did not allow the Germans to create a new Security Police. The disadvantage of this system is that all the information on extremism, a very wide and broad term, is now gathered by the secret services and a lot of this information is not disclosed, not even to the police. This structure is also the reason why most of the informants active in rightwing organisations work for the domestic security services and not for the police.

We know that there existed at least ten informants, working for domestic secret services, who were very close to the NSU group; partly supporters, partly friends, partly political environment. What we also know is that already in 1997 the Federal Police Department of Germany criticized in an internal paper the domestic secret services for not disclosing important information to the police and that they often warned the Nazis about police raids beforehand in order to protect their own informants. There was a quite open conflict about this at that time.

Regarding paper trail, our limitations are quite strong. Because a big part of the paper trail, i. e. of the files of the authorities involved, has been destroyed. Interestingly, just two weeks after 4th November 2011, some of the most important information was destroyed in the office of the Federal Police Department.

I would like to give you a few examples of the very close cooperation between the secret services and the Nazis.

The first is Carsten Sczcepanski, who was an informant of the domestic secret service on federal level from 1994 to 2000. He had killed a Nigerian asylum-seeker in 1992 and was in prison for that from 1994 to 1998. He was recruited by the secret service in prison in 1994 and worked for them until 2000. He tried to found a terrorist group in 1999/2000 buying weapons and constructing bombs with another police informant and a third person, but has never been on trial for that. Currently, he is in a victim protection programme. He was not named by the public prosecutor as a witness for the NSU trial, although between 1998 and 2000 he had reported on the NSU group to the secret service (as we now know from the files) that they were buying weapons, that they maybe wanted go abroad, that they were in Chemnitz, …

The second one is Tino Brandt, an informant for the domestic secret service of Thuringia. He was a leader and founder of the “Thueringer Heimatschutz”, a very violent Nazi group the NSU were members of, before they went underground. He had already been recruited as an informant before he founded the “Thueringer Heimatschutz”. Brandt had contact to the NSU between 1998 and 1999 and was one of the most important persons helping them being underground at that time.

The secret service paid him about 100,000 Euros during that period, so it was nearly a full scale job for him. In addition, they financed him a car and about 350 to 400 Euros telephone costs every month. That means more or less the whole infrastructure of the ”Thueringer Heimatschutz” was financed by the security services.

The third person, Thomas Richter, called “Corelli”, was an informant of the federal domestic secret service. According to the authority itself he was one of its most important informants and sources in East Germany from 1994 to 2012. He was one of the founders of the “Ku Klux Klan” group in Germany. There were two colleagues of the 10th NSU victim, the police woman, who were “Ku Klux Klan” members of the same group as he was. Unfortunately, he died this year while being in the victim protection programme of the secret service under very strange circumstances: allegedly undetected diabetes, where you can never find out if it was a natural or an unnatural death. I do not say it was an unnatural death, but there are serious doubts. In particular, as he just died at a moment when we requested the court to call him as a witness at the NSU trial and when a CD was found from 2006, which he had produced and where he uses the name NSU, when at this time nobody officially knew about the NSU.

The legal Framework

The German legal framework for the use of informants by secret services is not a very strong one, unfortunately. There are guidelines stating that *‘no informant, who could decisively influence the decisions and activities of a group/organization, is allowed to be run by a secret service’*. Still, Tino Brandt and the others were recruited as informants...

Another example is the attempt of the German government to ban the National Democratic Party (NPD), a Nazi party, in 2002. According to German law this can only be done by the Constitutional Court. The Constitutional Court stopped the proceedings on the grounds that up to 20 % of the leading positions of the NDP were held by informants of the secret services. The court argued that it cannot judge if the NDP is a state organisation or an independent party as long as no information about these informants is disclosed.

In the German legal system criminal offences committed by informants cannot be justified because of this position as an informant (with the exception of Lower Saxony). Nevertheless, Tino Brandt committed 35 criminal offences and was convicted for none of them.

What is currently the most important problem regarding the control of informants is the serious limitation of access to files about the informants.

I would like to give you an example: In 2006 the NSU murdered the proprietor of an internet cafe in Kassel. At the time of the killing an officer of the secret service of this state was present at the internet cafe.

There are about 50 files about this, but so far at the NSU trial we have seen only 10 of them the argument of the secret service for not disclosing the other files is Article 8 ECHR, privacy of the officer. He was even considered a culprit in the beginning, but still we cannot see the files about him. He testified as a witness in the NSU trial for four days, but all we know is that he was for sure at the time of the murder in the internet cafe.

It is possible to sue for the disclosure of information on secret service informants at the administrative court. However, disclosure can be denied if *"this information would prove disadvantageous to the interests of the Federation or of a Land",* another very broad term. In this case *"the competent supreme supervisory authority may refuse the submission of certificates or files"* The decision is then taken by the supreme administrative court. The trial is not public and the court does not have to give reasons for its decision.

In search of the truth?

We do not have a legal instrument similar to Northern Ireland. There is no ombudsman in Germany, not in schools, not in police, not in the secret service, we have nothing like that. There are parliamentary inquiries in the German states and on federal level; some better, some worse. The ones in Thuringia and in the federal parliament were quite good, but even they did not really challenge the covering up by the secret services. They were not able to or they did not want to.

There is the NSU trial in Munich, but a lot of the information is held back by the prosecutor's office. They argue it is not relevant for the case. But how do we know? Sometimes we request a witness to be called and when they come it turns out that they have already been interviewed by the public prosecutor maybe 2 years ago and have been classified as 'not relevant'. Because of the limited access to security service files, especially at the court, we are not in a position to check the reasons for this.

We, i. e. the lawyers representing the victims in the NSU trial, often talk about the experience of the Lawrence inquiry and of other similar cases. We hope that maybe in 8 or 10 years some secret service officer will disclose some information and then we can come one step further towards finding out the truth.

We try to ask questions and put pressure on the public prosecutor, but our resources are limited. We would like to invite especially the academics working on the topic to come to Munich to follow the trial and discuss their impressions and ideas with us. I am sure we can learn a lot from your experience which might help us with the trial.

Session III

The oversight mechanisms

Chair Brian Gormally, Director CAJ

Dr Michael Maguire, Police Ombudsman for Northern Ireland, The Police Ombudsman's oversight of covert policing

Yasmine Ahmed, Rights Watch UK Accountability and reflections on the public inquiries from the Cory Collusion Reports

Ryan Feeney, Independent Member, Northern Ireland Policing Board, on the Board's work in relation to covert policing.

