

The Rt. Hon Geoffrey Cox QC MP  
Advocate General for Northern Ireland  
5 -8 The Sanctuary  
London  
SW1P 3JS

Dear Advocate General,

As you will be aware, in the past months there has been considerable agitation around the possible prosecution of British Army personnel for actions during the conflict in Northern Ireland. There have been calls for a "statute of limitations" to apply to such cases and other suggestions designed to ensure that the process of justice is modified to protect putative defendants based on their status as members of the armed forces when alleged crimes were committed. One of these suggestions is apparently that the consent of the Attorney General should be required before a soldier could be prosecuted.<sup>1</sup> We understand this to be a reference to you in your capacity as Advocate General for Northern Ireland.

You will be aware that the role of the Attorney General for Northern Ireland, both before Direct Rule and afterwards, when the UK Attorney General took over the responsibilities, was a matter of major contention during the conflict. The perception was that Law Officers were abusing their position and showing political bias when taking prosecution decisions regarding British soldiers. Declassified records support this view. For example, a note of a meeting in 1971 between a representative of Army headquarters and the then Attorney General for Northern Ireland, stated:

"I have no doubt the Attorney General is doing all within his power to protect the security forces against criminal proceedings in respect of actions on duty."<sup>2</sup>

In a letter to his Adjutant General, Cecil Black, in January 1974, General King, then GOC in Northern Ireland, wrote of a meeting with Sir Peter Rawlinson:

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<sup>1</sup> <https://www.bbc.co.uk/news/uk-politics-45947678>

<sup>2</sup> <http://www.patfinucanecentre.org/declassified-documents/prosecution-british-soldiers>

"He (Sir Peter) assured me in the plainest terms that not only he himself but also the DPP and senior members of his staff, having been army officers themselves, having seen active service and knowing at first-hand about the difficulties and dangers faced by soldiers, were by no means unsympathetic or lacking in understanding in their approach to soldier prosecutions in Northern Ireland. Rather the reverse, since directions not to prosecute had been given in more than a few cases where the evidence, to say the least, had been borderline."<sup>3</sup>

This perception of political bias in prosecutorial decisions concerning soldiers, occurred in the exercise of the Attorney's ability to direct the Director of Public Prosecutions, rather than in decisions relating to the consent of the office being required for prosecutions under various statutes. This is why, when the Criminal Justice Review, established under the Belfast Good Friday Agreement, came to consider the matter, they recommended that "there should be no power for the Attorney General to direct the prosecutor, whether in individual cases or on policy matters."<sup>4</sup>

The Review Group noted in their report that "it is clear from comments made to us throughout the consultation period that independence from political influence is what is sought above all else."<sup>5</sup> They therefore went on to say that "We see the Attorney General [for Northern Ireland] as a non-political figure drawn from the ranks of senior lawyers..."<sup>6</sup> They recommended that legislation should "confirm the independence of the prosecutor" and "make it an offence for anyone without a legitimate interest in a case to seek to influence the prosecutor not to pursue it..."<sup>7</sup>

Many of the recommendations of the Review Group were enacted in the Justice (Northern Ireland) Acts 2002 and 2004. It is not clear whether the offence created in Section 32A of the 2002 Act (as amended)<sup>8</sup> would today criminalise the actions of Sir Frank King or, indeed, the comments of the current Chief of Defence Staff, General Sir Nick Carter, who last year declared he would "stamp on" "vexatious claims" against soldiers.<sup>9</sup> It is, however, clear that

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<sup>3</sup> <https://www.thedetail.tv/articles/declassified-documents-reveal-army-lobbied-attorney-general-not-to-prosecute-soldiers>

<sup>4</sup> Review of the Criminal Justice System in Northern Ireland. HMSO, March 2000 Para. 4.162

<sup>5</sup> Ibid. Para. 4.157

<sup>6</sup> Ibid. Para. 4.160

<sup>7</sup> Ibid. Para. 4.163

<sup>8</sup> "32A A person commits an offence if, with the intention of perverting the course of justice, he seeks to influence the Director, the Deputy Director or a Public Prosecutor in any decision as to whether to institute or continue criminal proceedings."

<sup>9</sup> <https://www.theguardian.com/uk-news/2018/aug/03/army-chief-defends-british-soldiers-over-northern-ireland>

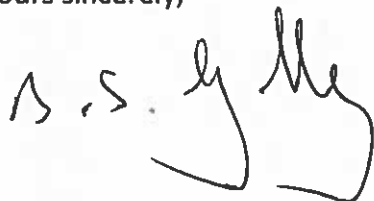
the intention was to prevent undue interference with the independent decision making of the public prosecutor.

Its, of course, proper for a prosecutor to fully consider where the public interest lies in a particular case where the evidential test has been met and it only remains to be decided whether it is in the public interest to prosecute. However, it seems to us that no prosecutor could properly or lawfully apply distinct criteria of the public interest to a class of case distinguished only by the status of the alleged perpetrator, especially where that status is defined by their acting under the orders or supervision of a state agency.

In these circumstances, we have two areas of serious concern about the rumoured efforts to have the consent of your office made necessary for the prosecution of soldiers for crimes allegedly committed during the conflict in Northern Ireland. First, that the passing of prosecutorial responsibility to a person who, while being a law officer, is also a member of Parliament who attends Cabinet, would be perceived as politicising the decision making process and reversing the hard won reforms made to the criminal justice system in Northern Ireland. Second, that the construction of a special mechanism for prosecutorial decision making designed exclusively for a particular class of alleged perpetrator defined by their status as a category of state actor, would be improper, discriminatory and unlawful. In particular, we think that such a process would be unlawful under the Human Rights Act as being in conflict with the procedural obligations under Articles 2 and 3 of the European Convention on Human Rights<sup>10</sup> and also contrary to Articles 13 (Right to a Remedy) and 14 (Prohibition of Discrimination).

As the senior law officer of the United Kingdom, and as your office is implicated in the improper proposals apparently being discussed, we invite you to rule out any such measures being taken while you hold the post.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'B. S. Gormally', written over a horizontal line.

Brian Gormally  
Director

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<sup>10</sup> E.g. "The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible." *Jordan v. UK* 2001 <http://hudoc.echr.coe.int/eng?i=001-59450> Para 107