

## Bloody Sunday - The Costs of Truth

**The events of January 30<sup>th</sup> 1972 uniquely shaped the Northern Ireland conflict. The loss of life and injury, the failure of the state to investigate adequately, with the continued denial of state accountability created a deep reservoir of hurt within bereaved families and the community. February marks the 40<sup>th</sup> anniversary of the events on the streets of Derry, and the images that riveted the world and in part defined the course of the conflict for decades thereafter. Bloody Sunday was a mirror held up to the state's own rhetoric of rule of law and democratic participation. The state was found wanting.**

Following years of legal and political struggle to vindicate the innocence of thirteen persons killed during the civil rights protest the report by the Hon Lord Saville of Newdigate was released on June 15<sup>th</sup>, 2010 to their families and a watchful local and global community. The Report of the Bloody Sunday Inquiry spanned 10 volumes. The Report was unequivocal that the deaths were “unjustified and unjustifiable” and that all those shot were innocent civilians who had given no cause for the use of force against them by members of the British paratroop regiment.

40 years on provides a space for reflection and for pause. What have we learned and what can the experience of Bloody Sunday teach? Bloody Sunday was a traumatic and politicizing experience for many in the jurisdiction. Yet, it did not produce paralysis. Rather family members, relatives and community became deeply involved in the process of naming the state's failure and sought to hold the state accountable for the murder of its own citizens. It is easy with the Saville Report in hand to forget the costs of mobilization. The yearly march in Derry on January 30<sup>th</sup> was a symbolic reenactment of the state's failure, its silence and its complicity. Families and activists involved in remembering and in challenging were themselves marginalized and stigmatized – the words ‘terrorist’ and ‘fellow-traveller’ easily thrown about over decades.

Bloody Sunday also demonstrates the particular challenges for democratic states in acknowledging their responsibility for systematic human rights violations. Transitional Justice theorists and practitioners mostly assume that democratic states do a better job than their authoritarian counterparts in tackling accountability. This should not be taken for granted. Often the democratic state (here the British government in Northern Ireland) persists with the self-promoting myth of neutrality, and is unable to ‘see’ its own liability for human rights violations. Bloody Sunday is a classic illustration of the failure of the democratic state, unable and unwilling to see itself as perpetrator and reluctant to fully apply its rule of law maxims to its own agents.

On one view the Saville inquiry can be seen as the state finally and fully making amends. However, the role of the state in systematic and sustained human rights violations throughout the conflict did not begin and end with Bloody Sunday. One cynical reading of the Saville inquiry is the conclusion that the state fully acknowledged the harms that took place in Derry on January 30<sup>th</sup> because it had no choice. The level of international scrutiny and the internal political costs in a conflict-negotiation context were too high to sustain on this one egregious set of violations. But, scrutiny has been circumscribed. There has been no wide-ranging engagement with the events of the past in Northern Ireland. No truth recovery process has been agreed by the United Kingdom government, and the state remains hostile to its value. Other significant events, with substantial loss of life remain uninvestigated (including the deaths in Ballymurphy, Belfast in 1971).

*contd...*

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The state has given accountability on Bloody Sunday (though notably the lack of prosecutions for some family members remains deeply problematic) yet is not prepared to address broader patterns of violence, life-taking and conflict management.

This failure to address sustained and systematic state violations over decades is short-sighted. Insightful research by Cath Collins in her book *Post Transitional Justice* (2010) reveals that systematic human rights violations stay with a state – often resurfacing decades later and to more concentrated effect. Bloody Sunday teaches us that the ‘past is never far away’, and that collective memory and trauma will stay at or just below the surface of communal and political life for decades. As Principle 2 of the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (2005) articulates:

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.

Bloody Sunday is testament to the spirit and practice of a right to truth, and to the personal and communal costs that follow from vindicating it.

**Fionnuala Ní Aoláin, Transitional Justice Institute**

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## Armed only with his innocence: Gerald Donaghey

Lord Saville has given an interview to the BBC (31 January 2012) in which he has defended the Bloody Sunday Inquiry's finding that Gerald Donaghey "probably" had four nail bombs in his pockets when he was killed by the bullet that had already felled Gerard McKinney. He said that he had weighed up all the evidence and, although he could not be sure, on the balance of probabilities he had concluded that the nail bombs were not planted on Gerald's dead body. When one examines the evidence, however, it is hard to understand Lord Saville's reasoning.

### The case for

Lord Saville accepts that no civilian or security force eyewitness saw any nail bombs on Gerald's person in the immediate aftermath of the shooting; or when the car driving him to hospital was stopped at Barrier 20; or when his dead body arrived at the army post at Craigavon Bridge.

