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**Can the Past be Policed?: Lessons from the Historical Enquiries Team
Northern Ireland**

Dr Patricia Lundy
Department of Sociology
University of Ulster
Jordanstown
Newtonabbey
BT37 0QB
N. Ireland
Tel: 02890 368861
E-mail: p.lundy@ulster.ac.uk

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Can The Past Be Policed? Lessons From The Historical Enquiries Team Northern Ireland

Abstract

In the aftermath of conflict, victims often desire answers to unanswered questions about the tragic death of their loved ones. Internationally the favoured mechanism for addressing the legacy of conflict is a truth commission. These processes are tasked with establishing two levels of “truth”: macro and micro. It is generally accepted that truth commissions are more adept at delivering the ‘bigger picture’ or macro level truths. A fundamental weakness is their inability to satisfy the majority of victims’ needs for micro level information, and this remains unfinished business in many post truth commission societies. Using a case study of the Historical Enquiries Team (HET), this article explores how societies in transition might address victims’ quest for “the truth.” The HET was set up by the Police Service of Northern Ireland (PSNI) to re-examine deaths attributable to the conflict in Northern Ireland. Victims’ families are said to be at the heart of the process, and wherever possible all their unanswered questions will be answered. The HET is an innovative process and a unique concept in policing internationally. This article draws on over two and a half years of empirical research and unprecedented access to the HET/PSNI. The author reflects on what kinds of lessons and insights can be drawn,¹ and whether or not the HET concept is a model for other countries in transition.

INTRODUCTION

The rights of victims to information disclosure, and to be “heard and heeded,” have gathered considerable momentum over the past few decades. As Werbner puts it, the “rights of recountability” are fast becoming part of the post-conflict political arena as victims’ seek voice, acknowledgement and accountability.² The memory and trauma of violence and how to address unresolved legacy issues has become a subject of increasing interest to scholars, lawyers, victims, decision-makers, and human rights activists in transitional societies worldwide. Much of the dialogue has been framed in the context of transitional justice policy and practice.³ An indication of the growing global importance of transitional

¹ Drafts of the article were forwarded to a wide range of Human Rights NGOs and Victims groups within the unionist and nationalist communities and other key stakeholders for feedback; I have drawn on their comments and observations. At the time of writing, the HET has not responded to requests by the author and others to formally comment on a draft of the article forwarded to senior management in August 2008. I have endeavoured to ‘give voice’ to HET by quoting extensively from correspondence.

² Richard Werbner, *Towards Memory: Elections, Trials and Commissions*, in MEMORY & THE POSTCOLONY 96 (Richard Werbner, ed., Zed Books, 1998).

³ The literature on transitional justice is vast. See JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* (Cambridge University Press 2004); PRICILLA HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR & ATROCITY* (Routledge 2002); RUTI TEITEL, *TRANSITIONAL JUSTICE* (Oxford University Press 2000).

justice as a tool in conflict transformation is evidenced by its importance in the policies and practices of international organisations and donors.⁴ Priscilla Hayner considers that “the field has developed in response to the demands and differing circumstances of many transitional states around the world, and the increased public interest and international expectation that accountability is due after atrocity.”⁵ What is striking about the discourse are the claims and assumed benefits of transitional justice, despite being unproven for the most part. To date there are plenty of descriptive, anecdotal and conflicting accounts, but very few empirically based systematic assessments of what actually works.⁶

It has become increasingly recognized that there is no clear framework or methodology for evaluating the impacts.⁷ The International Center for Transitional Justice (ICTJ) in New York, which has been pivotal in assisting societies to design and implement transitional justice measures, has only very recently sought to develop methodologies to evaluate its work.⁸ In this vacuum, civil society and policy makers in transitional societies are left to grapple with difficult choices about how best to deal with the past. This article explores how societies in transition might address victims’ quest for “the truth,” or more specifically, micro level information. It does this by using a case study of the Historical Enquiries Team (HET) established by the Police Service of Northern Ireland (PSNI). The HET is a unique attempt by a police service in a society undergoing transition to police the past. In August 2005, the Chief Constable of the PSNI Sir Hugh Orde granted permission to conduct the research, and wide and unfettered access to the HET was permitted. In the context of Northern Ireland, this was unprecedented access to policing.⁹ The article therefore offers a

⁴ Patricia Lundy & Mark McGovern, *Whose Justice? Rethinking Transitional Justice From the Bottom Up*, 35 *J.L. & Soc’y* 265, 265-292 (2008).

⁵ Priscilla Hayner, *Justice In Transition: Challenges And Opportunities*, Address Before The United Nations 55th Annual DPI/NGO Conference (September 9, 2002), <http://un.org/dpi/ngosection/annualconfs/55/hayner.pdf>.

⁶ Ten years after the South African TRC the most comprehensive empirically based evaluation of the South African TRC has recently been published; See *TRUTH & RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER?* (Audrey R. Chapman & Hugo van der Merwe, eds., 2008).

⁷ For a very recent attempt to identify and evaluate obstacles, see *Research Instrument*, IMPUNITY WATCH 43 (2007).

⁸ ICTJ, *How Things Work*, <http://ictj.org/en/research/projects/research7/index.html> (last visited April 05, 2009).

⁹ Access included attendance at a wide range of internal management meetings including Command Team, Senior Management Team, Case Review Panel and Case Conferences, training sessions, Independent Advisory Group, and briefings to key individuals. With families’ consent, I observed first contact meetings with them and the HET and between the HET and a range of organisations including Victims’ Groups and Human Rights NGOs. The day-to-day functioning of the HET was observed by attendance at these meetings several days per week. I had access to all staff and in addition to the many informal discussions; over 50 in-depth interviews were carried out with senior management and staff responsible for the design, management and delivery of all aspects of the process. Permission was refused to record these

unique insight into a distinctive process, and draws on almost two and a half years of empirical research, which commenced in August 2005 and ended in December 2007. The research covers not only the setting up of the HET but importantly its first two years in operation.¹⁰ Interviews with relatives of victims and Non-governmental Organisations (NGOs) engaging in the process and analysis of HET Review Summary Reports remain ongoing.¹¹ The article is structured in five parts. Part 1 discusses the international context and theoretical debates on dealing with the legacy of conflict. A key theme explored in this section is the needs of victims and to what extent transitional justice processes and truth commissions in particular have addressed them. Part 2 briefly introduces the Northern Ireland context and the current debate on the past. Parts 3 and 4, which are the main focus of the article, critically examine the HET and aspects of its work, including an overview of policies, procedures and processes. This is followed by a detailed analysis of various structural impediments, constraints and an assessment of the ways in which HET methodologies facilitate or impede the recovery of “truth.” Several themes are explored, including the European Court of Human Rights (ECHR), the viability of prosecutions and the role NGOs and their implications for HET work. Part 5 considers what kinds of lessons and insights can be drawn, and whether or not the HET concept could be a model for other countries in transition. Some recommendations are made on how the concept might “fit” into a broader truth recovery process. Given the scope of the subject matter, this article focuses specifically on the nature of the HET, its policies, methodologies and structural issues. Stakeholders’ assessment of the process and examples of specific cases are explored in depth elsewhere.¹²

interviews but detailed notes were taken. Several members of the senior management team were extremely generous with their time and allowed me to quiz them endlessly on all aspects of HET business. In-depth interviews were carried out with a wide range of stakeholders including relatives of victims, representatives of Victims’ Groups, Human Rights Organisations, legal advisers and political officials. A representative sample of cases was tracked and families’ attitudes and perceptions documented at the beginning and again at the end of the process. Families’ that chose not to engage were also interviewed. In total approximately 60 family representatives were interviewed (many of them twice), these were recorded and transcribed. Mapping and analysis of HET documents was a key part of the research and included a representative sample of case files, up to 70 Review Summary Reports, all available debriefing self-assessment records, policies and operating procedures, minutes of meetings, strategic assessments, position papers and performance information & data.

¹⁰ In response to comments raised in the ECHR regarding the HET, the United Kingdom authorities stated that the research by Dr Lundy ‘was limited to the setting up of the HET...’ *Cases Concerning the Action of Security Forces in Northern Ireland*, Eur. Ct. H.R., Committee of Ministers, at 42 Info. Doc. CM/Inf/DH (2008). The UK authorities were perhaps unaware that the research was carried out over a period of two and a half years. Several months were spent observing HET setting up; a further two years were devoted to analysis of the Team in operation.

¹¹ A number of cases selected by the researcher to be tracked have taken HET well over three years to complete.

¹² Patricia Lundy, *The Official Stamp: ‘Truth,’ Recovery, Legitimacy and Stakeholders Assessment of Policing the Past in Northern Ireland* (forthcoming 2009).

PART 1. The International Context and Theoretical Framework

The research objective was to conduct a critical analysis of the HET and to advance understanding of transitional justice processes from a social scientific as opposed to legal perspective.¹³ It should be noted that this is not an analysis of policing per se; neither should it be viewed as a quasi oversight or monitoring initiative. The central focus is on victims and to what extent their desire for “the truth” is being addressed within the HET process. A key concern of practitioners and decision makers internationally has been to determine the best mechanism for accessing “truth,” justice and acknowledgement. Some commentators have argued that the legal arena provides the best platform for victims’ stories to receive official sanction, to restore dignity and to acquire recognition that was previously denied.¹⁴ Others have taken a more critical view of the judicial approach and argue that legal processes are inherently counter-narrative.¹⁵ It could be argued this critique is mistakenly evaluating one transitional justice mechanism according to the goals of another, or to goals legal processes are not principally created to serve.

Transitional justice theorists argue that truth commissions offer an alternative way to overcome the limitations of law and legal discourse. They can provide a more comprehensive record of the past than legal trials and are less likely to be divisive. As Chapman and van der Merwe point out, just as holding elections was once considered the mark of emerging democratic polity, instituting a truth commission now serves as the official symbol of a political transition.¹⁶ Truth commissions are often tasked with the recovery of two kinds or levels of “truth” - macro and micro or “social” and “personal.” Macro-truth provides a framework for understanding the structural dimensions and the assessment of contexts, causes, explanations and patterns, along with the determination of responsibility for them. Micro-truth provides facts of specific events, cases, and people. Both macro-truth and micro-truth help to determine accountability for past abuses, but the type and level of accountability differ considerably. Macro-truth provides a framework for understanding the structural dimensions of the violence leading to

¹³ Kieren McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 J.L. & SOC’Y 411, 411-440 (2007).

¹⁴ MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 30 (Transaction Publishers 2000); Carlos Nino, *RADICAL EVIL ON TRIAL* (Yale University Press 1996).

¹⁵ Marie-Benedicte Dembour & Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT. L. 151, 151-177 (2004); Jonathan Doak, *The Victim & the Criminal Process: An Analysis of Recent Trends in Regional and International Tribunals*, 23 LEGAL STUD. 1, 1-32 (2003); Mariana Goetz, *The ICC & Its Relevance to Affected Communities, in COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA* (Nicholas Waddell & Paul Clark, eds., Royal African Society 2008); Angela Hegarty, *The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland*, 26 FORDHAM INT’L L.J. 1148, 1148-1192 (2002-2003); Julie Mertus, *Truth in a Box: The Limits of Justice Through Judicial Mechanisms, in THE POLITICS OF MEMORY* (Ifi Amadiume & Abdullahi An-Na’im, eds., Zed Books 2000); Fiona C. Ross, *On Having Voice and Being Heard: Some After-Effects of Testifying Before the South African Truth & Reconciliation Commission*, 3 ANTHROPOLOGICAL THEORY (2003).

¹⁶ Chapman & van der Merwe, *supra* note 6, at 1.

the identification of the broader causes and intellectual authors of the abuses. Micro-truth points to circumstances and the identification of the individuals, the groups, or the units of the security or armed forces that committed particular crimes.¹⁷ As we will see, there are tensions between these two levels of “truth.”

Despite their global popularity, there is no universal agreement on the merits of truth commissions, and limited empirical data on their tangible beneficial outcomes. Increasingly, questions abound about the value and impact of truth commissions.¹⁸ South Africa is often treated as the gold standard for truth commissions and one to be emulated, although many South African analysts do not share the unqualified accolades for the Truth and Reconciliation Commission (TRC) expressed by outside observers.¹⁹ Truth commissions can reopen old wounds, “the truth” delivered is often partial and there are usually unpalatable tradeoffs, in the interest of pragmatic politics. Recent questions have been raised about the therapeutic imperative, or the assumed cathartic effects of story telling. This raises questions about the healing is revealing assumptions that lie at the heart of truth recovery restorative justice enterprise. As numerous writers have observed the link between voice, healing, dignity and being heard is not a straightforward one.²⁰ Truth commissions are not free of positivism and similar to legal processes; they can exclude certain voices and create silences, leading to “second-order traumatising,” and perhaps do more harm than good. They may actually result in a “strangulation of desired forms of voice.”²¹

The quantity and quality of “truth” accessible to victims has also been the subject of most recent criticism. Pigou makes the point that in the South African TRC, the outcome of investigations was often largely dependent on the quality of legal representation victims or perpetrators could afford, with the poor being disproportionately affected.²² A fundamental criticism is that there are tensions between the demand for individual investigations and the practical necessity of

¹⁷ Chapman & van der Merwe, *supra* note 6, at 241.