The Police Ombudsman's oversight of covert policing

Dr Michael Maguire

Police Ombudsman for Northern Ireland

"There is no element of police criminality or misconduct which is outside the remit of the Police Ombudsman's Office. That includes Covert Policing. This view is the basis of all our investigations and much of the discussions we have within the organisation. The ability of my Office to deal with issues of covert policing is often a litmus test for both police accountability and the effectiveness in holding the police to account."

The focus of my talk today is on the links between covert policing and the importance of accountability and what that means for the work of the Police Ombudsman's Office.

Let me begin by discussing the difficulties in dealing with the issues on covert policing and some of the changes I have made to the Office since taking up the post of Police Ombudsman. The relationship between oversight and covert policing is, to my mind, relatively simple: you either have accountability or you do not.

For me, accountability means the capacity to ask very difficult questions and it can also mean the capacity to say things which actually demonstrate that there is not a problem. It means everything on the spectrum from being able to say there is a problem' to 'fundamentally we don't think there is an issue here.'

There is no element of police criminality or misconduct which is outside the remit of the Police Ombudsman's Office. That includes Covert Policing. This view is the basis of all our investigations and much of the discussions we have within the organisation. The ability of my Office to deal with issues of covert policing is often a litmus test for both police accountability and the effectiveness in holding the police to account.

Many of the most serious complaints to the Office over the years concern some of the most grave allegations that can be made against any police service: they include allegations of conspiracy to murder, conspiracy to pervert the course of justice and collusion different kinds of paramilitaries.

How the Office deals with covert policing and the range of things we can categorise as covert policing does have an impact on how we are perceived and how the effectiveness of the oversight mechanisms are seen to be working in practice.

The Police Ombudsman's Office must have access to sensitive information in order to be able to do its job. I have said explicitly that those who are the subject of an investigation cannot have a veto, cannot have a degree of influence over the information that the Office gets in order to complete its investigation. We cannot have an investigation by negotiation.

I think a second issue in relation to the difficulties of exploring and undertaking and investigating issues around covert policing concerns my responsibility as Police Ombudsman in managing how that information is held, processed and disseminated. I take those responsibilities extremely seriously.

There is a difference between having access to information and what you do with that information in a public domain. In order to develop and anchor confidence in an oversight body it is important that society generally believes it has access to and consideration of the information important for its investigations.

The third issue relates to operational difficulties in exploring the concept of covert policing. I only look at one aspect of the role of state in relation to Troubles related issues and that is the police. We can only deal with certain civilians as witnesses and therefore, to deal with criminality involving both the police and others requires joint investigation. This brings with it a number of complexities and difficulties, including the speed of investigation, complexity of decision making and the resources available.

A consideration of covert policing remains a key element of modern day accountability. It is important that we recognise the problems and difficulties which go with this but there is nothing new with these issues. The Police Ombudsman's Office has always only looked at policing, only been able to deal with that side of the equation and not with civilians.

My Office has some of the strongest police oversight powers in the world. We only have to look at south of the border and indeed I was reading in the paper today that the Justice Committee in Dublin has put forward a proposal for a Criminal Justice Inspectorate which looks across all criminal justice agencies, a single Ombudsman and a police authority building on, I have no doubt, the accountability arrangements in Northern Ireland.

An eminent legal figure told me recently that in Washington DC, if a police officer shoots someone dead, the police themselves will investigate the incident, and the complaints body will only look at any subsequent misconduct issues.

It is important not to lose sight of the strength of what we have in Northern Ireland relative to what exists elsewhere, and how we can build on some of the opportunities we have to develop further the powers of the Office.

These have been identified in the review that the Department of Justice is taking forward. My view, for example, on compelling retired officers to speak to the Office are well known and that will all be part of the review.

Trust and confidence in the Police Ombudsman's Office was hard won and could easily be lost. We need to work hard at demonstrating the independence of the Office and the integrity of its investigative processes. I want to read something that I wrote, that was published in September 2011 and related to some of my own work in relation to a review I did of the Police Ombudsman's Office.

Talking about historical cases I said: *'The inspection identified a number of significant concerns over the ways in which the OPONI conducts investigations into historical cases. They include an in consistent investigation process, a varied approach to communication with stakeholders and differences in quality assurance. In addition, we found a senior management team divided around the production of reports in this area and a fractured approach to governance and decision making. The handling of sensitive material was also considered problematic.'*

In looking at the last two years we have made great progress. The Office's new management team has addressed the issues. We had a positive CJI inspection allowed for the re-launch of our 'history' cases and we have demonstrated a balanced portfolio of conclusions in both our 'current' and 'history' cases.

The Police Ombudsman's Office has people working in it who are focused and committed to answering the questions they can with the information they have available.

So in looking at covert policing I think the debate that we have had this morning demonstrates some of the issues in relation to the difficulties with current arrangements. I recognise some of those: indeed in the context of the review I have put forward suggestions on how we can improve those and I would encourage any changes that are required to make that happen. But in recognising those criticisms and in recognising some of the difficulties with oversight arrangements, let us not lose sight of what we have, which is also this basis on which we can work to make things better.

Accountability and reflections on the public inquiries from the Cory Collusion Reports

Yasmine Ahmed

Rights Watch UK

Based on joint research by CAJ and Rights Watch UK – *Report of the Inquiries Observation Project, 2008 – 2010* - published by both NGOs and TJI this presentation addresses inquiries that flow from the Cory Report: the Rosemary Nelson, Billy Wright and Robert Hamill Inquiries. It highlights the significance of public inquiries as a means of accountability, the role of the Inquiries Act 2005 which is now the statutory basis for inquiries and its implications, and what needs to be changed to make the inquiries process more robust and to ensure basic accountability.

Today I'm going to be talking about accountability mechanisms in relation to collusion and covert policing more broadly, but specifically, I'm looking at public inquiries and the public inquires that flowed from the Cory Report.