The nail bombs were discovered by two different RUC officers, Sergeant Vernon Carson and Woman Constable Hamilton, both of whom described seeing one nail bomb sticking out of Gerald's right trouser pocket. Their accounts differed. Constable Robert S Simpson, an RUC photographer, took two photographs of Gerald's body, still lying in the car, one of which shows a white object that could be a nail bomb protruding from his right hip pocket.

Captain 127, the ATO (army explosives officer), said that he removed four nail bombs, one each from a front and a back trouser pocket and one each from the two side pockets of Gerald's denim jacket. The bombs with their detonators each weighed between just over 1 lb and over 2 lb, and contained a total of 178 4" nails. They would have been bulky. The ATO dismantled the bombs and the outer wrappings and nails were sent to the forensic science laboratory. There is no report that these were tested for fingerprints.

### The case against

Gerald was dressed in tight denim jeans and a close-fitting denim jacket. Nail bombs "the size of a small cocoa tin", according to the ATO, would hardly have fitted into the pockets and, if they had been crammed in somehow, they would have been obvious.

When Gerald was shot he was taken into Raymond Rogan's house and was seen by a number of people, none of whom saw any nail bombs. Crucial among these witnesses was Dr Swords, who examined his body and said he should be taken to hospital. He was certain that there were no nail bombs in Gerald's pockets.

Raymond Rogan and Leo Young drove Gerald towards Altnagelvin Hospital, but were stopped at Barrier 20 by soldiers. Rogan and Young were arrested, and Corporal 150 was ordered to drive the car to the army post at Craigavon Bridge. Corporal 150 said that under no circumstances would he have done so if he had seen any nail bombs.

When the car reached the bridge, an army medical officer looked at Gerald and took his pulse, but by then he was dead. This officer saw no nail bombs. The car was then moved a short distance, and Gerald's body was left unattended for some minutes. It was after this that the two RUC officers claimed to have noticed the nail bombs.

### The balance of probabilities

So, no-one saw any nail bombs on Gerald's body until after he had been left unattended for ten minutes. Furthermore, Saville accepts that this is the case. His explanation? The nail bombs must have been buried so deep inside the pockets that everyone missed them. But Gerald was dressed in the uniform of his generation: tight jeans and a close-fitting jacket with small pockets. Common sense suggests that no-one could have failed to notice if his pockets had been stuffed full of heavy, bulky nail bombs – indeed, many of the eyewitnesses said precisely that.

Moreover, he was with his friends when he was shot. As one of those friends candidly told Saville, if he thought for one moment that Gerald was carrying nail bombs he would have removed them. Gerald, like all the other dead and wounded, had been taking part in an illegal demonstration against internment. Had he survived his injuries, he would have ended up in jail had he been found with nail bombs on him.

Saville was a senior judge. He should have understood the presumption of innocence. No attempt had been made to prove that Gerry Donaghey had put those bombs in his pockets himself – they were not even fingerprinted.

### The verdict on Saville

Quite simply, Saville got this wrong. As one of Gerald's friends, Conal McFeely, told the Bloody Sunday Inquiry, "The only thing that Gerald Donaghey was armed with on Bloody Sunday was his innocence."

Jane Winter, Director, British Irish RIGHTS WATCH [www.birw.org](http://www.birw.org)  
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## The Bloody Sunday Inquiry: a model to be followed or superceded?

**Is the Saville inquiry a model for investigating similar atrocities such as the Ballymurphy massacre which preceded it? The strengths of the Saville example are clear. In the face of intense institutional and establishment resistance it took a complex and long process to unravel decades of official lies about the events of Bloody Sunday. The result of the Inquiry was the re-writing of the official record to concede that what happened on the ground was indeed what the thousands of people who witnessed the massacre already knew, the shootings were unjustified and unjustifiable; the victims were innocent. The truth was officially acknowledged.**

The limitations of the Inquiry are also clear. The Bloody Sunday Inquiry has not yet led to significant sanctions against the state. To date barely a medal has been unpinned, let alone institutions or practice overhauled. It is still possible there will be prosecutions, albeit of individual soldiers, probably for perjury. There is a broader concern that the limited examination of army killings and other state actions, for example by the PSNI Historical Enquiries Team, fits a pattern of allowing the UK to review and apologise for individual actions rather than holding the state per se to 'account'.