¹⁸ In addition to *supra* note 3, the literature on the pros and cons of truth commissions is vast; see BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT (Norman Bigger, ed., Georgetown University Press 2003); Colm Campbell & Catherine Turner, *Utopia and the Doubters: Truth, Transition and the Law*, 28 LEGAL STUDIES (2008); Audrey R. Chapman & Patrick Ball, *The Truth of Truth Commissions: Comparative Lessons From Haiti, South Africa, And Guatemala*, 23 HUM. RTS. Q. 1, 1-43 (2001); Chapman & van der Merwe, *supra* note 6; Brandon Hamber, *Rights & Reasons: Challenges for Truth Recovery in South Africa & Northern Ireland*, 26 FORDHAM INT’L L.J. 1074, 1074-1094 (2003); COMMISSIONING THE PAST: UNDERSTANDING AFRICAN TRUTH & RECONCILIATION COMMISSION (Deborah Posel & Graeme Simpson, eds, Witwatersrand University Press 2003); Wilson, R. A. (2001) *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*.

¹⁹ Chapman & Van der Merwe, *supra* note 6, at 13.

²⁰ Chapman & Van der Merwe, *supra* note 6, at 23-190; Posel & Simpson, *supra* n.18, chapters 4, 5 & 6 by P. Pigou, P.S. Dube, & M. Matshoba, at 97-146; Brandon Hamber & Richard A. Wilson, *Symbolic Closure Through Memory, Reparation and Revenge in Post-Conflict Societies*, 1 J. HUM. RTS. (2002); Ross, *supra* note 17; Werber, *supra* note 2.

²¹ Ross, *supra* note 15, at 332.

²² Chapman & van der Merwe, *supra* note 6; Posel & Simpson, *supra* note 18, at 37-65.

thematic investigations. The United Nations High Commissioner for Human Rights, in the “Rule-of-Law Tools for Post-Conflict States,” points out that it is very rare for a truth commission to have the time and resources to investigate all individual cases.²³ Thus, while a case-by-case individual “truth” is usually demanded by victims, and indeed an individualized “truth” is suggested by international norms outlining a right to “truth”, most truth commissions can provide only a global “truth”, a description of patterns, with some representative individual cases investigated in depth and reported in detail. This will often be a disappointment to victims, who may have provided testimony with the hope that their own case would be solved.²⁴ The Guatemalan Historical Clarification Commission, which is generally regarded as a “success” thoroughly investigated a total of only 100 cases out of 7,338 registered testimonies.²⁵ And in South Africa only ten per cent of the nearly 22,000 victim testimonies were actually aired in public hearings. It has been argued, one of the ironies and perhaps tragedies of the South African TRC was the frustration and dissatisfaction of the survivors who participated in the process and the criticism of the many survivors who did not.²⁶ Those who participated in the amnesty process were particularly scathing; they felt that the full “truth” had not been revealed and the process failed to provide new details that were vitally important to them. Pigou makes the point that, probably over 90 per cent of the people who appeared before the commission in South Africa had not been provided with meaningful new information about their cases. He found that, only the “fortunate few had their questions answered,” and for the remainder who were denied “the truth,” “this exacerbated their grief.”²⁷ Concerns about the impact on victims providing testimony and receiving few answers in return, is often set against the desire to garner evidence required to establish patterns, practices and policies, and the construction of a so-called common narrative or macro-truth. Victims, however, are frequently unaware of this tradeoff.

The “top down” truth commission approach to truth recovery is clearly an imperfect process and falls short of meeting the victims’ needs. As noted, truth commissions by their nature are better equipped and suited to deliver on macro-truths. Audrey Chapman and Patrick Ball question whether the South African TRC provided a comprehensive picture of past abuses and a sufficient macro account of its causes. They suggest it placed less emphasis on macro-truth than other truth commissions, including Guatemala and Peru.²⁸ At a practical level,

²³ U.N. High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Truth Commissions*, U.N. Doc. HR/PUB/06/1 (2006).

²⁴ See *id.*, at 20; Priscilla B. Hayner, *Commissioning the Truth: Further Research Questions*, 17 THIRD WORLD Q. 19 (1996), Chapman & Ball, *supra* note 18.

²⁵ Joanna R. Quinn & Mark Freeman, *Lessons Learned: Practical Lessons Gleaned from Inside the Truth Commissions of Guatemala & South Africa*, 25 HUM. RTS. Q. 1117, 1122 (2003).

²⁶ Chapman & van der Merwe, *supra* note 6; Posel & Simpson, *supra* note 18, at 248.

²⁷ Piers Pigou, *False Promises & Wasted Opportunities?* in Posel & Simpson, *supra* note 18.

²⁸ Audrey R. Chapman & Patrick Ball, *Levels of Truth: Macro truth and the TRC*, in Chapman & van der Merwe, *supra* note 6.

Truth Commissions lack of resources, time-scale and methodologies preclude investigation of individual cases that frequently number in thousands. Their source of data too raises questions; most commissions rely on victims' testimonies as the primary source of data. Relying on memory or testimony may not affect establishing the broader macro-truths, but it does present fundamental weaknesses in establishing micro individual truth recovery.²⁹

A central question posed in this article is, can mechanisms of transitional justice, and truth recovery in particular, be framed in such a way as to avoid such pitfalls? Is it possible to develop a mechanism that ensures the centrality of victims and enables their voices to be heard, heeded and acknowledged? Increasingly the international community, policy makers, academics, and practitioners are questioning the problems inherent in the generic one-size-fits-all approach and there is recognition, at least on paper, of the need for local ownership and a more participatory approach to transitional justice processes.³⁰ While the HET is clearly not a truth commission, the above discussion has obvious relevance in the context of truth recovery and developing an organic Northern Ireland model. The HET wisely refrains from using the term "truth" and avoids the concept of truth recovery; it has clearly stated that it is not a part of any political or truth and reconciliation process. Despite official avoidance of "truth" or truth recovery language, many of the families that engage in the process do expect it. HET remit does not extend to addressing the "bigger picture" or macro level analysis. The overarching objective is to meet individual needs of victims by answering their questions. Conceptually, therefore, the HET has the potential to be a vehicle to deliver micro-level truth.

PART 2: Dealing with the Past in Northern Ireland

International comparisons show that the single greatest determinant of the role and nature of truth recovery processes in any specific instance of post-conflict transition is the political circumstances of that transition. Post-conflict transition in Northern Ireland has invariably been defined by the terms and conditions of the Good Friday Agreement (GFA), which signalled an end to over thirty years of political violence.³¹ Significantly, the Agreement made no more than a passing reference to truth recovery mechanisms. In the negotiations leading up to the Agreement, discussion of such questions was conspicuous by its absence; "truth" recovery was not an issue high on the agenda of any of the major actors in the conflict. In addition, the "constructive ambiguity" that defined the peace process placed a premium on avoiding dealing with anything as contentious and

²⁹ *Id.*

³⁰ Lundy & McGovern, *supra* note 4; 14 TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE (Kieran McEvoy & Lorna McGregor eds., Hart Publishing) (2008)..

³¹ *Agreement reached in the multi-party negotiations, April 10, 1998; See also Analysis of the Northern Ireland Peace Agreement*, 22 FORDHAM INT'L L.J. 1136 (1999).

potentially divisive as a mechanism for dealing with the past.³² Issues that, in other circumstances, might have fallen under the remit of a truth commission (reform of the police force, a review of the criminal justice system, prisoner releases and so forth) were disaggregated from each other and dealt with in a piecemeal fashion. Yet, even as the GFA was being formulated, varying, sometimes directly contradictory voices were being raised on “truth,” justice and victims’ issues. Often fractious debates emerged over the early release of conflict-related prisoners, the fate of the “disappeared,” the creation of the various public inquiries and calls for further investigations into state killings and allegations of collusion between the security forces and loyalist paramilitaries. Each evidenced the extent to which various elements of Northern Irish society had unfinished business as far as the conflict was concerned. It has become clear that the past is not going to go away easily.

Bell notes that while the GFA avoids any narrative about the conflict, it can be argued that reform of policing and criminal justice stand as testimony to past human rights concerns and a need for further legitimacy of these institutions in the future.³³ The Agreement provided for the establishment of an independent commission to make recommendations for future policing arrangements, chaired by Chris Patten (last British Governor of Hong Kong).³⁴ Successful transition from conflict to peace is in many respects premised on the attainment of a transformation in policing. As Mulcahy notes, in deeply divided societies where state authority is widely disputed, the question of police legitimacy dominates the social and political landscape.³⁵ Commentators acknowledge that transition is particularly difficult where policing structures have been used to shore up the State through the implementation of counter-insurgency measures, many of them anathema to basic human rights principles.³⁶ In Northern Ireland the disputed nature of the State and the perceived role of the police force in propping it up created a legitimacy crisis for the Royal Ulster Constabulary (RUC) police force,³⁷ while also posing fundamental concerns for its successor, the Police Service of Northern Ireland (PSNI).³⁸

³² Paul Dixon, *Political Skills or Lying and Manipulation? The Choreography of the Peace Process*, 50 POL. STUD. 725, 726 (2002). See also Arthur Aughey, *The Art and Effect of Political Lying in Northern Ireland*, 17 IRISH POL. STUD. 1 (2002).

³³ Christine Bell, *Dealing with the Past in Northern Ireland*, 26 FORDHAM INT’L L.J. 1095, 1116 (2002).

³⁴ INDEP. COMM’N ON POLICING FOR N. IR., A NEW BEGINNING: POLICING IN NORTHERN IRELAND 9 (1999) (hereinafter Patten Report), available at <http://cain.ulst.ac.uk/issues/police/patten/patten99.pdf>. (last visited Apr. 2, 2009).

³⁵ A. Mulcahy, *Policing Northern Ireland: Conflict, Legitimacy and Reform*, (2006), at 3.

³⁶ See Mary O’Rawe, *Transitional Policing Arrangements in Northern Ireland: The Can’t and the Won’t of the Change Dialectic*, 26 FORDHAM INT’L L.J. 1015 (2002).

³⁷ The RUC has been the state police force in Northern Ireland since 1922. It underwent a process of fundamental reform including a name change to the Police Service of Northern Ireland (PSNI) in 2001.

³⁸ See JOHN D. BREWER WITH KATHLEEN MAGEE, *INSIDE THE RUC: ROUTINE POLICING IN A DIVIDED SOCIETY* (1991); G. Ellison & J. Smith, ‘Bad Apples or Rotten Barrel? Policing in NI, in O.

The key police legitimacy crisis has been greatest among the nationalist community who viewed the creation of the Northern Ireland state as illegitimate. The police have traditionally been Protestant dominated. Indeed, increasing Catholic participation in the PSNI has been described as the “holy grail” in policing reform in order to achieve a police force that would be representative of the community and win widespread acceptance.³⁹ It is well-documented that the police in Northern Ireland have been the focus of serious allegations of human rights abuses and claims of collusion with loyalist non-state armed groups during the conflict.⁴⁰ Despite significant reforms and changes in policing, the inability of the police to “deal with its past,” and acknowledge its role in the conflict, present lingering legitimacy challenges. Not surprisingly, policing was high on the political agenda in the context of the Northern Ireland peace process. Lack of perceived progress on policing matters threatened to obstruct the restoration of the devolved administration and the re-establishment of the power-sharing executive. Sinn Fein, the largest nationalist/republican party, did not agree to sign up to policing until January 2007.⁴¹ This marked a seismic shift in what would have undoubtedly been an unthinkable move less than a few years earlier. Nevertheless, how to “deal with the past” continues to be a key site of struggle and debate that impacts on and has ramifications for other key institutions in society. Chief Inspector of the Police Service of Northern Ireland (PSNI) Sir Hugh Orde added to this debate and stated that, “the past has the potential to destroy all the effort and real change policing has delivered in the post-Patten world... in order to deliver 21st century policing, we require a radical solution to the past.

Marenin ed, *Policing Change, Changing Police*, (1996); Mulcahy, *supra* n.35; O'Rawe, *supra* note 36.

³⁹ See A. Mulcahy, *supra* n.35, at 7 & 182.

⁴⁰ See Center for Civil and Human Rights, Notre Dame Law School, Report of the Independent International Panel on Alleged Collusion in Sectarian Killings in Northern Ireland (2006); See House of Commons, Cory Collusion Inquiry Report: Patrick Finucane, 2003-04, H.C. 470, *available at* [www.nio.gov.uk/cory_collusion_inquiry_report_\(with_appendices\)_pat_finucane.pdf](http://www.nio.gov.uk/cory_collusion_inquiry_report_(with_appendices)_pat_finucane.pdf) (last visited Mar. 30, 2009); See Police Ombudsman for Northern Ireland Public Statement and Report on Operation Ballast-RUC/PSNI Collusion with the UVF in North Belfast (2007), *available at* <http://www.patfinucanecentre.org> (last visited Mar. 30, 2009); See Relatives for Justice, *Collusion 1990-1994: Loyalist Paramilitary Murders in the North of Ireland* (1995); See Bill Rolston, ‘*An Effective Mask for Terror: Democracy, Death Squads and Northern Ireland*, 44 *Crime, L., & Soc. Change* 181 (2006); See Sir John Stevens, *Stevens Inquiry 3: Overview & Recommendations* (2003) *available at* http://www.madden-finucane.com/patfinucane/stevens_inquiry.htm (last visited Mar. 30, 2009).