What I'm going to do first of all, I will talk specifically about the inquiries that flow from the Cory Report. I'll be talking about Rosemary Nelson, Billy Wright and Robert Hamill, but before I do that, I want to briefly discuss the significance of public inquiries as a means of accountability, as a mechanism of accountability and a little bit about the Inquiries Act 2005 which is now the statutory basis for inquiries although inquiries can obviously be run on a non-statutory basis as well. I will then have a look at the implications of the fact, under the 2005 Inquiries Act, that it is who can actually decide whether an inquiry can and will be held, and what the implications for accountability and justice of that are, and also, in terms of the mechanisms of running the inquiry, who holds the pen on how an inquiry would be run, and again, what that means in terms of accountability for actions of covert policing and collusion. Finally, I'm going to talk about some of the things that I think maybe should be changed or we can seek amendments to make the inquiries process more robust and to ensure basic accountability.

I think inquiries are a really important means of accountability for government action more broadly. They can take account of the broader circumstances, they take account of systemic

issues and they can look into government actions more broadly than some other mechanisms of accountability.

I think in the context of Northern Ireland, and actually the UK more broadly, we can see that in the areas of covert policing and collusion, public inquiries provide us with a really important mechanism to be able to draw the links between systemic issues that are happening although there are other bodies obviously that are doing this similarly. So you have got the Office of the Police Ombudsman, you have the inquest system, you have a number of other systems that do that. I think there are limitations on how they are actually able to do that. We see, for example, with the Office of the Police Ombudsman, the limitations exist with the case recently brought against the PSNI. The issue of actually being able to get evidence from the police and ensure scrutiny of the information is provided. We also see other mechanisms such as the coroner's inquest. Although they are trying to put cases together and deal with systemic build into their inquiries identifying systemic issues we know that the coroners' inquest processes are quite narrow in scope and they are designed to be narrow in scope. They are not necessarily meant to be dealing with broader government issues and accountability. I think also we can see the issues around, for example, the HET, the Historical Enquiries Team. We see there, obviously, a body that investigates, looks at past allegations of investigations, attributable between 68 and 98 that there were issues of impartiality. Obviously the HMIC report said that they weren't looking at issues, looking at cases to do with the state in the same way of non-state actors. So again you can see that a number of these different mechanisms don't have the same mobility to look at the issues of government actions as potentially a public inquiry does. I think there are also issues around the restriction in terms of compellability of witnesses and documents and the disclosure of sensitive documents to other forums. So for example in the Azelle Rodney inquest in mainland UK and also, in both of those the coroner actually suggested an inquiry should actually be established because they were unable to see all of the sensitive documents. You can see there that there is actually genuine value in a public inquiry that other mechanisms of accountability can't necessarily ensure.

In terms of who can actually establish a public inquiry under the 2005 Inquiries Act, as I think has been mentioned before in this room, it is the government ministers that have the control to decide whether an inquiry will be established or not. This obviously raises significant issues. One can see that the point of an inquiry is to look into government action more broadly and when the government holds the pen on deciding whether a public inquiry will be held or not there are issues raised about whether that is actually the correct mechanism which should be used. The issue of that obviously comes up to play very prominently in the Cory Inquiry in the Finucane case. As we know the Cory report suggested that, in addition to the other three, there should be, in relation to Northern Ireland, an inquiry into Finucane. There have been many calls by NGOs, by families, by the community at large for as inquiry as was promised in the Finucane case. As we have seen that has still

not happened. We have had a judge led report, the de Silva report, which is being talked about extensively but not the public inquiry which has actually been promised. What was quite interesting about that is the extent to which the fact that the government has actually and, Prime Minister Cameron has actually admitted collusion and apologised for collusion and yet there is still a refusal for a public inquiry.

As most of you will know there is a judicial review of that decision happening in December this year to challenge the decision of the government. I think one of the problems with public inquiries that we all know too well, is that the government uses as a narrative to say we can't have public inquiries, is that of austerity and the costs of public inquiries. I feel like this is a narrative which plays very much obviously into the government's hands because essentially what it doesn't take account of is a number of things, the fact that the government will often contribute to the length of the inquiry, for disclosure issues, for other issues. It's not merely the fact that an inquiry has to take so long, has to cost a lot, but the government also themselves can also contribute to that cost by not disclosing adequate information in the right way etc. etc.. I think there are good examples, for example the Azelle Rodney inquiry that cost a lot less than other inquires, only 2.5 million. Obviously that's a lot of money but a lot less than some other big inquiries. So it's possible for inquiries to be held and limit their scope in a way so that obviously it doesn't cost as much as the Bloody Sunday or other inquiries. I think it's quite interesting as well, the House of Lords Select Committee who did a report analysing the Inquiries Act 2005, they suggested a number of reforms that the Government could do to try and make inquiries more manageable, make them more cost efficient, and for example, they suggested the setting up of the Central Enquiries Unit within the MOJ. So they were saying that there were certain measures that could be taken by the government that would streamline the process of setting up inquires that would make them much more cost efficient and time efficient. As I said, the 2005 Inquiries Act provides the framework for currently governing statutory inquiries. There have been, as I said, severe criticisms of this, of the Inquiries Act 2005.

As I said, the first one being that it's the government ministers that decide whether an inquiry will be held or not. One of the main problems with this, in addition to the fact that it is the government who holds the pen on this decision, is the fact there are no criteria for deciding whether a public inquiry will be held or not, so the public has no means really of challenging whether an inquiry should have or shouldn't have been held in a particular circumstance. We can't challenge the consideration that the government is taking in deciding not to hold a public inquiry. For example in the Litvinenko situation the government was forthcoming to a certain extent in saying that one of the reasons they were not going to hold a public inquiry was because of diplomatic issues and relations with other states, namely Russia. One can see, should there not be an ability to challenge the government and see what criteria they are taking account of when deciding to or not, establish a public inquiry.

The second issue where there has been a lot of criticism about the Inquiries Act, more generally, is the fact that the control over the inquiry itself also sits with the minister and the government more generally so it's in terms of actually setting the terms of reference which are obviously incredibly important in determining what an inquiry will or will not look at. Also whether the inquiry will be open or closed, whether documents will be disclosed to the public that are presented to the inquiry, all these sit with the minister. The minister can actually change the terms of reference of the inquiry after the inquiry is established as well. They have the ability to suspend or terminate an inquiry so there is a lot of power that sits within the government ministries in deciding how an inquiry will happen. As I said, coming back to the fundamental point, what this all means is, this is a mechanism of accountability for government activity that essentiality the government has control over and that is the debate that we need to be having is whether that's actually appropriate and maybe it's appropriate but to what extent does that need to be tempered and how would that be tempered.