International justice is still evolving and has its limitations but at least provides some indications of what accountability or an effective remedy should look like. It is difficult to see how 'review and apologise' could meet such a threshold. The International Criminal Court (ICC) in The Hague is a newly established international court whose jurisdiction is limited to the "most serious crimes of concern to the international community as a whole". The Rome Statute sets out the ICC's jurisdiction with respect to genocide, crimes against humanity, war crimes and the crime of aggression. The ICC is to compliment national criminal jurisdictions and cannot examine breaches which occurred before 2002 when the Rome Statute came into force. The ICC has just sustained its first conviction (namely of Thomas Lubanga Dyilo for using child soldiers in the Democratic Republic of Congo). Put simply, the ICC model is to hold individuals at the top of the chain criminally accountable for war crimes and gross violations of human rights. The UN's International Court of Justice (ICJ) also in The Hague provides more of an inter-state civil-model awarding reparations for violations of international law. This was the case in the 1980s emblematic *Nicaragua v the USA* case where the latter was found guilty for "training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua." The model provided by the European Court of Human Rights in Strasbourg involves states being held to account through judgements which oblige individual measures (e.g. remedies and reparations to individual victims) and general measures obliging legal reforms and changes in practice, that seek to make repetition untenable.

There are competing arguments as to whether individual cases are either limited in their capacity to tackle systemic violations or conversely at times have significant capacity to shine a light on how a whole system has worked. A related matter is the extent to which proceedings go beyond the immediate incidents under examination to assess the background context of state actions. It is notable that a number of Chechen Judgements by the Strasbourg Court have found substantive 'right to life' violations even with serious problems of non-disclosure of evidence from the Russian authorities. This is in part from apparent inference from, for example, the pattern of individuals being 'disappeared' by unidentifiable officials in the context of the Chechen conflict. By contrast Inquiries which only look at the 'events on the day', or indeed only allow space for an official background narrative, will be limited by not being able to independently contextualise the *modus operandi* of the perpetrators and determine whether their actions were, to paraphrase the Rome Statute in relation to war crimes, part of a "plan or policy" rather than an aberration of individual military personnel. Contextualisation allows the system, not just its individual actors, to be put under the spotlight.

In response to submissions that the events needed to be contextualised to the *modus operandi* of the authorities the Bloody Sunday Inquiry did not restrict itself to examination of events on the day. Rather the Inquiry Report sets out that it did look "in detail at what the authorities were planning and doing in the weeks and months preceding Bloody Sunday." This examination and an accompanying local historical narrative did not however extend to examining other army shootings, which could have included those in Ballymurphy, which had taken place in the same weeks and months. The Inquiry argued "this would have been a wholly impracticable course for us to take, adding immeasurably to what was already a very long and complex inquiry" and then concludes "In these circumstances, we are not in a position to express a view either as to whether or not such a culture existed among soldiers before Bloody Sunday or, if it did, whether it had any influence on those who fired unjustifiably on that day" (paragraphs 4.4-4.7 of Volume 1). An approach affording accountability could not only have done this but looked much further afield. Bloody



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Sunday took place in 1972. Many of the soldiers and their commanders may well have been fresh from Kenya, Cyprus, Aden, Malaya and other colonial 'theatres' in the years and decades before. An examination of policy and practice in these countries could help contextualise whether Bloody Sunday was limited, in the words of the Coroner Major Hubert O'Neill, to "sheer unadulterated murder" in which soldiers ran "amok and shot without thinking what they were doing" or was it in fact part of 'counter-insurgency' policy which permitted or encouraged the massacre of civilian demonstrators with a view to terrorising dissenting peoples into submission.

Such an contextual approach appears to have been important to Baha Mousa's legal team led by Rabinder Singh QC in the recent Inquiry into the killing of this Iraqi civilian in British Army custody in Basra and the treatment in detention of others (This Inquiry was held under the Inquiries Act 2005, but on the basis of undertakings that Ministers would not use their powers under the Act to interfere with the Inquiry- the model being prepared for the Finucane inquiry before the government's u-turn on the same). Baha Mousa's legal team's Opening Written Statement of the 7 September 2009 to the Inquiry includes 41 pages on 'historical context.' This focuses, given its clear relevance to the Baha Mousa situation, on the historic background to the use of open and 'stealth' torture techniques and includes a section on 'lessons never learned' in Northern Ireland .