⁴¹ In January 28 2007 Sinn Fein members voted to support policing in Northern Ireland for the first time in the party's history at the Ard Fheis, or conference. *Sinn Fein Votes to Support Police*, BBC News, Jan. 28, 2007, http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/6308175.stm (last visited Apr. 5, 2009). In their official statement Sinn Fein stated, “[t]he truth about wrongdoing by British military, intelligence and policing agencies needs to be uncovered and acknowledged.” *Motion for Extraordinary Ard Fheis*, Sinn Féin, Jan. 13, 2007, <http://www.sinnfein.ie/news/detail/17405> (last visited Apr. 5, 2009).

The HET is the Police contribution to dealing with the past.”⁴² The HET is one in a number of state-led processes, which exist alongside a range of unofficial truth recovery initiatives.⁴³ This fragmented approach, and the absence of a comprehensive mechanism, remain highly contentious and destabilizing. In June 2007, the British government announced the establishment of a Consultative Group on the Past chaired by Lord (Robin) Eames, former Church of Ireland primate, and Denis Bradley, former vice-chairman of the Policing Board. The remit of the Panel was to consult and make recommendations on how best to address the legacy of the conflict. As this article went to press, the Consultative Group launches its long awaited report amid angry scenes and much controversy.⁴⁴ A key proposal is to set up an independent internationally-led Legacy Commission with a budget of £300 million and a five year timeframe to oversee its recommendations.⁴⁵ It remains to be seen whether or not the Bradley-Eames proposals will be accepted by the British and Irish governments and how civil society will respond.

Part 3: THE HISTORICAL ENQUIRIES TEAM

Policies, Procedure and Processes

Given the interest and significance of the HET, there is a need to document and understand what precisely it does. This section provides an overview of HET policies, procedures and processes by way of background before continuing to critically examine structural weaknesses, constraints and methodological impediments.⁴⁶ The HET has three over-arching objectives:

- To assist in bringing a measure of resolution to those families of victims affected by deaths attributable to ‘The Troubles’ in the years 1968 to pre-Good Friday agreement 1998.

⁴² Hugh Orde, War is Easy to Declare, Peace is an Elusive Prize 2, 3 (June 10, 2005) (paper presented at the School of Religious & Theology and The Irish School of Ecumenics at Trinity College Dublin) (*available at* <http://www.patfinucanecentre.org>).

⁴³ See *generally* Kieran McEvoy, *Healing Through Remembering, Making Peace with the Past: Options for Truth Recovery Regarding Conflict In and About Northern Ireland* (2006), at http://www.healingthroughremembering.org/d_pubs/publications.asp (An excellent overview of state and unofficial “truth” recovery initiatives) (last visited Mar. 29, 2009). “truth”

⁴⁴ Gerry Moriarty & Dan Keenan, *Governments Give Cautious Response to Eames-Bradley Plan*, IRISH TIMES, Jan. 29, 2009, at 1. See also *Id.* at 10, 16, and 17.

⁴⁵ The author submitted a confidential draft copy of the article ‘Can the Past be Policed? Lessons from the Historical Enquiries Team Northern Ireland’ to the Consultative Group on the Past (CGoP) August 2008; the CGoP stated, “the research was “immensely helpful . . . to our discussions at this time. Members [of the panel] . . . have asked . . . to ensure the issues you have raised around HET are taken into account in any new model we may propose” E-mail from Sinead Simpson, Secretary to the Consultative Group on the Past, to author (Sept. 16, 2008, 19:13 BST) (on file with author).

⁴⁶ This information was correct at the time of research. HET continues to be an evolving process and some changes will inevitably have occurred after the research period.

- To re-examine all deaths attributable to ‘The Troubles’ and ensure that all investigative and evidential opportunities are examined and exploited...
- To do so in a way that commands the confidence of the wider community.⁴⁷

The scope of the task is to re-examine all 3,268 deaths attributed to the conflict within a timescale of six years.⁴⁸ According to the Chief Constable Sir Hugh Orde, the HET was envisaged as part of a wider process that would encompass all involved in the conflict and find a solution to the difficult and sensitive issue of the past. Its primary objective is to provide a family-centred approach, by identifying and addressing unresolved issues and concerns from the families’ perspective. The HET states that it is their intention to address, as far as possible, all unresolved questions and concerns that families raise working to the principle of maximum permissible disclosure.⁴⁹

There are enormous political sensitivities arising out of particular use of language and terminology. At an early stage, there was debate over precisely what constituted an unresolved case and the application of the term murder to particular deaths. In March 2005, Secretary of State Paul Murphy announced at a press conference that £32 million had been allocated for a new unit which would examine some 1,800 unresolved conflict related murders that occurred between 1968 up to the signing of the Agreement in 1998.⁵⁰ Those appearing to involve cases where death occurred at the hands of the security forces were not classified by the PSNI as murder and were thus not included in cases to be reviewed. NGOs raised the issue with Chief Constable Hugh Orde; they stressed the need to re-examine all conflict related deaths, irrespective of perpetrator.⁵¹ Moreover, the NGOs’ concern was that even cases with secured convictions should be included in any re-examination of “cold cases,” as others involved in the incident may have avoided arrest and families’ questions remained to be answered. The Chief Constable accepted the inaccuracy. The NGOs played a critical role in widening the scope of the enquiry, and their efforts led to a significant increase in the number of cases included in the scope of the review. The initial anticipated figure of 1,800 deaths almost doubled to 3,268.⁵² The HET, in an effort to demonstrate commitment to delivering an impartial service, and to meet its key objective of building public confidence in policing, took a policy

⁴⁷ Standard Operating Procedure, Historical Enquiries Team, Section 2.2 (2005) (on file with author).

⁴⁸ Historic cases that involve the conduct of police officers are investigated by the Police Ombudsman’s Office.

⁴⁹ Six Monthly Report, Historical Enquiries Team, Section 2.3 (2005). (on file with author).

⁵⁰ Press Conference given by Secretary of State, Paul Murphy to announce the establishment a new unit to review unresolved deaths March 2005 at <http://www.nio.gov.uk/new-unit-to-review-unsolved-deaths/media-detail,htm?newsID=10980>.

⁵¹ Open Letter to PSNI Chief Constable Hugh Orde at http://www.patfinucanecentre.org/truth/pfc_het.html.

⁵² Six Monthly Report, Historical Enquiries Team, Section 2.10 (2005) (on file with author).

decision to use as their base line "unresolved from the families' perspective."⁵³ The review of all deaths would have the added benefit of facilitating a wider examination of a series of connected killings and the compilation, for the first time, of a comprehensive, consolidated database of forensically linked cases.⁵⁴

The Northern Ireland Affairs Committee (NIAC) has recently questioned the logic of automatically reviewing all cases. The Committee concluded that in some cases scarce resources are being used to investigate historic cases where there is little likelihood of helping a family and limited opportunity of securing a conviction. It recommended alternative ways of prioritizing cases and reducing the scope of the exercise be identified, so as to focus resources on cases "where the next of kin of the deceased specifically request it or where the existence of forensics or other exhibits provides investigative opportunities which could contribute to a successful prosecution case."⁵⁵ How the HET might establish whether evidential opportunities exist without first carrying out a review is unclear.

Following determination of the scope of the enquiry, the HET decided in the interests of fairness that as a general rule, cases would be reviewed on a strict chronological basis starting with the earliest cases in 1968 and working forward to 1998. However, it was considered necessary to introduce a prioritisation policy in order to allow for certain cases to be re-examined ahead of their chronological schedule. This is based on four criteria: "previously opened investigations; humanitarian considerations (relatives are critically or terminally ill); cases involving issues of serious public interest (the main driver in this is the statutory imperative to re-examine European Court cases); linked series of murders."⁵⁶ The most recent statistics available at the time of the research indicate that the majority of cases (67%) under review (covering the period up to 30 November 1972) are chronological and 33% are exempted. The breakdown of exempted cases by religious or political affiliation is not available. The majority of these cases were exempted because they are previously opened cases (over 60%) and/or public interest cases (20%).⁵⁷ The research indicates that the prioritisation policy appears to have been loosely applied in some instances to cases strictly falling outside the criteria. The reasons for this are not readily apparent but appear to be linked to preferential treatment given to NGOs and others in an

⁵³ Six Monthly Report, Historical Enquiries Team, Section 2.5 (2005). (on file with author).

⁵⁴ The United Kingdom authorities in a recent submission to the Committee of Ministers, (ECHR), stated that families are under no obligation to engage with the HET should they not wish to do so. However, reviews of cases will take place regardless of whether or not there is family involvement in order to ensure that families do not come under pressure by any individual or group to prevent a HET review. Committee of Ministers, *supra* note 10, at 32.

⁵⁵ NORTHERN IRELAND AFFAIRS COMMITTEE, POLICING AND CRIMINAL JUSTICE IN NORTHERN IRELAND: THE COST OF POLICING THE PAST, 2007-8, H.C. 333, at 3.

⁵⁶ Standard Operating Procedure, Historical Enquiries Team, Section 1.5 (2005) (on file with author).

⁵⁷ Strategic Assessment & Evaluation, Historical Enquiries Team (2007). (on file with author).

effort to build public confidence and participation. This differentiation in treatment is evident throughout the process. As a result of the research, NGOs have recently raised with senior management the issue of what appears to be inequality in the application of the prioritisation policy.⁵⁸

HET Structure

HET claims to have hierarchical independence and practical independence in that it has the operational capacity to provide fully independent review and investigation process, including forensic review.⁵⁹ The Director and Deputy Director are from police services in England, but with experience of Northern Ireland gained from working on the Stevens Inquiries.⁶⁰ According to HET literature, the Director reports directly to the Chief Constable and the unit is a free standing structure within the PSNI. Decision-making, it is claimed, is independent and supported by access to independent legal advice from outside Northern Ireland.

The HET original structure included two Review and Investigation Teams, Red and Purple. The Red Team was designed to be “ring fenced,” staffed entirely by external personnel, mainly retired police officers from forces outside Northern Ireland (England, Scotland and Wales) re-employed on a contractual basis and seconded officers.⁶¹ The Red Team was set up to deal exclusively with cases in which an independent review by external staff was seen as a pre-requisite. The Purple Team has a mix of mainly retired RUC officers, a very small number of PSNI and some retired officers from outside Northern Ireland. The HET has been an evolving process and over the past three years there were considerable structural changes and re-writing of procedures. This can be commended, as it shows flexibility, responsiveness and openness to change. At another level, it appeared to cause confusion amongst staff and it was difficult to get a copy of Standard Operating Procedures that accurately reflected the procedural changes at any given point in time.

⁵⁸ Notes from a meeting between NGOs re: HET, at the Belfast Unemployment Resource Centre (Oct. 6, 2008) (on file with author).

⁵⁹ The issue of independence is defined a ‘high risk’ by the HET and one that needs to be managed. The risk is viewed in terms of ‘a significant proportion of the community in NI will not engage due to perceived lack of independence, therefore the HET will not be able to fulfil its purpose around families’, Risk Register, Historical Enquiries Team (Sept.2007) (on file with author).

⁶⁰ See Stevens Inquiry 3, *supra* note 40 (The Stevens Inquiries were set up by the British government to investigate the killing of solicitor Patrick Finucane and allegations of collusion between the RUC and loyalist paramilitaries. In total there were three inquiries headed up by Sir John Stevens former commissioner of the Metropolitan Police Service (MET) London).

⁶¹ A decision was taken to phase out seconded officers from forces outside Northern Ireland apparently owing to the high financial costs; this appears to have been recently revised possibly due to the demands of particular complex cases requiring more serving officers with powers. Retired police officers overwhelmingly make up the staff on the Red & Purple Teams.

In response to the growing demands on the HET, two additional independent teams were established. These are the White Team and Complex Enquiries Team (CET). The rationale behind the creation of these teams arises out of a number of demands on the HET, ostensibly but not exclusively relating to issues of independence and families and NGOs seeking answers to questions regarding the “bigger picture,” as well as accusations of collusion between security forces and paramilitaries and the systemic nature of such issues. The setting up of the White Team in January 2007 was regarded as a “third way,” of dealing with this class of case and enabled HET to maintain the core role of re-examining over 3,000 deaths unimpeded. The White Team is a small analytically driven team located outside Northern Ireland, in London. The location was apparently in order to demonstrate independence, and to enable recruitment of sufficient high calibre staff with the required developed vetted security status unwilling to re-locate to Northern Ireland. As I discuss later, there are a number of factors that underpin the motivation of setting up the White Team, including the competing demands for macro level analysis which is outside the HET remit, the UK authorities’ obligations arising from European Court of Human Rights (ECHR) cases, and “buying” time to allow the process to bed-down and at the same time build public confidence within the nationalist community.