So as I have said at first, the main issue is about deciding whether to hold a public inquiry. The key example for all of us here, and even in the mainland UK as well, is that there was an agreement under the Weston Park Agreement that if this judicial figure, who ended up being Judge Cory, said that that there should be certain inquiries, that the government would actually fulfil that promise and, as we know Finucane was one of those and no such inquiry has been held to date.

I think in relation to controlling the inquiry, that's where we see some of the problems that come out in the other inquiries so the Hamill, Nelson and Billy Wright inquiry. In that inquiry I think some of the issues that we found came out was particularly around the terms of reference and here we are talking about obviously collusion. Now quite interestingly, none of the terms of reference of any of those three inquiries actually included the word collusion. That has a significant impact obviously on the inquiry itself, the perception of the inquiry by the public, what the inquiry is going to do going forward. Having said that, the inquiries did, to a certain extent; deal with issues around collusion, to different extents in different inquiries. I think probably the most striking one though was the Billy Wright inquiry and I think, in that example, we found that the inquiry panel was conscious of the significance of the Secretary of State for Northern Ireland having emphasised his view that Judge Cory's definition of collusion was very wide. So although they did take account of collusion in the three inquiries what we find is a narrowing of the definition of collusion.

So collusion being, including not only participating in acts actively coercing actors to do things but also, obviously turning a blind eye to things, actively turning a blind eye, wilful negligence, those sorts of activities and what we find in these, particularly in the Billy Wright inquiry that it was restricted specifically to require an agreement or arrangement between state and non-state actors. So it was very specific in its terms of reference that it did not

include turning a blind eye, wilful negligence. And that obviously has massive implication for what the outcome of the inquiry will be. So with the Billy Wright inquiry, it was found that there was no collusion in the Billy Wright case but, one has to question, to what extent that would been a different outcome had the terms of reference been broader. Similarly in the Rosemary Nelson inquiry, we find that although it did include acts of omissions of the RUC, NIO, army and other state agencies it was not as broad a definition as Cory had suggested as well. Another issue which affects the ability of the inquiry to hold the government to account is disclosure. We find that, for example, again with the Billy Wright inquiry there was resistance and delays in obtaining intelligence documents from the PSNI including the inquiry facing an unacceptable request that the police service would only supply intelligence documents to a judicial inquiry after the inquiry had signed an MOU that the PSNI had drafted, which Michael will be quite familiar with these sorts of issues. So disclosure has a massive impact if the documents can't be forthcoming.

That sort of leads me back to where I first started in a way that public inquiries can provide a very powerful mechanism of accountability but, like the Office of the Police Ombudsman, they are reliant on co-operation with bodies that are being investigated. I think another question which actually brings us back to the panel that we heard from before lunch is about public access to inquiries. Now one of the article 2 elements of an inquiry is that it should be public, it should be open and there should be a perception of it being open, and there being open access to justice. But again this whole idea of open and closed justice comes into the public inquiry system as it does in other judicial arenas. So we find that in the Rosemary Nelson inquiry and the Billy Wright inquiry, there were numerous closed sessions, there was a number of documents that were redacted, quite severely and heavily redacted documents. Some of the documents that were redacted were provided to some of the core participants and their legal advisors. However, those documents were then not put onto public record and onto relevant public databases so people could access them. So again we see the fact that if there is not the ability for there to be public access, and in closed sessions, in some of those closed sessions there weren't the victims, the core participants and their legal representatives were excluded from those sessions as well. So that's another means by which the ability of a public inquiry to really fulfil those article 2 obligations to hold the state to account.

Finally, I will now finish, in just talking about what I see as being the means by which we could improve public inquiries so that they will provide an important means and mechanisms of accountability for government actions. And when I speak about inquiries I don't think inquiries will be, by any means, the only mechanism used. I think Office of the Police Ombudsman, inquests; they all have an incredibly important function. But inquiries, I think are important, and we need to make sure that when we do have them, that they are as robust as possible, giving the fact that we will probably be having very few and far between going forward. As I said, I think that one of the main things is that the

government, that there should be an agreed criteria or at least a set of circumstances that the government should need to consider when deciding whether or not to hold a public inquiry, in such as the ability of other mechanisms to disclose adequate information, the ability of them to compel documents and witnesses. These all should be considered by the government and taken account of when deciding whether a public inquiry should be held. As I said In the Litvinenko inquest it was quite significant that one of the justices who was appointed to sit as the coroner said " I don't think there should be an inquest, it should be a public inquiry because I cannot access the documents" So in those circumstances, I think it's really important that the government justify why it's not awarding a public inquiry when the coroners themselves have said that it should be an inquiry rather than an inquest. There should also be criteria determined if there is a conflict on behalf of the ministry who is deciding whether an inquiry is going to be held. I think that's quite important because in some instances there may not be a conflict of interest, but in others there may, so there should be some kind of determination about whether or not a conflict of interest does exist. If one does exist we then need to explore avenues of who else may be the appropriate body to decide whether parliamentary inquiry should be held, should it be more broadly parliament, parliamentary committees, should it be the judiciary? There are a number of other actors who could potentially decide whether a public inquiry is appropriate.

I think it is important that the terms of reference, if the government is going to set the terms of reference, that they must be agreed by the chair, and they can only be changed with the chair's agreement, the chair to the inquiry. That's quite important because they will determine the breadth of the inquiry and also take account of representations from the core participants as well as to what those terms of reference should be. I think there should be a restriction on the use of restrictive notices which come under the 2005 Inquiries Act. The restrictive notices under the 2005 Inquiries Act are ones that allow the government to say that certain parts of the inquiry process will be closed and also that certain documents cannot not be produced, as well, I suppose more broadly. I think that needs to be reviewed. I think it should be potentially the government should have to apply to the chair to have documents redacted and not produced, that it shouldn't just be the ability of the minister to do that.

One final point that I would make, I think it is very important that there are clear measures that are put into effect to ensure that the government takes account of recommendations made by the chair and that these are implemented because otherwise we will have what can be very expensive inquiries, what can be very illuminating inquiries and very important inquiries, and as public, we learn important things but recommendations are made and changes are not made if those recommendations are not enforced so I think we need to have proper mechanisms to ensure that any recommendations that are made are properly implemented and enforced by the government.