This narrative catalogues, in part citing now declassified official papers, the routine practice of torture – in its crudest forms in Kenya (including "collusion and participation in rape and castration, as well as electric shock treatment"); to techniques used by British Forces in Cyprus (which "included whipping, beating with rifle butts, threatened hanging, Chinese water torture whereby the victim is held under a container from which water is allowed to drip upon his skull until he succumbs to nervous exhaustion" and were the subject of complaints by the Greek Government to the European Commission of Human Rights in 1956); to the more 'stealth techniques' used in 1960's Aden, latterly to themselves evolve into the "five techniques" in Northern Ireland in the 1970s, setting the context for present day practice in Iraq, Afghanistan and wherever else extraordinary rendition has reached.

Such a complex analysis on the subject of counter insurgency policy against protestors and activists in Kenya, Malaya, Egypt, Aden would assist in contextualising Bloody Sunday. Official narratives of states tend to speak of armed forces who can do no wrong. Other sources of history often tell a different story. Historian John Newinger observing the 1950s concludes "The reality was in Kenya the flogging, torture, mutilation, rape and summary execution of suspects and prisoners were everyday occurrences." During the "emergency" over 1000 'rebels' were sentenced to death and hanged, often by mobile gallows. Despite the scale of the slaughter one military commander, Frank Kitson (later to ply his trade in Belfast) reportedly still complained the armed forces were stifled by legal constraints. There is evidence massacres were followed by official cover ups. Such was the case at the Manyani camp massacre of 1955, where officially the victims died of typhoid. Newinger chronicles how the "cover up machinery" broke down after the Hola Camp Massacre of 1959 where guards beat to death 11 detainees seriously injuring 60 others. In this instance the resulting public scandal in Britain afforded a level of accountability which was decisive in shifting British policy.

States are no doubt weary of such an approach of examining context, policy and power and may have seen it coming. Under the Inquiries Act 2005 the terms of reference of an inquiry can of course preclude such an examination of context and policy, and should the inquiry stray into such territory ministers in any case have powers to intervene. Clearly the contextual exposure of systemic criminal practices of a state has the potential to rewrite history, expose the whole machinations of how a system works despite its democratic façade, and lead to reputational damage of its armed forces and other institutions. It only of course rewrites history with facts, can only be remedied by proven reform and makes such behaviour by the same institutions much less tenable and likely. This is something Baha Mousa and countless thousands like him could no doubt do with. Is this accountability and its purpose?

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The Transitional Justice Institute, University of Ulster,  
is currently accepting applications for the LLM Human Rights Law  
and Transitional Justice for the forthcoming academic year 2012-13.

**See [www.transitionaljustice.ulster.ac.uk](http://www.transitionaljustice.ulster.ac.uk) for details.**

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## A view from the Archives

As part of an irregular series, and in the context of a bigger project, Maggie Beirne has offered to write up occasional articles for Just News when she comes across items in the archives that may be of interest to members... Any readers wanting to comment/add further insights are encouraged to do so at [maggiebeirne@googlemail.com](mailto:maggiebeirne@googlemail.com)

### How did CAJ start?

A letter dated May 1st 1981 was issued convening a "jointly sponsored conference on the administration of justice in Northern Ireland" to be held at Queen's University in Belfast. Signed by a dozen or so signatories including Peter Tennant, Margaret Watson, Tom Hadden, Mairead Corrigan, John Morrow, and Peter McLachlan, the invitation letter sounds quite plaintive:

'We have been working over the years both as individuals and in organisations to help secure a balance between individual liberty and public security in NI by publicising problems and malpractices which have arisen under existing law. We are all conscious that none of us have been able to make much lasting impression on public opinion, or to get our message through to the authorities, partly due to public apathy, partly to distrust of any criticism of the security forces, and partly to the problem of establishing our impartiality. We have decided therefore to launch a joint invitation to those with a general or professional interest in the administration of justice to attend a conference early in June'....

The conference subsequently held at Queen's University in June 1981 led to the establishment of the CAJ, but this was not a foregone conclusion at the outset. The May invitation letter concluded:

'The debate in the plenary sessions will be completely open> ended and will include discussion on whether there should be a call either individually or collectively for the appointment of an official review along the lines of the Gardiner Committee of 1974 and on whether some more permanent unofficial body or forum should be established.

The conference registration fee was set at £1, and the invitation list was extensive: nineteen individual trade unions, and a number of individual trade union activists; several individuals from most of the then extant NI political parties – Alliance, DUP, OUP, Republican Clubs, SDLP, New Ulster Research Group, UPNI, CP, Liberal Party of NI, PUP, Provisional SF, including some named politicians who remain active – eg Gerry Adams & Peter Robinson, as well as all the English political parties; a broad swathe of organisations such as the Association for Legal Justice, NI Association of Socialist Lawyers, Loyalist Prisoner Association, NIACRO, National H Blocks campaign, Irish Council of Churches, and Save the Children Fund; solicitors, barristers and legal academics, as well as their representative bodies; a number of clergy; and, from the official side, the General Officer Commanding, the RUC Chief Constable Jack Hermon, the NIO, Minister of State, Senator Mary Robinson, and South African Kader Asmal.