The CET (the most recent addition to the HET structure) was set up in response to the Police Ombudsman of Northern Ireland’s (OPONI) recent report (Operation Ballast Report) into collusion between the police and loyalist paramilitaries published in January 2007. The Police Ombudsman upheld complaints that those responsible for a particular murder were linked to a number of other killings and attempted murders, yet were shielded from arrest and prosecution by Special Branch⁶² because of their status as police informants. OPONI recommended that the PSNI re-investigate all crimes which the report had considered treating as a linked series. The Chief Constable accepted all the Operation Ballast report recommendations and committed the HET to undertake the work.⁶³ The CET was set up in light of the complexity and sensitive nature of this work, and the

⁶² Special Branch was an elite, highly unaccountable and powerful section of the RUC. It had responsibility for counter-insurgency activities and widely viewed as a ‘force within a force’. It has been accused of operating as a law unto itself and some of its officers have been shown to have colluded with loyalist paramilitary organisations in criminal activity up to and including the instigation and carrying out of murder. (See also Stevens Inquiry 3, *supra* note 40; See also Cory Report, *supra* note 40; OPONI, *supra* note 40). It was estimated at around 800 strong and that accounted for one tenth of the full time police force. The Walker Guidelines, a set of instructions outlining the relationship between Special Branch and the RUC’s Criminal Investigations Department (CID) (recently leaked into the public domain), indicated that at every stage of enforcement policing was subservient to Special Branch dictate. This often was a source of conflict within the RUC (See, e.g., JOHN STALKER, THE STALKER AFFAIR (1988); Mulcahy, *supra* n.35, at 79-81). See also Patten Report, *supra* note 34 at 73 (recommended that Special Branch be amalgamated with the Criminal Investigation Department, reduced numerically and renamed).

⁶³ The Ombudsman’s investigation identified a total of 19 murders, resulting from 17 separate incidents, which should be dealt with as a linked series to comply with the report’s recommendations. Other serious offences may be linked. Response to OPONI Report, Historical Enquiries Team (Feb. 2007) (on file with author).

need to restore public confidence and demonstrate independence to the families, their representatives, the Northern Ireland Policing Board and OPONI. This series of cases presented the HET with an undeniably huge and difficult task that demanded additional resources. It was estimated that a properly resourced CET made up of entirely independent officers from outside Northern Ireland would cost £1.6 million and 31 additional staff, although no additional funding was made available to the HET.⁶⁴ This put extra demands on an already stretched budget and raises issues of HET capacity. The White Team investigators (four staff members and the cases within their remit) have now merged with CET, possibly in response to the need for experienced high calibre independent investigators. The CET is now tasked with dealing with any other complex cases that the HET process encounters. The Red Team deals with all other cases that require independence. It is difficult to see how the CET could deal with further complex cases given that it is already severely overstretched (and understaffed).⁶⁵ The Operation Ballast cases are a high priority and huge departure for the HET as OPONI had recommended full re-investigations. I would suggest focus on this set of linked cases is likely to consume significant resources and cause an even greater “back log” of controversial cases.⁶⁶ Overall, the image that emerges is one of crises management and ‘fire fighting’ as further demands are forced on the Team.

The Process

By introducing a hierarchical reporting arrangement, together with the appointment of external staff to command and investigative positions, the HET sought to demonstrate independence and impartial service delivery to all sections of the community. An assessment of the structure and foundations on which it is built tends to cast doubt on the claim of independence and indicates that at every stage of the process, independence and integrity appear to have been compromised. Very briefly, the HET process consists of five core sequential phases. This is referred to as the CARIR process and includes the following:

5 Phase Process

⁶⁴ In March 2007, HET undertook a scoping exercise to estimate the size of the task given to the unit by the PSNI. The conclusion was that a team resembling the size and makeup of a conventional MIT was necessary in order to deliver effectively on the ‘recommendations’. The cost was calculated to be £1.6 million for a team made up of entirely independent retired officers from elsewhere in the UK. With this model in mind, recruitment began in March 2007 although no additional funding was made available to the HET. Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author).

⁶⁵ “Working to a restricted budget of 948k the CET has recruited up to 18 staff, some 12 short of establishment figure...”; Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author).

⁶⁶ The HET acknowledge that it will have to run a backlog system, which they note, is not ideal but the inevitable consequence of managing the volume of cases.

1. Collection
2. Assessment
3. Review
4. Investigation
5. Resolution

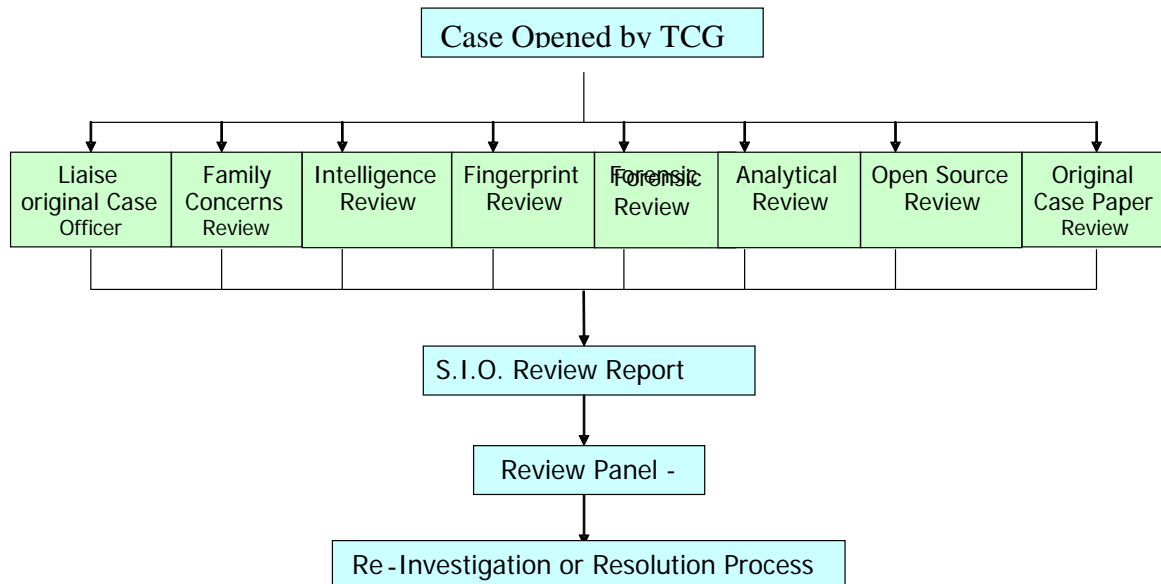
The initial target was that each case would take sixteen weeks to complete, but it was acknowledged that some cases might take longer. The relatively short time initially allocated to re-examining cases provides an early insight into what level of re-examination was envisaged.⁶⁷ Every month forty new cases go into the process. Phase 1, Collection Phase, involved a complete search of the PSNI estate (i.e. all police stations in Northern Ireland) and collating all available material relevant to the cases within its remit (case files, maps, photographs, exhibits etc). Phase 2, Assessment Phase, entails collation of all material gathered during Collection Phase and the entry of data onto the HET analytical database. This process is underpinned by an analytical database the Historical Enquiries Analytical Database (HEAD), which contains all the details relevant to each case and which allows for an early indication, via computer generated graphical display, of what material is available in individual cases, and can be used to identify links between cases (intelligence, forensic, ballistic), trends and evidential possibilities. The HEAD is an analytical tool similar to the complex information management systems used in truth commissions to analyse broader patterns of violence and abuses.

Each case progresses to Phase 3, the Review Stage. As indicated in the diagram below, cases are subject to eight disciplines. This includes analytical review, forensic review, fingerprint review, intelligence review, original case paper review, contact with original investigating officer, and contact with families, and open source material.

⁶⁷ One report stated, "in those cases where nothing is found, the families' questions are addressed as far as possible. We have a 'business process' that allows 16 weeks for the case to be assessed, reviewed, any further investigation conducted and resolution agreed.... It is hoped that the majority of cases, certainly in the early years of the Troubles, will fit within this process." Internal Report, Historical Enquiries Team (Feb.2007) (on file with author).

Phase 3

Review



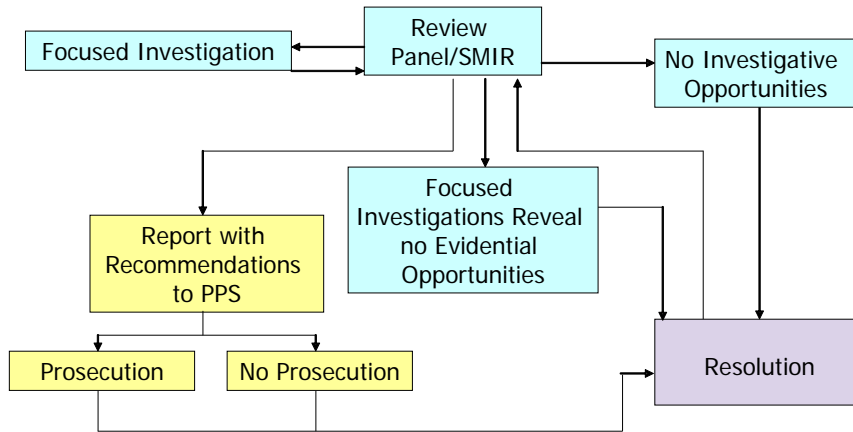
Source HET, "A presentation by: Sir Hugh Orde Chief Constable & David Cox, Director of HET to Oireachtas," Slide 20, 2006

The review disciplines, apart from family concerns and liaise with original case officer, are automatically triggered prior to the publication of the monthly list of forty cases (Availability Matrix) whether or not a family has agreed to participate.⁶⁸ The eight disciplines are important and will be explored later in the article. At the end of each review, cases go before the Review Panel for a decision on how the case will be progressed. As the diagram below illustrates, if there are no evidential opportunities the case moves to the Resolution stage. If there are realistic evidential opportunities, the case will progress to Stage 4 Focused Investigation and/or are submitted to Public Prosecutions Service (PPS) for consideration and then to Stage 5, Resolution.

⁶⁸ The UK Authorities submission to the Committee of Ministers (ECHR) November 2008 states, 'reviews will take place regardless of whether or not there is family involvement in order to ensure that families *do not come under pressure by any individual or group to prevent a HET review* (emphasis added), *supra* n.10, at 32.

Phase 4

Focused Re - Investigation



Source HET, "A presentation by: Sir Hugh Orde Chief Constable & David Cox, Director of HET to Oireachtas," Slide 21, 2006

Regardless of the outcome of the review, the HET states they will tell families as much as they can, no matter how difficult that may be, and they are committed to a policy of maximum permissible disclosure, consistent with legal constraints.⁶⁹ At the end of the process each family will receive a Review Summary Report (RSR) setting out the nature of the review and answers to questions raised. The HET observes statutory and ethical obligations around disclosure of information and a risk assessment is conducted in each case. The assessment is the risk to the HET and wider PSNI, not the victim. The legal constraints include the Regulation of Investigatory Powers Act (RIPA) and Article 2 of the European Convention of Human Rights. That the RIPA makes it a criminal offence to name an informant illustrates this point. Victims' questions may well be answered or satisfied without revealing names. But it is difficult to see how some families will have access to the information that they seek when the PSNI/HET will remain legally bound on key points of disclosure such as the identities of those involved in their inquiries. The legal rules surrounding disclosing the identities (naming names) of informants and others is not unique to the HET. In line with human rights standards the identities of individuals at the centre of inquiries cannot be

⁶⁹ Standard Operating Procedure, Historical Enquiries Team, Section 1.5 (2005) (on file with author).

disclosed if they have never been charged with an offence or been before the courts. Following conflict there may be a legitimate level of non-disclosure by states for national security reasons. The criticism is the misapplication or broadness of rules applied; it is a matter of balance, but the national security card is often over-played by the police and State. It does not bode well in terms of willingness to push disclosure boundaries that the Chief Constable initiated legal proceedings against the Coroner's access to the police investigation into the controversial shooting of Pearce Jordan an unarmed IRA man in 1992.⁷⁰ There are, however, further and often more subtle constraints impacting disclosure.

PART 4: STRUCTURAL IMPEDIMENTS, OBSTACLES & CONSTRAINTS

The remainder of the article examines in detail various structural impediments, constraints and HET methodologies that facilitate or impede the recovery of "truth" and are discernable in the five core phases of the CARIR process described above. Firstly though, I will discuss three important themes that provide important contextual background and that have a bearing on the work of the HET. These are the viability of prosecutions, the role of NGOs and the impact of the ECHR.

Viability of Prosecutions: The Reality?