The Policing Board's work on Covert Policing

Ryan Feeney

Independent Member, Northern Ireland Policing Board.

First of all I'd like to thank CAJ for the opportunity of being here and giving people an overview of the policing boards work and particularly the work that we are involved in with covert and security policing, which falls slightly outside the framework we are involved in however we are responsible for all the police officers who are undertaking work and investigations in this jurisdiction.

Most of you will be familiar with the Policing Board and what we do as an organisation. I would argue very strongly that the civic role of the Policing Board has never been more important than it is now. The framework that we have in place as a result of Patten has allowed us to develop a civic and political oversight body which holds the Chief Constable of the police to account and we can see the Police Scotland board that is now in place in Scotland, Michael has already alluded to the new Garda authority that will be established in the south over the next number of years and we also have Police and Crime Commissioners in Britain, which I'm not exactly happy with as I feel that one person having the role politicises it slightly, but the idea of civic oversight of policing is now in vogue and vitally important in terms of accountability and oversight.

The board itself as a body was established in 2001 and we've 19 members - 10 political members which reflect the makeup of the Executive in terms of d'Hondt and 9 civic members like me who accountable to the Minister of Justice following a public competition with the Minister of Justice consulting as per the legislation, with the Office of the First Minister and deputy First Minister.

Our job is to meet on an ongoing basis with the Chief Constable to scrutinise the police but most importantly to build community confidence. It is our role to ensure that the community are confident in me and the other people who sit on the board to do our job and are confident that the police are performing theirs. And that means that we act as the buffer and you come to us and say that there's an issue here and to ensure that we're asking the right questions.

Over the last number of years, I'm coming into my 4th year on the board, I've been on it three years now, we've had a strained relationship with the police in terms of information exchange. I don't want to comment on it now but I know the Police Ombudsman's office was having the same and I hope now we are entering a new era of accountability and transparency within the PSNI because as the people who represent the community and as the people who are there to try and build community confidence we should be the first port of call.

We should be the people who have the information and talk about more the covert side of things and the role that human rights can play in that. Just to go through the functions very quickly, our overarching role is to ensure that there is effective and impartial representative policing through the PSNI and we also want to ensure that all functions of the PSNI are human rights compliant

Now I come from a very strong Republican Nationalist background. It would have been unheard of for someone like me to have been on the Policing Board before the devolution of policing in 2007 but I fundamentally believe that the model we have at the moment can work if we have a relationship with the Police built on trust. Michael alluded to it as well when he said the importance of getting relations right and information exchanged. We as the Policing Board have powers to actually compel the Chief Constable to provide us with information. We have not yet used that power and hopefully will not have to in the new leadership but we've come fairly close over the last number of years. There should never be a situation, outside of the current security umbrella, where the police would not provide information to try and ensure the community have a board that are holding the police to account.

There are a range of oversight mechanisms in terms of covert policing and just to make it very clear from the very outset the Policing Board here has responsibility for the operations which take place in the context here in the North.

There are responsibilities that the Chief Constable has outside of that sphere within the Secretary of State and it comes a bit murky and difficult to comprehend on occasions.

Our role in that ensure that we have oversight of the police and the work they undertake while they're on duty and it is the responsibility of the Chief Constable to report to the Secretary of State and the Home Secretary in London. So there is a range of oversight mechanisms there and our role on the board is to coordinate the activities with the other authorities; the RIPPA mechanism, we have Michael in the Police Ombudsman's office and an ongoing relationship with Alex Carlisle, David Anderson and David Seymour and we meet with them on an ongoing basis to ensure we have confidence in the security and covert areas of work that things are being done to a very high standard and there is a level of accountability.

Now that is difficult, be under no illusions about that, it is difficult on occasions to comprehend but also that's the case, because we have very eminent QCs and very highly qualified and respected legal figures and establishment figures coming into a room and telling us 'well this is how we see it', those discussions have been frank but in terms of accountability, is it the best way forward? That is the debate that CAJ and others may want to have.

It's very important to highlight that the relationship between the Policing Board and the Police Ombudsman is key as well. Michael's job is to ensure that any complaints or any issues are investigated and our job is to hold the PSNI to account. We have a very productive and frank relationship with the Police Ombudsman's office and we hope that will develop as well with the new change in leadership within the PSNI. From our point of view we found it particularly difficult and I'll say this on the record, over the last while we found the Police Ombudsman's office and the PSNI in court as part of the Judicial Review in terms of information exchange. That's something we don't want repeated and I think I am reflecting the attitude of the entire board on that.

In terms of the role the Policing Board plays in terms of covert policing, it's important to highlight again, back to the caveat in terms of the relation of the different roles, it is our job to ensure efficiency and effectiveness, monitor the human rights compliance and framework around that in relation to all aspects of work that is carried out in this jurisdiction. We have no oversight, and let me be very clear about this, no oversight arrangement with regards to the security service so we have no remit in terms of MI5 and the operations that go on in our area. And I'll come back to that.

So the Chief Constable remains accountable to the board for all police operations and all police officers and staff that are acting alongside the security services here. We cannot direct the PSNI, I cannot tell George Hamilton what to do, I certainly couldn't tell Matt Baggott what to do, but our role is to be there as the accountability body, that they will provide an answer to us on issues of concern and ongoing reports in terms of operations of the police and obviously ensuring compliance at all times with the law.

We carry out this work on an ongoing basis and it's not just as simple as sitting in committee meetings scrutinising the police, there is a much wider role the Policing Board and its members would play in terms of ensuring accountability. That the police are doing their job, that the community have confidence in the police and working with Michael in the Ombudsman's office with complaints or issues that are relevant to the police are carried out and investigated.

The policing plan that we have, which acts as our guiding document and we put that together on an ongoing basis in consultation with the police and we set the targets that we want them to achieve, over a 1 or 3 year periods and the policing plan at the moment has concentrated on counter terrorism and that report will be ongoing to the board.

We meet as I have said previously with Alex Carlisle, David Anderson, Rob Whalley and David Seymour and get briefings from them on a range of issues and that engagement is ongoing. We did set up a small working group, the Covert Security Policing Arrangements Group, that I chaired, it got a bit out of control because people sort of thought of it in a James bond sense, that we were going to oversee all of the security arrangements. It was really a group to put together a framework to help Allison Kirkpatrick, our human rights advisor in her role in monitoring and reporting to us in terms of the security and covert policing issues and we put together that framework and we are hoping to finalise it in the Performance committee over the next number of weeks.