My preliminary search of the archive has not yet revealed who attended, but the invite list seems interesting enough on its own! It seems also that the conference itself created a bit of a flurry since disagreements arose regarding party political participation, and the conference chair, Gerald Gardiner QC, survived a failed assassination attempt when the IRA put a 3-pound bomb under his car. The device fell off and was defused without any casualties – but it reinforces the fact that CAJ came into being in truly turbulent times.

**Maggie Beirne**

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## Director of the PPS addresses CAJ

To celebrate the end of our 30th anniversary year, CAJ held an event on 2nd February for our members and supporters. The guest speaker at the event was the recently appointed Director of the Public Prosecution Service (PPS), Barra McGrory QC. Around 50-60 CAJ members and some representatives of the Northern Ireland media attended the informal event which was held in the CAJ office.

Mr McGrory took the opportunity to praise the work of CAJ over the last 30 years, stating that:

*“CAJ is an organisation which has been an enormous support to the lawyers in this jurisdiction who have had to confront a huge variety of human rights issues. And I am one of those lawyers, over a period of 25 years, who has had to do that and I hope to touch on some of the issues that I have had to confront, and also in the context of some of the issues which I now have to confront as the Director of the Public Prosecution Service. But this organisation, and organisations like it, is an invaluable support base for lawyers in every respect.”*

Mr McGrory spoke about the role of NGOs in a democracy and outlined some of the challenges and opportunities ahead of him in his new role as Director of the PPS. He answered a range of questions from the floor around issues including dealing with the past.

A transcript of this event will be made available on the CAJ website over the coming weeks.

Visit [www.caj.org.uk](http://www.caj.org.uk) for more information.



Director of the Public Prosecution Service, Barra McGrory QC addresses CAJ

## Civil Liberties Diary - January 2012

### 18 January

Following a review of pre-school admissions arrangements, the Education Minister, John O'Dowd, announced that children born in July or August will no longer get priority for pre-school places. Additionally, the policy of giving preference to children of families receiving benefits will be reassessed. These recommendations were prompted by heavy oversubscription of nursery schools and claims that the admissions arrangements discriminated against working parents.

Crown Court judge, Mr. Justice Gillen, ruled that written skeleton arguments and any resulting judgments from the supergrass trial are to be put online and made available to the public. He held that making this information freely accessible was to ensure proper access to the judicial process.

### 19 January

The Northern Ireland Council for Ethnic Minorities has launched a report which reveals that 42 percent of all Filipino workers in Northern Ireland have been victims of workplace racism. The report stated that some Filipino workers are forced to work long hours for low wages, while others have been racially harassed.

### 20 January

The Department for Social Development has reported that repossession of homes in Northern Ireland has doubled in the last two years. More than 1,000 households and businesses were repossessed in 2011, compared with 542 repossessions in 2009.

Justice Minister David Ford launched two consultation papers aimed at speeding up the criminal justice system. These reports examine a number of different approaches aimed at earlier guilty pleading and measures to streamline the trial process by reducing the traumatic impact on victims and witnesses.

### 24 January

The Criminal Justice Inspection NI reported that a radical approach is needed to quicken the pace of Northern Ireland's judicial process. The report suggested that statutory time limits for certain cases should begin to be introduced. It highlighted that the average avoidable delay in some prosecutions is running a month longer than a year ago.

A spokesman for the Department of Health stated that approximately 50 of the 1300 case files in the former Lissue and Forster Green hospital abuse probe have been reviewed. In response, the Stormont health committee chairperson has accused the department of failing in its duty of care to survivors.

### 26 January

Police Ombudsman Al Hutchinson has investigated the firing of police tasers in Northern Ireland. He determined that the actions of the PSNI were compliant with guidelines in each of the 20 incidents he has examined and on each occasion the weapons were fired appropriately and proportionally. He has 9 incidents remaining to be examined.

### 30 January

40 years after Bloody Sunday, protesters again marched to urge prosecutions of those responsible for Bloody Sunday as well as to support victims of state violence. The march was smaller than usual, as many families of victims declined to participate, stating they received justice with the Saville Inquiry Report's exoneration of their family members.

**Just News** welcomes readers' news, views and comments.

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