The viability of prosecutions is to the fore in the debate on dealing with the past in Northern Ireland. The PSNI Chief Constable, the HET, and other influential bodies and commentators have publicly and privately acknowledged that prosecutions are likely only in a small number of cases. The Chief Constable stated as far back as 2003, and has since reiterated publicly, that "in an evidential sense we are going to be struggling to secure convictions."⁷¹ This view was endorsed in May 2008 when the Government appointed Consultative Group on the Past, after meeting a wide range of official bodies and civil society representatives, reached a similar conclusion in their interim report. The Panel, Chaired by Lord Eames, stated:

[I]t is difficult for us not to listen to those experts who are telling us that the reality is that as each day passes securing justice becomes less and less likely. The public need to understand the limitations in securing convictions. In many historic cases witnesses have died, exhibits are no longer credible or have

⁷⁰ Barry McCaffrey, *Orde Aims to Keep File From Coroner*, IRISH NEWS, July 9, 2008, at 13.

⁷¹ Simon Doyle, *Orde Told 'Truth and Justice' Won't Work*, IRISH NEWS, June 11, 2003.

disintegrated over time. The evidence collected in the 1970s and more recently is highly unlikely to meet modern forensic standards. This is the reality of the situation.⁷²

The panel went on to say it was their duty to begin to tell people that this is the reality and not to perpetuate false hope. It is likely that the panel considered the criticism expressed by Mr Justice Weir in his recent judgement in the Omagh bombing trial of the quality of forensic evidence and the unlikelihood of securing evidential opportunities in historical cases.⁷³ In June 2008, a newspaper report, possibly informed directly by the HET, stated that “the PSNI believes the team will do well to press even a handful of charges, never mind secure convictions.”⁷⁴ A number of NGOs working mainly within the nationalist community (but not exclusively) have reached a similar view that prosecutions are unlikely for all the reasons mentioned above, and that the criminal justice system has frustrated rather than facilitated access to the “truth.” They believe that the only way to bring “truth” to the greatest number of families is through an international independent truth commission.⁷⁵

Such views on the viability of prosecutions are likely to be difficult for some victims’ relatives and sections of the wider population to accept. In a recent Northern Ireland wide survey of 1,800 people, it was found that 66% of respondents felt that investigations aimed at possible future prosecutions were either important or very important for the future (31.8%, very important) and a mere 15.3% disagreed with this view. Protestants were relatively more likely to support the prospect of such investigations (70.7% in total, 35.6% strongly so) than Catholics (60.5% and 27.3% respectively). The position of unionist and nationalist political supporters tended to follow a fairly similar pattern and would seem to bear out the evidence suggesting that certain sections of Protestant opinion in particular see “getting to the truth” to be associated with some form of judicial process.⁷⁶ The question of justice is undoubtedly highly emotive. This was recently demonstrated by the widespread public criticism that forced the hasty withdrawal of the Government’s so-called “on-the-run” legislation published

⁷² Lord Robin Eames & Denis Bradley, Consultative Group on the Past, Keynote Address at the Innovation Centre, Titanic Quarter Belfast, at <http://www.cgpmi.org/news/25/full-text-of-key-note-address-29-may-2008/> (May 29, 2008).

⁷³ See *Queen v. Hoey*, [2007] NICC 49, WE17021(N. Ir.), available at <http://www.bailii.org/nie/cases/NICC/2007/49.html>.

⁷⁴ Liam Clarke, *The Victims of the Troubles Have a Right to the Truth, if not Justice*, SUNDAY TIMES (London), June 1, 2008, at 16.

⁷⁵ Press Release, Relatives for Justice, Victims Groups Unite to call for Truth Commission (Jan. 14, 2008) available at <http://www.relativesforjustice.com/victims-groups-unite-to-call-for-truth-commission.htm>.

⁷⁶ Patricia Lundy & Mark McGovern, *Attitudes Towards a Truth Commission for Northern Ireland* at 60-67 (June 2006), available at <http://www.community-relations.org.uk/about-the-council/contact-us/?doc=Attitudes+Towards+a+Truth+Commission+for+NI>.

in November 2005, ostensibly designed to allow “on-the-runs”⁷⁷ to avoid possible future prosecution. It appeared to permit a blanket amnesty, which included the security forces, for any unsolved conflict-related acts that occurred before the signing of the GFA. Criticism included many of the victims’ and human rights groups from both communities who have differed widely on other issues. Indeed the same survey reported that there was very little support for the amnesty principle. Just under one in five (19.4%) agreed that a truth commission should have the power to grant amnesty; 60.5% of respondents disagreed, including almost one in three (31.1%) who strongly disagreed. Protestants were more likely to disagree with amnesty; almost three in every four (69.8%) disagreed, significantly including 40.1% who did so strongly.⁷⁸ Nevertheless, there appears to be growing consensus in official circles, and in certain sections of wider society, that prosecutions are unlikely. This is firmly linked to the unlikelihood of establishing new evidential opportunities and satisfying current forensic standards.⁷⁹ Recent European Court judgments, including *Brecknell v. the United Kingdom*, support the view that prosecution or conviction is not the only acceptable outcome in a case.⁸⁰ If the judicial imperative is removed from the equation, either via a form of amnesty or immunity provision, bolstered by the reality regarding prosecution, it is suggested the way could open for alternative developments on how to deal with the past. HET methodology is hinged on fresh evidential opportunities that according to the informed view appear to be an impossible hurdle to overcome. This point and its delimiting nature are discussed shortly.

Non-Governmental Organizations and the Politics of Participation

NGOs have adopted different approaches to the HET.⁸¹ Cross-community victims’ groups like WAVE Trauma Centre, support families throughout the process but do not undertake the role of caseworker or family representative. Victims’ groups within the unionist community such as Families Acting for Innocent Relatives (FAIR) have adopted a broadly similar approach. The largest nationalist victims NGO, Relatives for Justice (RFJ), has refused to engage because HET lacks the requisite independence. Human Rights organisations

⁷⁷ “On-the-runs” refers to a number of IRA members who have not be prosecuted for alleged incidents and have escaped the authorities by living outside the UK jurisdiction.

⁷⁸ Lundy & McGovern, *supra* note 76.

⁷⁹ DENIS BOYD & SEAN DORAN, HEALING THROUGH REMEMBERING, THE VIABILITY OF PROSECUTION

BASED ON HISTORICAL ENQUIRY: OBSERVATIONS OF COUNSEL ON POTENTIAL EVIDENTIAL DIFFICULTIES, para. 1.3, at http://www.healingthroughremembering.org/d_pubs/publications.asp (last visited Mar. 29, 2009).

⁸⁰ See, e.g., *Brecknell v. United Kingdom*, App. No. 32457/04 Eur. Ct. H.R., para. 66 (2007) (unreported judgment) <http://www.echr.coe/int>.

⁸¹ This article does not seek to comment on the merits of the different NGO approaches – the choice to engage, or not, is legitimate and both positions have value. It is my view, relatives who wish to engage in any process like the HET should have access to NGOs or solicitors who will advise and/or represent.

with a broad “client” base such as British Irish Rights Watch (BIRW) and Committee for the Administrative of Justice (CAJ) represent families that wish to have their case re-examined and engage with the HET on their behalf. The Pat Finucane Centre (PFC),⁸² a key Human Rights group working mainly within the nationalist community, has taken a strategic decision to engage. The organisations that participate in the process see their role as constructive critics seeking to get a better service for their ‘clients’. From its inception the HET has adopted a progressive approach to working with NGOs. Senior management attend meetings with a consortium of groups to discuss good practice and listen to concerns.⁸³ As HET Director Dave Cox points out: “Our approach was always an evolutionary programme, with flexibility to adapt to challenges as they emerged. This involved a large degree of consultation with other interested parties and a commitment on our part to listen and learn....”⁸⁴

At the time of the research, well over half of all HET cases with representation were PFC “clients.” In terms of bringing cases to the HET, and representing families, it stands out as the most prolific NGO across the communities in Northern Ireland and beyond. While the PFC is not the only NGO to engage with the HET, it has, however, come to play a significant part in the HET strategy of building public confidence within the nationalist community. In part this is due to its perceived ‘client’ base and the volume of cases it brings to the process. This, in turn, has had a number of repercussions and implications for the process.

“Driving” the Process & Setting the Standards: The European Court of Human Rights

The UK government has certain commitments and obligations arising from international law including those emanating from the European Convention on Human Rights and Fundamental Freedoms and its implementation domestically through the Human Rights Act 1998, which came into force in UK law in October 2000. Article 2 of the Convention protects the right to life. The UK government has been found in breach of Article 2 in a number of cases in Northern Ireland.⁸⁵ In a 1995 judgment, the ECHR held that by implication Article 2 requires that there be some form of effective official investigation when individuals have been killed as a result of the use of force by the state.⁸⁶ The ECHR has described this as a “procedural” obligation imposed by Article 2. According to the ECHR, the

⁸² The author was a member of the PFC Management Committee for a number of years and during the research.

⁸³ The consortium first met in September 2007 (see footnote 170). It includes BIRW, CAJ, Justice for the Forgotten (JFTF), PFC, WAVE and solicitor representing a number of families.

⁸⁴ Notes from a meeting between NGOs re: HET, at the Belfast Unemployment Resource Centre (Oct. 6, 2008) (on file with author).

⁸⁵ Christine Bell and Johanna Keenan, *Lost on the Way Home? The Right to Life in Northern Ireland*, 32 J. L. & Soc’y 68, 73 (2005).

⁸⁶ *McCann & Others v. the United Kingdom*, App. No. 18984/91, ECHR 1995, available at <http://www.echr.cor.int>.

purpose of the investigation is to secure that domestic laws protecting the right to life are effectively implemented and in cases involving state agencies, to ensure those responsible for deaths are made properly accountable.⁸⁷ The requirements of an investigation, if it is to fulfill the procedural obligation inherent in Article 2, were discussed by the ECHR in a series of judgments where the UK was found by the Court to have violated Article 2 through failure to properly investigate a number of killings.⁸⁸ In a joint judgment delivered on 4 May 2001,⁸⁹ the court set out the elements which must be adhered to for an investigation into alleged unlawful killing by State agents to be Article 2 compliant, which include effectiveness, independence, promptness, accessibility to the family, and sufficient public scrutiny.

In response to the above judgments, the UK has been obliged to engage with the Committee of Ministers of the Council of Europe to determine the steps the Government is obliged to take to meet its obligations. In 2002, the UK Government presented the Committee with a series of general remedial measures or 'package of measures'⁹⁰ which it claimed were the necessary steps to address the issues raised in the Court's judgment of the cases under consideration and which would ensure future Article 2 compliant investigations. Amongst the measures presented to the Committee of Ministers was the Historical Enquires Team.

The UK government has strongly resisted the suggestion that the cases, which were the subject of the judgments from the Court, should now be reopened for Article 2 compliant investigations. The House of Lords, in *Mc Kerr*,⁹¹ considered the issue of whether the Government was obligated to carry out an investigation which was compliant with Article 2 because the events complained of occurred before the incorporation of the Convention into UK domestic law. The House of Lords held that the 1998 Act is not retroactive, and therefore does not apply to

⁸⁷ Joint Committee on Human Rights, Fourth Report. Inquiries Bill, at <http://www.parliament.the-stationery-office.com/pa/jt200405/jtselect/jtrights/26/2605.htm> (November 25, 2004).

⁸⁸ *McCann & Others v. the United Kingdom*, App. No. 18984/91, ECHR 1995, available at <http://www.echr.cor.int>; *McKerr v. the United Kingdom*, no. App. No., ECHR 2001-III, available at <http://www.echr.cor.int>; *Kelly & Others v. United Kingdom*, App. No. 30054/96, ECHR 2001-III, available at <http://www.echr.coe.int>; *Shanaghan v. United Kingdom*, App. No. 37715/97, ECHR 2001-III, available at <http://www.echr.coe.int>. The Court criticized inadequacies each stage in the process regarding the investigation of these controversial killings. See Bell & Keenan, *supra* note 85.

⁸⁹ Which encompasses the cases *Jordan*, App. No. 24746/94, *McKerr*, App. No. 28883/95, *Kelly & Others*, App. No. 30054/96 and *Shanaghan*, App. No. 37715/97.

⁹⁰ The "package of measures" taken include establishment of the Police Ombudsman's Office; "calling in" of other police forces to investigate deaths; the establishment of the Serious Crime Review Team [now Historical Enquiries Team]; the option for families to judicial review of decisions not to prosecute; new practices relating to verdicts of coroner's juries at inquests & disclosure at inquests; measures following reviews of the coroners' system; legal aid requests; and the Inquiries Act.