Annex E of the St Andrews Agreement clearly outlines the human rights proofing of the security services and the PSNI protocol which falls under our remit within the Policing Board, so as you can see while we are not responsible for MI5 or their actions here we do have a role in terms of resourcing and in terms of the role that police officers who are on duty play in the North.

In terms of the provision of information as I mentioned earlier, there is a legislative framework which outlines the role that we have in terms of inquiring or gathering information from the Chief Constable and that's outlined in section 33A of the Police Act. The Chief Constable is not obliged to provide info around the areas of national security as outlined on the screen there, again that comes difficult because there are things that we define as not being within the sphere of national security and there may be things that the Chief Constable defines as are.

Therefore we find ourselves on many occasions as we have in the past and I have no doubt we will in the future, at a bit of a loggerheads in terms of how we progress on these. Hopefully in terms of the development of good relationships and by building trust, as Michael outlined, we will negate some of those problems.

Just to make a final point on the issue, it's very very important to highlight the role of the Boards human rights advisor and we've Allison Kirkpatrick here in the room today and there's another former human rights advisor in the room as well, Keir Starmer was the former the director of Public Prosecutions in England and Wales, who is also a former HR advisor. The PSNI allow our human rights advisor unrestricted access to sensitive information.

She can tell the board certain information, she is fully vetted and a very eminent barrister and we respect the role that she plays on the board. She's able to provide us with a level of satisfaction in many cases, or not, that the areas in which we are not allowed information because of security sensitivities, are being carried out with propriety and carried out within the accountability framework.

Now the limitations around the information supply to Board we cannot report back on, there are some briefings we get in confidence; there are some things that we have taken to a special purposes committee, which is a special group within the board which deals with sensitive issues and issues of a security nature as well.

As I said we are currently finalising through the security group a framework which will protect our human rights advisor in terms of her role ensure that she is able to work through that framework and report back to us.

Now though a very convoluted system in terms of accountability in policing and I would echo the comments of previous speakers, I believe it's a world standard of accountability mechanisms, I believe that the model of civic oversight to come out of the Patten report has now become the model that should be adopted in policing throughout the world. We have a very good story to tell here and perhaps on occasion we don't talk about the success of the mechanisms which hold the police to account and the transformation of the PSNI and there is a very good story to tell there. But there is still a lot of work to do.

So in conclusion I would suggest that covert policing by its very nature will never be transparent but through the oversight mechanisms that are in place including the work of the policing Board and the human rights advisor it can certainly be accountable.

Speaker Biographies

Rory O'Connell Director UU TJI	**Rory O'Connell** is Professor of Human Rights and Constitutional Law at the Transitional Justice Institute / School of Law at the Ulster University, which he joined in 2013. Rory's research and teaching interests are in the areas of Human Rights and Equality, Constitutional Law and Legal Theory. Prior to 2013 Rory worked in the School of Law / Human Rights Centre at QUB.
Louise Mallinder UU TJI	**Dr Louise Mallinder** is a reader in human rights and international law at the Transitional Justice Institute (TJI). She is also TJI's 'Dealing with the Past' research coordinator. Louise has been awarded a BA in economic and social history and politics (2001), LLM in Human Rights Law (2003) and a PhD in Law (2006) from Queen's University Belfast. She has published her doctoral thesis as 'Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide' (Hart Publishing, 2008) and this monograph was awarded the 2009 Hart SLSA Early Career Award and was jointly awarded the 2009 British Society of Criminology Book Prize.
Paul O'Connor, Director Pat Finucane Centre	**Paul O'Connor** is coordinator at the PFC which provides advocacy and support to over 200 families bereaved through the conflict on both sides of the border. A Derry native, Paul spent time working in the US on a project for the homeless and volunteering with the United Farmworkers Union. He has also lived in Germany where he was active in anti-nuclear and anti-militarist groups and was a shop steward in the public service union. Paul spent time in Sandanista Nicaragua with a coffee brigade and remains keenly interested in Latin America. Active in the PFC since its foundation Paul was one of the founders of the original Bloody Sunday Justice Campaign and his focus is on the issue of dealing with the past.
Daniel Holder, Deputy Director CAJ	**Daniel Holder** has been employed as the Deputy Director of CAJ since 2011, leading the organizations, policing, justice and equalities policy work. Prior to this he worked in the policy team of the Northern Ireland Human Rights Commission for five years, and before that he led a migrant worker equality project run by the NGO the South Tyrone Empowerment Programme and Dungannon Council. He previously worked in Havana, Cuba as a language professional for the University of Havana, press agency Prensa Latina and national broadcaster, ICRT. He has a primary degree in Spanish and Sociology and an LLM in Human Rights Law, both from Queens University. Daniel co-authored, with Mick Beyers, the 2012 CAJ report '*The Policing You Don't See: Covert policing and the accountability gap: Five years on from the transfer of 'national security' primacy to MI5*" and is currently completing the forthcoming CAJ report '*The Apparatus of Impunity?*' focusing on the limitations placed on mechanisms with a remit to deal with the legacy of the conflict.
Cheryl Lawther, Queen's University Belfast	**Cheryl Lawther** is a Lecturer in Criminology at Queen's University Belfast. Her research interests include the areas of transitional justice, truth recovery and the politics of victimhood. In 2011, her article "Securing' the Past: Policing and the Contest over Truth in Northern Ireland', *British Journal of Criminology* 2010, 50, 3: 455-473 was awarded the Brian Williams Article Prize by the British Society of Criminology in July 2011. This award in made in recognition of the best sole authored journal article by a 'new' scholar in the previous year. Her monograph '*Truth, Denial and Transition: Northern Ireland and The Contested Past'* was published by the Routledge Transitional Justice Series in early 2014.