⁹¹ *McKerr*, App. No. 28883/95.

deaths occurring before 2nd October 2000. The *Mc Kerr* judgment has significant implications for investigations conducted by the HET, where death occurred by the use of lethal force by agents of the state. Essentially, there is no requirement for such cases to meet the requirements of Article 2 of the Convention, given that all cases under review predate the coming into force of the 1998 Act. The UK government remains steadfast in its opposition to the suggestion that the cases subject to the European Court judgments (and by implication similar pre-Act cases) should now be reopened for Article 2 compliant investigation. This was recently evidenced in the linked cases of *Brecknell*⁹², *McCartney*⁹³, *McGrath*⁹⁴, *O'Dowd*⁹⁵, and *Reavey v. United Kingdom*.⁹⁶

Of particular interest is the fact that the Committee of Ministers, whose essential function is to ensure member states comply with the judgments of the ECHR, has maintained oversight of the practical steps taken by the UK in order to redress the violations found by the Court. The Committee completes each case by adopting a final resolution. The Committee will not adopt a final resolution striking a judgment off its list of cases until it is satisfied that the measures taken by a Member State are compatible with the conclusions set out in the Court's judgment. Where a Member State fails to comply, the Committee may set a date for the reforms to be undertaken or insist upon a Member State taking action. In 2006 the Secretariat of the Committee of Ministers determined HET enquiries fall below the standard of investigation required by Article 2 of the ECHR. In particular the Committee considered that "the HET will not provide a full effective investigation in conformity with Article 2 in historical cases but only identify if further 'evidentiary opportunities exist.'"⁹⁷ In 2007 the Committee invited the authorities to "continue to keep the Court informed as regards the progress made in the investigations of historical cases, and in particular to provide information concerning concrete results obtained" by the HET.⁹⁸ In February 2008, the UK authorities submitted an update on the HET and stated that the HET would "continue to seek the approval of families to share some closed cases as

⁹² See *Brecknell*, *supra* note 80, at para. 88. (found that the UK failed in their obligation "to provide a properly independent investigative response in the initial stages following the allegations" in the death of the applicants).

⁹³ *McCartney v. United Kingdom*, App. No. 34565/04, ECHR 2008-IV, available at <http://www.echr.coe.int>.

⁹⁴ *McGrath v. United Kingdom*, App. No. 34651/04, ECHR 2008-IV, available at <http://www.echr.cor.int/echr>.

⁹⁵ *O'Dowd v. United Kingdom*, App. No. 36422/04, ECHR 2008-IV, available at <http://www.echr.coe.int/echr>.

⁹⁶ *Reavey v. the United Kingdom*, App. No. 34640/04, ECHR 2007-IV, available at <http://www.echr.cor.int/echr>.

⁹⁷ Council of Europe, Council of Ministers [CM], Cases Concerning the Action of Security Forces in Northern Ireland—Stocktaking of Progress in Implementing the Court's Judgments, CM Doc. CM/Inf/DH(2006)4 revised 2 (June 23, 2006).

⁹⁸ Council of Europe, Council of Ministers [CM], *Action of the Security Forces in Northern Ireland*, CM Doc. Interim Resolution CM/ResDH(2007)73 (June 7, 2007).

evidence of concrete results obtained.”⁹⁹ The Committee’s Secretariat considered it “to be premature to make any assessment at this stage as to whether concrete results have been obtained in the investigation of historical cases.” It further noted that the phrase, “concrete results obtained,” does not necessarily refer to the number of prosecutions initiated or convictions but to what actually has been done by the HET to shed light on the circumstances of unresolved cases.¹⁰⁰ In November 2008, the Committee of Ministers noted, despite setbacks and some delay in processing cases, that “the Secretariat is of the opinion that the HET can be considered as a useful model for bringing a ‘measure of resolution’ to those affected in long-standing conflicts. Such institutions could be viewed as playing an important role in satisfying the State’s continuing obligation to conduct effective investigations in violations of Article 2 of the Convention.”¹⁰¹ The Committee of Ministers will continue to maintain an interest until they are satisfied that the necessary measures have been taken to ensure compliance with the judgments of the ECHR in the cases against the UK.

A central argument advanced in this article is that the ECHR cases have been a key driver in the HET process. The HET are acutely aware of the extreme sensitivity of the cases under review and their likely political ramifications particularly in the ECHR context. The research found that a differentiation in quality of treatment exists between these and mainstream cases, which points to the existence of a hierarchy of cases. An added dimension in these cases is families are often represented by an NGO. These interventions significantly shape the outcome of the investigations. The case reports appear to be of a superior quality, in breadth and depth, to the Review Summary Reports (RSR) delivered in mainstream cases. HET have argued that, “the ‘inequality’ already exists in the different circumstances of cases ... some are more complex inquiries than others; some raise disturbing issues that are not present in every case.”¹⁰² It would seem that, the prioritization of high profile cases is quite common in some jurisdictions and would be seen as legitimate by attorney generals.¹⁰³ The “successful” delivery of ECHR cases is of major strategic importance and is considered to be “high risk” to the HET. As with many other public bodies the HET employ a Risk Register. In addition to a general risk register, there is a separate Case Risk Register,¹⁰⁴ which is used to monitor and make intervention where appropriate to mitigate any negative impact or threats to the project arising out of cases. HET Director has stated that the Case Risk Register, “allows senior managers to keep sight of especially difficult

⁹⁹ Cases concerning the action of security forces in NI, Council of Europe, Council of Ministers [CM], *Cases Concerning the Action of Security Forces in Northern Ireland*, CM Doc. CM/Inf/DH(2008)2revised (Nov. 19, 2008).

¹⁰⁰ Cases concerning the action of security forces in NI, Council of Europe, Council of Ministers *supra* note 99.

¹⁰¹ Committee of Ministers, *supra* note 10, at 49.

¹⁰² Letter from Dave Cox, Director, HET, to author (Sept. 30, 2008) (on file with author).

¹⁰³ Thanks to Susie Kemp for highlighting this.

¹⁰⁴ Risk Register, Historical Enquiries Team (Sept.2007) (on file with author).

investigations, and support staff involved appropriately.”¹⁰⁵ Having studied the register, not all cases listed appear to be “especially difficult investigations.” The criteria for placing a case on the register is associated with factors such as whether or not a family is represented, if the case is high profile, allegations of collusion, an ECHR case, or likely to attract media attention.¹⁰⁶ While it may well be “a perfectly natural and professional approach to strategically evaluate the threats to the project,” as HET argues,¹⁰⁷ the repercussion for the wider process is a layer of prioritized cases and inequality in treatment embedded in the system.¹⁰⁸ NGOs appear to be the main beneficiary of this anomaly, and some acknowledge that there is a hierarchy of cases and an inequality in treatment.¹⁰⁹ Their role as NGOs is to represent families and to get the best outcome possible for their “clients.” As one NGO representative put it, “there is deep concern if families being helped by NGOs are getting a better service than those who are not. We had hoped that if we improved the HET’s response to our clients there would be a knock-on effect for people without help.”¹¹⁰ The issue of differentiation in treatment has been raised with senior management by a “consortium” of NGOs who engage in the process.¹¹¹ The HET response is that it has “tried to establish equality in managing cases, with the introduction of the chronological approach and the application of core standards of review to each investigation.”¹¹² Further improvement is to be addressed by trying to narrow the gap through seeking to expose staff more to NGOs so they are more alert to the type of issues that they raise and then this will be applied to families.

Staffing and Independence

In November 2008, the UK authorities stated, “the HET is part of a process (which includes the Public Prosecution Service) aiming to achieve as Article 2 compliant an investigation as possible, while recognising there are certain limitations....”¹¹³ In order to comply with Article 2 standards, an investigation must be regarded as disclosing the requisite independence and demonstrate independence from the actors in question. In 2006, the UK authorities asked the ECHR in *Brecknell v. UK*, to take account of the following facts: that all persons involved in the investigation of the 1975 incident have left the RUC and security

¹⁰⁵ Letter from Dave Cox, Director, HET, to author (Sept. 30, 2008) (on file with author).

¹⁰⁶ Risk Register, Historical Enquiries Team (Sept. 2007) (on file with author).

¹⁰⁷ Letter from Dave Cox, Director, HET, to author (Sept. 30, 2008) (on file with author).

¹⁰⁸ This issue and other concerns emerging from the research have recently been taken up by NGOs with HET.

¹⁰⁹ Numerous interviews with PFC staff during 2007-2008.

¹¹⁰ E-mail from Jane Winter, Director, British Irish Rights Watch, to author (September 22, 2008) (on file with author).

¹¹¹ Notes from a meeting between NGOs re: HET, at the Belfast Unemployment Resource Centre (Oct. 6, 2008) (on file with author).

¹¹² Letter from Dave Cox, Director, HET, to author (Sept. 30, 2008) (on file with author).

¹¹³ Committee of Ministers, *supra* note 10, at 24.

forces or have died; that the RUC had undergone major reforms in the twenty-four years since the incident, specifically aimed at drawing a line under the suspicions of the past and ensuring neutrality in investigating crimes; and that the relevant section of the HET conducting its own investigations into allegations of police collusion consists of officers from outside Northern Ireland, having no connection with the RUC and reporting directly to the Chief Constable of the new PSNI.¹¹⁴ The Court pronounced its satisfaction “that the PSNI was institutionally distinct from its predecessors even if, necessarily, it inherited officers and resources.”¹¹⁵ A further measure of independence considered by the Court is the HET’s ability to provide investigative teams who have no previous history with the RUC. The causal link between a lack of independence and willingness¹¹⁶ and impartiality is self-explanatory. In November 2008, the Secretariat of the Committee of Ministers (ECHR) stated, it “takes note of the structural arrangements/organisation of the HET and acknowledges that the organisation is independent.”¹¹⁷ From a detailed analysis of various cross-referenced sources, and over two and a half years observation of the HET, the research found that each phase of the HET CARIR process (Collection, Assessment, Review, Investigation, Resolution) has involvement of former long serving RUC officers and cannot be described as having the requisite degree of independence as benchmarked by *Brecknell* and required by the ECHR.

From its inception the HET Command Team has been made up of a very small number of key individuals, including the Director, Deputy Director, Senior Manager of Review and Investigations, all of whom are retired from police forces outside Northern Ireland. A fourth original member of the Command Team, Senior Manager of Intelligence and Senior Manager of Collection and Assessment is a retired RUC officer with over 30 years’ experience;¹¹⁸ he is responsible for managing key areas of HET business. Within Senior Management there is at least one other former long serving RUC officer with Special Branch experience who is Manager of Intelligence. Additionally, a former employee of the Ministry of Defence (MoD) who had been previously stationed in Northern Ireland during the conflict performs the role of Command Secretary, Information Manager and Specified Person of Contact with MoD. All of these individuals hold key senior positions and attend Command Team meetings. The Command Team is the strategic advisory body for the HET. Its role is to advise the HET Director on policy and practice. The Director Dave Cox has stated that,

¹¹⁴ *Brecknell v UK*, Application No: 32457/04, Observations of the Government of the UK on the Admissibility & Merits, Foreign & Commonwealth Office, 31 May 2006, para 4.36, at 52.

¹¹⁵ *Brecknell*, *supra* note 80, para. 76.

¹¹⁶ The Rome Statute sets out three indicators of unwillingness in article 17(2): firstly proceedings shielding a person from criminal responsibility, secondly unjustified delay and thirdly lack of independence or impartiality or otherwise conducting a process in a manner that is inconsistent with an intent to bring the person to justice. IMPUNITY WATCH, *supra* note 7, at 43.

¹¹⁷ Committee of Ministers, *supra* note 10, at 52.

¹¹⁸ The ex-RUC officer has 30 years experience within the Criminal Investigations Department (CID) and was transferred to Special Branch for the last year of his service to ensure the better flow of information between departments.

questions raised “about the involvement of ex police and military personnel...do not take account of the reality of Northern Ireland; there are two communities one of which would not share [such] objections.”¹¹⁹

The HET is subject to the same accountability mechanisms as any other department of the PSNI. It is answerable to the Chief Constable and the Policing Board and is subject to the inspection process of Her Majesty’s Inspectorate of Constabulary. The Office of the Police Ombudsman for Northern Ireland (OPONI) has the same remit in respect of seconded police officers in HET as with PSNI staff. The Committee for the Administration (CAJ), a Belfast-based NGO, raised concerns that the Ombudsman cannot investigate complaints in to the behaviour of police officers who have retired from duty.¹²⁰ The HET staff profile overwhelmingly consists of retired police officers from outside Northern Ireland, RUC and security forces personnel¹²¹ and civilian back-up staff. According to the most recent statistical information available at the time of the research, 87% of HET staff is drawn from retired officers provided by three employment agencies.¹²² In November 2007, out of a total of 166 staff involved in the ‘policing side’ of HET business, there were seventy-seven retired police officers from forces outside Northern Ireland, sixty-seven RUC officers, six Secondees, twelve PSNI, one Civil Servant, and three Consultants.¹²³

The above statistics are subject to fluctuation given the extremely high staff turnover within almost all areas of HET (apart from the Intelligence Unit).¹²⁴ In the first year HET had a 40% turnover in staff; in 2007 it was a little under 30%.¹²⁵ Indeed, the HET Director recently gave evidence to the Northern Ireland Affairs Committee (February 2008) which illuminates the position; he informed the Committee that “[o]f the 180 staff, around four are serving police officers and the remainder are retired police officers and civilian support staff, recruited within

¹¹⁹ Letter from Dave Cox, Director, HET, to author (Sept. 30, 2008) (on file with author).

¹²⁰ Cases concerning the action of security forces in NI – Stocking of progress in implementing the Court’s judgments, Council of Europe, Council of Ministers *supra* note 97.

¹²¹ Including former MoD staff, and Ulster Defense Regiment (UDR) renamed Royal Irish Rangers (RIR).

¹²² Grafton supply staff within Northern Ireland; Rig and Dream supply staff from outside Northern Ireland

¹²³ Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author). This report further noted, “there is a train of thought in the PSNI that temporary staff do not need managed, as they are not PSNI staff but rather Grafton staff.”

¹²⁴ The Red Team (external staff & independent element) in particular has suffered high staff turn over since its inception. Purple Team (mainly RUC) does not appear to be affected by the retention issue. Review & investigations are operating below the staffing requirement. This raises a number of issues including capacity, performance, continuity in case management, training, familiarization and depth of knowledge of N. Ireland context and continuity of personnel with families & NGOs. See P. Bradford, *Resignations Blow for Troubles Enquiry Team*, Belfast Newsletter, March 27, 2008, at 1, 6.

¹²⁵ Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author).

both Northern Ireland and Great Britain.”¹²⁶ It is not apparent how many out of the four are serving PSNI officers. The pattern and involvement of PSNI personnel may be illustrative of the level of commitment from the wider PSNI to the HET project. The HET does not appear to meet the Patten Report recommendation that the composition of police service staff “should be broadly reflective of the population of Northern Ireland as a whole, particularly in terms of political/religious tradition and gender.”¹²⁷ Moreover, given the very high numbers of retired police officers working in the HET, a crucial matter seemingly overlooked is who has oversight responsibility.

Given the considerable sum of money invested by the Northern Ireland Office (NIO) in the HET project, a Financial Monitoring Group (FMG) was set up. The FMG comprises of representatives from the Northern Ireland Office (NIO), PSNI, Forensic Science NI (FSNI), OPONI and Public Prosecution Service (PPS). During my research it was difficult to establish the exact role of the Financial Monitoring Group.¹²⁸ The business of the FMG is to monitor expenditure, share information, assess the impact of decisions made on each organization and consider the financial consequences of operational and strategic decisions. At this point it is worth noting HET finance and personnel was in late 2006 taken out of HET direct control and physically located under the command of Assistant Chief Constable, PSNI Crime Support.¹²⁹ The loss of control of “the purse strings,” has caused tension within HET senior management and cast doubt on claims that the Director reports directly to the Chief Constable, which was a significant assurance to NGOs in deciding whether to engage with the HET. It further raises questions about political oversight beyond financial matters; the FMG requested and receives monthly HET management information. The NIO would not be perceived as a neutral observer by most nationalists. There again appears to be a conflict of interest for families seeking answers to questions about the role of the State in the conflict.

Intelligence: The Gatekeepers

All aspects of intelligence are managed by former RUC and Special Branch officers. The HET Intelligence Unit (IU) forms an integral part of HET, providing intelligence in a variety of forms to each of the investigation units. In addition, intelligence is critical in providing answers in all areas of enquiry, but particularly in those cases which are regarded as controversial or where there are

¹²⁶ Northern Ireland Affairs Committee, Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past, 2007-8, H.C. 333, at 10, Ev 2.

¹²⁷ Patten Report, *supra* n.34, at 85.

¹²⁸ I requested permission to attend these meetings but was refused.

¹²⁹ HET initially controlled its own budget and personnel matters. The reasons for this loss of control over the “purse strings” was not entirely apparent to the author. However, the change occurred shortly after an independent audit was conducted which criticized employment matters and financial issues.

allegations of collusion.¹³⁰ During the Assessment Phase the IU is responsible for collating all intelligence material from PSNI Special Branch (C3), Weapons and Explosives Research Centre (WERC), Ministry of Defence (MoD) and the Security Services (MI5). At the time of the research, the IU was staffed by eighteen former RUC and Special Branch officers spread across three sites; nine at HET Headquarters in Sprucefield, six at PSNI HQ and two at WERC. The research found that intelligence is more often available for incidents carried out by paramilitary groups than for incidents attributed to the Security Forces.¹³¹ Impunity Watch proposes that shielding may be denoted if any trend can be identified in the success or failure of disclosure requests over time or in relation to different types or sources of information. For example, if there is a high disclosure rate in response to requests for information about non state atrocities as compared to state atrocities or vice versa.¹³²

The Intelligence Manager (a separate post from the Senior Intelligence Manager) plays an important “gatekeeper” role; he is a standing member of the Review and Resolution Panel.¹³³ As mentioned above, the Review and Resolution Panel discuss cases that have completed Review and/or Focussed-investigation (where appropriate). All cases will eventually go through the Review and Resolution Panel. The role of the Intelligence Manager is to “advise the Chair” (Deputy Director) regarding intelligence issues. The Panel is designed to be a forum where views are exchanged in an open manner and decisions are researched and implemented. Case details and recommendations for future action are discussed in depth, although the reasons are not recorded.¹³⁴ It is my view that this is a particularly important meeting, because the Panel decides case progress. The gap in record keeping, in an otherwise meticulously recorded process, raises important questions about transparency, and the Review Panel provides a Quality Assurance role. There is need for transparent and defensible criteria applied at any stage of the process at which a decision can be made to halt progress of a case/investigation. A further significant role undertaken by the Intelligence Manager together with the Resolution Manager (an external officer), is reviewing every Review Summary Report (RSR) that is produced “to ensure accurate and appropriate access to intelligence and the maximum possible

¹³⁰ Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author).

¹³¹ Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author).

¹³² IMPUNITY WATCH, *supra* note 7, at 47.

¹³³ There are 5 standing members of the Review & Resolutions Panels which include also Deputy Director, Senior Manager Review & Investigations, Intelligence Manager, Resolution Manager, Com Sec Manager. The various review officers present their work on occasions to the Panels.

¹³⁴ I was permitted to attend a number of these meetings, and I requested minutes of the meetings in order to analyse how decisions were reached and the contribution made by each standing member to the final decision making process. I was informed that the final decision is recorded; but not how and why the decisions were reached.

disclosure to accommodate family issues.”¹³⁵ This extremely important process did not appear to be open and transparent or part of any structured formal meeting. It is apparent that ‘the old guard’ play a key role in the management and access to intelligence and perform a censoring role in respect of disclosure. These are key gate-keeping roles and serve as a significant control mechanism permeating each phase of the HET CARIR process.

Independent oversight of the Intelligence Unit (IU) and beyond is provided by the Deputy Director of the HET. In his capacity as overall Director of Investigations and Intelligence he undertakes “intrusive supervision.” A further element of independent oversight (or QA) was for a considerable period of time provided (I believe solely) by a D/Sergeant on secondment from the MET (now retired but still employed by HET). This individual was also the designated independent person responsible for oversight of the search of what is referred to as the Collection Phase, which involved the search of the entire police estate throughout Northern Ireland and the collection, cataloguing and boxing of thousands of documents and exhibits. The search was undoubtedly a Herculean task and a logistical nightmare; it has taken well over two years and at the time of the research remained incomplete. A team of 33 agency staff were employed to undertake this task – all were former RUC officers selected by the Senior Intelligence Manager from a list provided by Grafton, an employment agency. I was informed by senior management that the cost of employing officers from outside Northern Ireland would have been prohibitive. And, in any case, as I was informed by one senior manager, these former RUC officers knew where to look. The search was conducted with the cooperation of the local police District Command Units (DCUs). Files and exhibits were found in all manner of places, including attics and roof spaces, garden sheds, behind and under filing cabinets and seemingly any other available space. This exercise dovetailed with the opening of a newly built, state-of-the-art secure police storage facility at Seagate. HET estimates that in over 98% of cases some police documentation has been recovered. What this statistic does not reflect is the quality or type of documentation that has been retrieved. HET literature does acknowledge that particularly in AM1 to AM20, the documentation retrieved “is far from complete ... in many cases we are relying on partial documentation of varying usefulness to the CARIR Process, and in a number of cases the HET have supplemented the available material with open-source material.”¹³⁶ The Collection Phase, which started in April 2005, has not gone as smoothly as HET anticipated. At the time of research there were still personnel in various parts of the PSNI cataloguing and managing documents and exhibits relevant to the HET. It is not clear what happens in those cases where documents or exhibits are found after the case has been processed without the full knowledge and sight or input of exhibits, or how missed opportunities are monitored and addressed. The Forensic Science

¹³⁵ Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author).

¹³⁶ Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author).

Northern Ireland (FSNI) carried out a search/audit of its own organisation. A further point of note is the exhibits that were collected by the HET during the initial collection phase were not physically removed until well over a year later. Apparently this was because the new police store was not yet ready to receive them. These exhibits were however catalogued and put into sealed boxes. On more than one occasion these boxes were emptied of their content in the police station where they were stored awaiting collection. This raises serious questions about the integrity of exhibits. Given the current debate about the reality of prosecutions and the direct link to the integrity of exhibits and modern forensic standards, the HET has an important role to play in being transparent about these matters and in particular the Collection Phase. As Lord Eames pointed out, there is a duty to begin to tell people “the reality” and not to “perpetuate false hope.”¹³⁷

The manner in which the Collection Phase was conducted casts doubt upon the integrity of the process and the very foundation on which the HET is built. I can not emphasise strongly enough, this is not meant to be a criticism of individual RUC officers, their integrity and professionalism; it is however important, among other things, for reasons of perception. Independence is not a commodity that can simply be briefed; it has to be practically demonstrated. Despite the sterling efforts of senior management, the structural issues described above have obvious implications for claims of independence. The employment of former members of the RUC, including ex Special Branch officers, who served during the conflict and whose members have been subject to well-documented criticism has compromised the real and/or perceived independence and integrity of the HET.

The HET is a constantly evolving entity and has addressed further proposals to develop independence around intelligence. As noted, there is currently the capacity for officers from outside Northern Ireland who have the appropriate developed vetting (DV) security status to undertake independent intelligence work and provide an “independent intelligence structure.” This is described by HET as a “developing and mobile response to issues and requirements.”¹³⁸ A particular issue impacting on the capacity of the HET in this area of business has been the chronic shortage of suitably qualified staff with DV security status. This is apparently a costly and time-consuming exercise. The Chief Constable Hugh Orde recently described it as “a niche market business,” and one that only a small number of individuals are skilled to undertake and they must be vetted up to a very high level.¹³⁹ No statistical information on the number of HET officers with DV security status and the shortfall was available at the time of the research.

¹³⁷ Lord Robin Eames, *supra* note 72.

¹³⁸ Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author).

¹³⁹ Northern Ireland Policing Board, Record No. 71309, Minutes of a Meeting of the Northern Ireland Policing Board Held on Thursday, 5 July 2007 at 12:00pm in Waterside Tower, Belfast 9 (2007).

Senior managers suggested that UK police forces were unwilling to release DV officers to come to Northern Ireland because of the current perceived 'terrorist threat' in Britain. As already noted, the HET have experienced great difficulty in attracting the right calibre of motivated staff and there remains a very high staff turnover. The shortage of staff with DV clearance has a number of implications. It raises questions about HET capacity to meet the independence prerequisite demanded in certain cases. In the absence of the necessary number of DV officers it would appear that there is an over reliance on the Intelligence Unit (and therefore former RUC and Special Branch officers) to service the bulk of intelligence requests. It is my understanding from interviews that only those officers that have DV security status can access intelligence which is "unedited by the HET Intelligence Unit." This "editing process" is evident in the following procedure that is undertaken in each case review of intelligence, which forms part of the eight disciplines as previously mentioned and is worth outlining very briefly.

The HET currently gathers intelligence through the Initial Requirements for Operations as they appear on the Availability Matrix and list of forty names produced each month. Three intelligence questions are raised at this stage:

- As a result of available intelligence at the time could this death have been prevented?
- As a result of the available intelligence at the time should this death have been detected?
- Since the death is there available intelligence which could assist in its detection?

At this point, for the most part, no further enquiries are made. The HET Director points out that, "once the intelligence is produced, it is the responsibility of the Senior Investigating Officer to explore inferences and evidential opportunities that are found. This is where 'independence' in practical terms is provided; exploring, questioning and challenging material provided as necessary."¹⁴⁰ If there are evidential opportunities, an Additional Intelligence Request (AIR) or developed intelligence request can be made; these requests must be countersigned by the HET Deputy Director. The questions listed above are often repeated in the final Review Summary Report (RSR) to families, despite strict instructions from senior management not to do so. The above process appears to be self-limiting. It is difficult for a layperson to see how an effective re-examination can be carried out on a case without full sight or appreciation of the full intelligence picture. Understandably, there are legal constraints that must be adhered to when handling and disclosing sensitive material. HET appear to have adopted a super cautious and heavily censored "need to know" policy. A further gate-keeping hurdle in the process is the requirement that all sensitive enquiries are directed

¹⁴⁰ Letter from Dave Cox, Director, HET, to author (Sept. 30, 2008) (on file with author).

through the Intelligence Manager to the office of the ACC Crime Operations PSNI. These requests are subject to rigorous scrutiny.