Suresh Grover, **Director** **The Monitoring Group (UK) and former co-ordinator of the Stephen Lawrence Family Campaign**	**Suresh Grover** has been involved in anti-racist civil rights work since his early teens. In the late 1970's and early 1980's, he helped to set up a number of key groups in Outer West London, namely the Southall Youth Movement and Southall Rights. He was also one of the founders of the Southall Monitoring Group, now known as The Monitoring Group. He has extensive knowledge of race related legislation and policy and is recognised nationally for his advocacy work. He is the leading exponent of family and justice campaigns in the UK. He has led over fifty campaigns to help families, including those related to Blair Peach, Bradford 12, Ricky Reel, Michael Menson, Amarjit Chohan, Stephen Lawrence, Zahid Mubarek and Victoria Climbie – the latter three cases led to Public Judicial Inquiries and consequent changes in legislation and practices. The Guardian Newspaper has described him as one of the hundred most influential people in Social Policy in the UK. He continues to develop international public interest campaigns to support communities suffering discrimination, racism and genocide as well as those affected by ecological disasters induced by either state or corporate neglect. This has included supporting victims of the Bhopal Gas Disaster, Gujarat 2002 and members of Indian community that are subjected to draconian terror legislation and discriminatory practices in Malaysia. He is an accredited trainer/advisor on humanism, "hate crimes" and Human Rights for public bodies and NGO's in the UK and the rest of Europe. He is currently writing his book on race relations in the UK, due to be published next year.
Fionnuala Ní Aoláin Associate Director and Professor TJI	**Professor Fionnuala Ní Aoláin** is concurrently Professor of Law and Associate Director at the Ulster University's Transitional Justice Institute in Belfast, Northern Ireland and the Dorsey and Whitney Chair in Law at the University of Minnesota Law School. She has published extensively in the fields of emergency powers, conflict regulation, transitional justice and sex based harms in times of war. Her book *Law in Times of Crisis* (CUP 2006) was awarded the American Society of International Law's preeminent prize in 2007 - the Certificate of Merit for creative scholarship. *On the Frontlines: Gender, War and the Post Conflict Process* was published by OUP (2011). Ní Aoláin was a representative of the prosecutor at the International Criminal Tribunal for the Former Yugoslavia at domestic war crimes trials in Bosnia (1996-97). In 2003, she was appointed by the Secretary-General of the United Nations as Special Expert on promoting gender equality in times of conflict and peace-making. In 2011, she completed a Study on Reparations for Conflict Related Sexual Violence for the OHCHR and UN WOMEN. She chairs the International Women's Program of the Open Society Fund. She has twice been nominated by the Irish government as Judge to the European Court of Human Rights. She has been a member of the CAJ Executive for 10 years and is Editor of Just News.
Rechtsanwalt Carsten Ilius Lawyer	**Rechtsanwalt Carsten Ilius** is a lawyer based in Berlin with a focus on criminal law, immigration law and anti-discrimination law. He is working intensely on issues of structural racial discrimination in schools and by police authorities in Germany. Since October 2012, he is representing the widow of Mehmet Kubaşık, who was murdered by the NSU Nazi-group in April 2006.

Brian Gormally Director CAJ	**Brian Gormally** is Director of the Committee on the Administration of Justice, Northern Ireland's leading human rights NGO. For over a decade before that, he was an independent consultant working mainly in the voluntary and community sector and specialising in justice, human rights and equality issues. He was Deputy Director of NIACRO for 25 years until 2000 working with communities, alienated young people, ex-offenders and prisoners' families. He has published and presented extensively on justice, community policing and conflict resolution issues, particularly on politically motivated prisoner release, victims of terrorism, dealing with the past and restorative justice. He has been involved in international peace-related work in South Africa, Israel/Palestine, the Basque Country, Italy and, more recently, Colombia. He has also worked on a number of projects on equality and human rights with the trade union movement and on the Bill of Rights with the NI Human Rights Commission.
Dr Michael Maguire Police Ombudsman for Northern Ireland	**Dr Micheal Maguire, Police Ombudsman** is now finishing his second year as Police Ombudsman for Northern Ireland. During that time he has published a number of high profile reports into many aspects of policing. One of Michael's first tasks in taking up the post was to look again at the organisation's structures and process for holding covert policing to account. This issue was central to the report he compiled on aspects of the Police Ombudsman's Office while he was Chief Inspector of the Criminal Justice Inspectorate in Northern Ireland (CJI). Michael held that post for four years, during which he led a series of complex inspections into a wide range of criminal justice issues including prison reform, the treatment of victims and witnesses, community policing and delay within the justice system. Inspections and holding system to account have been something of a theme through Michael's career. Prior to joining CJI, he was a Partner in the international consulting firm PA Consulting Group for 10 years during which he was head of the PA business in Ireland. Before that had been a Director in Price Waterhouse. During his 18 year career as a management consultant he carried out many evaluations, inspections, value for money reviews and audits in the private and the public sectors internationally.
Yasmine Ahmed Rights Watch UK	**Yasmine Ahmed** has been Director of Rights Watch (UK) since April 2014. She started her career in Australia working on issues concerning asylum seekers and refugees. As part of this work, she established an NGO, Australian Refugee Support Group and worked with legal groups assisting asylum seekers in detention. She was a member of the South Australian Muslim Reference group appointed by the South Australian Minister for Multicultural Affairs. Yasmine has worked as a public international lawyer for the UK and Australian Governments and the UN. She worked as an Assistant Legal Adviser at the UK Foreign and Commonwealth Office, a Legal Officer at the Office of International Law, Australian Attorney-General's Department and a law clerk at the International Criminal Tribunal for the former Yugoslavia and the Serious Crimes Unit in Timor-Leste. She is a Chevening Scholar, has an LLM in Public International Law from the School of Oriental and African Studies (SOAS) and has taught public international law at SOAS and the University of Adelaide, South Australia. She also worked as an Associate to a Judge of the Supreme Court of South Australia and is qualified as a solicitor of England and Wales and a barrister and solicitor in Australia.

Ryan Feeney Independent Member **Northern Ireland Policing Board**	**Ryan Feeney** joined the Policing Board as an Independent Member in 2011 and sits on the Performance Committee and Partnership Committee. He is currently the Chairman of the Independent members group and up to 2013 was Vice Chairman of the Human Rights and Professional Standards Committee. Ryan also acts the Policing Board lead on the Community Safety College project. Ryan is a former Politics and Economics teacher and Lecturer having taught in St. Mary's High School Limavady, Holy Cross Strabane and Ulster University before spending time in the private sector working as a both Project Manager and Strategic Consultant. Ryan is a graduate in Business Studies and History from St. Mary's University College and holds Masters Degrees in Law and Public Policy, Irish History and Politics from both Ulster University and Queen's University Belfast. He also studied at Boston College undertaking the Sport in the Community Programme in 2008 and in 2011 was a participant on the US Department of Commerce American Management and Business Internship programme. Ryan has been employed by Ulster GAA since 2006 and currently serves as the Council's Head of Community Development, Strategy and Public Affairs and is a member of the Senior Management Team. He leads on the overall GAA's Community Engagement and Outreach work. Ryan is also a member of the Casement Park Stadium Project executive team and Project Board.

Informants and three steps in a covert policing accountability framework: a CAJ stock-take table

CAJs '*Policing You Don't See'* report sought to tease out a framework for human rights compliance when running informants (CHIS). As well as dealing with matters such as structure, composition and fostering a human rights culture three substantive areas were identified as:

1: **The Rules: ensuring CHIS (informants) operate within the law**

2: **Paper Trail: keeping records**

3: **Accountability bodies**

The following table, included in conference packs briefly summarises the current accountability framework in the PSNI and the Security Service (MI5) in these three areas.

	Description	PSNI current situation	MI5 current
The Rules: ensuring CHIS operate within the law	**Published written policy which sets definite parameters on the conduct of CHIS** Declassified documents cited in the **Desmond de Silva review** reveal that RUC SB worked outside Home Office Guidelines which heavily restricted CHIS involvement in crimes. De Silva also documents a number of attempts to introduce guidelines which would have explicitly allowed CHIS to participate in 'serious crimes', which would not be human rights compliant. CAJ concurs with de Silva that RIPA and its associated Code of Practice does not effectively regulate the permitted conduct of CHIS, as in de Silva's words RIPA "provides little guidance as to the limits of the activities of" CHIS. The **Patten Report** stated that Police Codes of Practice should be publicly available (para 6.38) and that Codes of Practice on all aspects of policing, **including covert law enforcement techniques**, should be in strict accordance with the ECHR; (para 4.8). In relation to police Codes of Practice being publicly available Patten stated: "...this does not mean, for example, that all details of police operational techniques should be released – they clearly should not – **but the principles, and legal and ethical guidelines governing all aspects of police work should be, including such covert aspects as surveillance and the *handling of informants*...The presumption should be that everything should be available for public scrutiny unless it is in the public interest – not the police interest – to hold it back...**Transparency is not a discrete issue but part and parcel of a more accountable, more community-based and more rights-based approach to policing (emphasis in original).(para 6.38)"	Among other matters the OPONI Operation Ballast Report states the **PSNI had adopted a Manual for the Management of CHIS** (both for crime and 'national security' CHIS) but, despite the stipulation in Patten, the manual or other similar documents have not been made public. The PSNI have however declined to release the above manual or any successor or similar documents under Freedom of Information, citing national security, law enforcement and health and safety grounds as well as ECHR Art 2. A request for a redacted version removing anything operational and retaining just the policy framework was also denied. The PSNI even declined to release *the name of the policy document* even though the *name* is clearly not going to prejudice national security, law enforcement or endanger life.	Unknown (beyond RIPA)

Paper Trail: keeping records	**Activity by CHIS is strictly documented and controlled** According to the *Sunday Times* the 1981 Walker Report, which reportedly provided the overarching policy framework for RUC Special Branch, contained stipulations to destroy records after operations. In reference to SB an ACC giving evidence to the Billy Wright Inquiry, described "…a practice or culture that existed in an organisation where the members did not keep records, so there was no audit trail. Nothing could be traced back, so that if they were challenged they denied it, and that denial, being based on no documentation, would become 'plausible deniability'." The Operation Ballast report reporting on the outworking of the PSNI CHIS Risk Analysis Group (CRAG Review) states that the review directed that "**all criminal activity by paramilitary informants has to be strictly documented and controlled**." It also states that "The CRAG review established that **involvement in any criminal offence**, other than membership or support of a proscribed organisation, had to be the **subject of an application to the ACC of Crime Operations**, who would approve or refuse the request. ... "	**According to the OPONI report procedures for strictly documenting and controlling criminal activity by paramilitary CHIS, as well as an authorisation procedure, were introduced following the CRAG review.** However under FOI the PSNI have declined to confirm whether such a procedure currently exists or make available the policy document. The PSNI has also declined to **release overarching statistical information** on the annual numbers of authorisations requested and granted.	Unknown
Accountability bodies	**Robust accountability bodies to oversee Covert Policing** The Patten Commission recommended ***A Commissioner for Covert Law Enforcement in Northern Ireland*** "*a senior judicial figure, based in Northern Ireland, whose remit should include surveillance, use of informants and undercover operations... [with] powers to inspect the police (and other agencies acting in support of the police) and to require documents or information to be produced, either in response to representations received, directly or through the Police Ombudsman, the Policing Board or others, or on his or her own initiative. The commissioner should ... conduct sufficient inquiries to ascertain whether covert policing techniques are being used: with due regard for the law; only when there is a justification for them; and when conventional policing techniques could not reasonably be expected to achieve the objective. The commissioner should check that justifications for continuing specific covert operations are regularly reviewed, and that records of operations are maintained accurately and securely, with adequate safeguards against unauthorised disclosure*." (para 6.44)" The Patten Commissioner was never introduced. RIPA ultimately did not introduce a 'Covert Investigations Commissioner' as had been mooted but deferred to the existing Office of the *Surveillance Commissioner*; with a much more limited role (RIPA did have an Investigatory Powers Commissioner for NI – but this relates to non-police powers). RIPA transferred power to take proceedings under the HRA re CHIS to the Investigatory Powers Tribunal.	The Police Ombudsman **can** take complaints of police misconduct and criminality in relation to CHIS handling by the PSNI (but not MI5). OPONI has no powers to question the CHIS themselves even in the context of investigating complaints against handlers, and would be reliant on the PSNI to do so. The Policing Board can oversee all aspects of the PSNI's work but does have 'national security' restrictions on its powers.	Complaints against MI5 can be made to the ***Investigatory Powers Tribunal*** – a court which meets in secret, does not have to give reasons for its decisions, has no right of appeal and (at the time of publication of our report) had never upheld a single complaint against MI5. There is also the *Intelligence Services Commissioner* and *Intelligence Services Committee* but with very limited roles.

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