Essentially what can be drawn from the above is that the strategic positioning of former RUC officers and particularly those with a Special Branch background not only undermines actual but perceived independence. In a recent survey of 1,800 of the Northern Ireland population, there was a large degree of consensus that any future truth commission (if it were to happen) must be independent from anyone having involvement in the conflict. There was almost universal distrust of all the organisations, parties and agencies that had been involved in the conflict being trusted to run a truth commission.¹⁴¹ When conceiving the “historical cases project,” it may have been considered important for a number of reasons, namely to secure support or buy in from the security agencies, and in particular former RUC who felt beleaguered through a series of public enquiries and investigations into the conduct of policing in the past, to ensure “the old guard” kept a grip of the essential areas of HET business.

With regards to the current structures around intelligence, HET Director Dave Cox argues that, there are a number of realities that need to be taken into account around the situation. No Government in the world is going to allow an external team unfettered and unlimited access to its most sensitive and classified data and material. To do so would present dangers to the State, destroy its international credibility around intelligence sharing and potentially threaten the lives of individual citizens. I believe our mechanism has allowed us greater ease of access than other parties have enjoyed. The delivery and security of data is managed by staff with the relevant security clearance; mostly these are ex-SB officers, from the RUC and external forces...It is just the way that it is; nor do I foresee any changes. Governments protect their data until whatever relevant time lapse provisions kick in’.¹⁴²

In light of the research, NGOs have recently raised the issue of independence with the HET.¹⁴³ Of particular concern is “the apparent strangle-hold of former RUC officers on the intelligence aspect of HET’s work.”¹⁴⁴ In a divided society such as Northern Ireland where policing has been contested, external “oversight” of HET processes could provide an important counterbalance. As I will argue later, there are leading recognised figures within the non-governmental criminal justice sector and others who deal with high level security matters regularly that could fulfil such a role.

¹⁴¹ Lundy & McGovern, *supra* note 76, at 45-52.

¹⁴² Letter from Dave Cox, Director, HET, to author (Sept. 30, 2008) (on file with author).

¹⁴³ Notes from a meeting between NGOs re: HET, at the Belfast Unemployment Resource Centre (Oct. 6, 2008) (on file with author).

¹⁴⁴ E-mail from Jane Winter, Director, British Irish Rights Watch, to author (September 22, 2008) (on file with author).

Sourcing the “truth”: Corporate Memory

The Red, White and Complex Enquiries Teams deal with controversial cases. The Purple Team, made up of mainly retired RUC officers, deals with cases that do not require independence. The Red Team was initially designed to be “ring-fenced”; staffed entirely by external personnel mainly retired police officers from forces outside Northern Ireland (England, Scotland and Wales) re-employed on a contractual basis and seconded officers.¹⁴⁵ The Red Team exclusively deals with cases in which an independent review by external staff is considered an essential pre-requisite. There appeared to me to be no discernable clear blue water between the Red and Purple Teams. The distinction between Red and Purple Teams appears to be based on external personnel. However, often there is no way of knowing in advance whether collusion exists in a case, which makes the distinction between the Red and Purple Teams somewhat irrelevant. The whole notion of “ring fencing” has simply fallen off the edge; according to some senior management it “was impossible to enforce” in any event and was causing resentment and tensions.¹⁴⁶ Red and Purple Teams on occasion share rooms and there are open and informal discussions between the teams about aspects of cases. Tracking the movement of files appeared to me to be a particularly weak point. This has only very recently been addressed with the introduction of a “file day” that seems to be designed to be a spot check or inventory of files.

Staff are instructed that they must declare an interest in cases. This is generally understood to pertain to having previously investigated a case and not to wider issues of loyalty and/or corporate memory. If collusion issues emerge in cases that have been allocated to the Purple Team, mainly RUC, it must be reported immediately to a senior manager. A constant theme in staff training sessions (often undertaken by former RUC officers), and also raised in the numerous interviews conducted with all levels of staff, was the importance of corporate memory as a resource. In a number of training sessions that I attended, staff members were strongly encouraged to “tap into” corporate memory and avail of the wealth of knowledge and experience of former RUC colleagues now employed in HET (particularly the Intelligence Unit). One senior investigator in the Red Team informed me that he regularly visited the Unit “to listen and soak it all up.”¹⁴⁷ Another informed me that the original investigator in the “Silverbridge” case¹⁴⁸ was now employed in the HET and “had a wealth of information and knowledge.”¹⁴⁹ External officers in the Red Team regularly use the former RUC officers on the Purple Team to “fill in knowledge gaps” regarding contextual

¹⁴⁵ A decision was taken to phase out secondment from forces outside Northern Ireland apparently owing to the high financial costs; this appears to have been recently revised possibly due to the demands of particular complex cases requiring more serving officers with powers. Retired police officers overwhelmingly make up the staff on the Red Team.

¹⁴⁶ Interview with staff, Red Team, in CITY, Ireland. (September, 2007).

¹⁴⁷ Interview with staff, Red Team, in CITY, Ireland. (September, 2007).

¹⁴⁸ See *Brecknell*, *supra* note 80.

¹⁴⁹ Interview with staff, White Team, in CITY, Ireland. (October, 2007).

matters and in turn receive “stories from the trenches.”¹⁵⁰ These examples are not isolated incidents but instead reflect a more general deference to RUC colleagues’ superior knowledge of past events and the value placed on corporate memory.

The problematic nature of relying on corporate memory is self-evident. Commentators have noted that official police discourse is heavily reliant on specific constructions of history that extols the virtues of the security forces in their fight to defeat ‘terrorism’ and preventing Northern Ireland from “sliding into a Bosnian-style abyss.”¹⁵¹ Mulcahy posits the police “organisational memory” which emphasised their suffering and sacrifice underpinned an antagonism not only to institutional reform but to debates on dealing with the past.¹⁵² Issues of loyalty, embedded corporate knowledge, and entrenched and deep-rooted life experiences are factors that seem to have impacted and shaped the HET process. The reliance on RUC corporate memory and the absence of a counter-discourse or counterbalancing memory is a fundamental weakness in the work of the HET. That HET composition appears not to meet Patton recommendations that the police service be broadly reflective of the population, means in practice there is the absence of a broadly nationalist perspective or memory informing its work. As I have argued elsewhere, competing and contested memories, official discourse and counter-discourses impact on how the past should be remembered and is very much the site of struggle in post-conflict Northern Ireland.¹⁵³ In the Review Summary Reports (RSR) that I examined, and the sample of case files analysed, such worldviews or organisational memory is very much in evidence. While these cases are examined elsewhere,¹⁵⁴ what can be said here is, it is striking that in most of the RSRs a significant space is given to a fairly prescriptive, self serving set piece, which comments on the historical context of the time from a policing perspective and the overwhelming pressures encountered by the security forces; frequently this is not reciprocated with reference to the prevailing impacts on communities. It is not apparent why this is considered a necessary feature in an investigation report, other than to give an exculpatory voice to the security service role. Indeed, the use of the ‘overwhelmed argument’ as an explanation or excuse for various things done or decisions taken appears to be a valued institutional script that no report would be complete without. This sets the tone of the RSR; the language is neither neutral nor balanced and it appears to be politically charged. In the cases where the PFC is representing families, this contextual set piece has been removed from reports on their insistence. Other NGOs such as BIRW and CAJ share PFC’s

¹⁵⁰ Several informal “interviews” with Red Team staff

¹⁵¹ Graham Ellison, *“Reflecting All Shades of Opinion”*; *Public Attitudinal Surveys and the Construction of Police Legitimacy in Northern Ireland*, 40 *Brit. J. Criminology* 88, 89 (2000); Aogán Mulcahy, *Policing History; The Official Discourse and Organizational Memory of the Royal Ulster Constabulary*, 40 *Brit. J. Criminology* 68, 74 n.5 (2000).

¹⁵² Mulcahy, *supra* n.151; Malchay, *supra* n.35.

¹⁵³ Patricia Lundy & Mark McGovern, *The Politics of Memory in Post-Conflict Northern Ireland*, 13 *Peace Rev.* 27 (2001).

¹⁵⁴ Lundy, *supra* note 12.

disquiet about the eulogy of the RUC contained as a standard element in HET reports and have raised it with HET senior management.¹⁵⁵ There needs to be sensitivity in these matters and recognition of the situation of each particular family and their community as well. The HET has attempted to manage the institutional culture and the tensions around this within the organisation. The Team has recently indicated a willingness to work with NGOs to seek ways in which to address this. Clearly the absence of competing or alternative perspectives and the dominance of police “ways of seeing” (whether local or external), as I will discuss later, are issues the HET or any future truth recovery process that might emerge would need to seriously address.

Gentlemen’s Agreement and ‘Partner Agencies’

Access to information is further dependent upon the cooperation of partner state institutions and agencies. These agencies control access to and disclosure of significant material. HET’s preferred approach is to enter into Memoranda of Understanding (MOU) with the various agencies that govern the process. Under such MOU, HET is obliged to consult and reach agreement on whether or not partner agency information can be used.¹⁵⁶ Partner Agencies include Ministry of Defence (MoD), Army, Public Prosecution Service, the Security Services, PSNI C3 (formally Special Branch) and OPONI. At present HET are relying on the good will of partner agencies to cooperate. During the Resolution Phase, the HET consults with partner agencies to discuss the impact of partners’ material within particular cases or to discuss broader strategic issues across a series of cases. The primary purpose of this consultation “is to risk assess the legality/appropriateness of the revelation of the material against the principle of ‘maximum permissible disclosure’ to families.”¹⁵⁷ This procedure is a further gate-keeping obstacle to disclosure embedded in the process. Some of these agencies were themselves participants in the conflict and are regarded by sections of the community to have been involved in violations and/or colluded in various ways.

Interestingly, the MoD has set up its own dedicated unit to find military records, trace soldiers and relatives. In many ways some of these matters are outside the control of the HET. In 2005, the MoD set up the Historical Inquiries Team (HIT) staffed by Royal Military Police (RMP), which later changed its name to the Historical Information Team (HIT/RMP) to more accurately reflect their role. HIT/RMP is a dedicated unit set up to provide information on any incident

¹⁵⁵ Notes from a meeting between NGOs re: HET, at the Belfast Unemployment Resource Centre (Oct. 6, 2008) (on file with author).

¹⁵⁶ For example, the HET consulted with C3 regarding inclusion of the ballistics history of weapons in RSR (i.e. Reavey & Brecknell). This information was previously disclosed in Judge Barron’s Report; its inclusion in an official PSNI/HET document (RSR) however gives it the ‘official stamp’.

¹⁵⁷ HET, supra n.47, at 18.

involving army personnel during the period under review (1969-1998). The Team consists of seven Royal Military Police (RMP) personnel and is based in Lisburn. In January 2006 the HIT/RMP informed newly recruited HET staff at an induction training session that “all Army records covering the period 1969-1975 were destroyed as per destruction policy.”¹⁵⁸ Since the introduction of the Freedom of Information Act, which came in to effect in 2005 the policy has changed so that documents less than 30 years old are now retained. The HET Director and Deputy Director informed me that when they learned of the “destruction policy” in 2005 they “put a halt to the practice immediately.”¹⁵⁹ Over the following two years there were constant references in the minutes of HET meetings, particularly from tracing staff, about the difficulties in tracing ex-soldiers.¹⁶⁰ HET tracing requests to HIT/RMP invariably returned with a negative trace. In addition to MoD destruction of documents, a further obstacle to the identification and tracing of soldiers was revealed. A HET policy document noted “in most circumstances the identity of the individual [soldier] has historically been enciphered” from inquest papers.¹⁶¹ The practice was that coroners were handed separate pieces of paper containing identity details of those involved (referred to in proceedings as soldier “A” or “B,” but this was generally destroyed immediately after the inquest. If it was not destroyed at the time, it appears that it was the policy to destroy it after the hearing. The HET stated that without the name, rank or number, the usual tracing methods of military pensions, DSS, and voter registers are not possible. The inability to identify, engage and interview security force personnel is identified as a risk by HET and as such has been placed on the Risk Register.¹⁶²

¹⁵⁸ The information on HIT/RMP was obtained during a HET training session held 16/01/06 at Sprucefield that the researcher was permitted to attend. As part of HET induction training (i.e. before it went operational 23 Jan 2006) HIT/RMP personnel gave a presentation to HET staff. The presentation outlined the work/role of HIT/RMP and stated “a big difficulty is that information held by the army prior to 1975 has been destroyed.... this might be available on microfiche – but this will be very poor quality.”

¹⁵⁹ Interview with Dave Cox, Director, & NAME, Deputy Director, Historical Enquiries Team (Nov. 2005) (the Freedom of Information Act came into operation in 2005 presumably this would have impacted and restricted MoD destruction policy).

¹⁶⁰ Minutes TCG Meeting, “All Red Team cases have been to Review Panel, most just await identification of soldiers”; May 31 2006, Minutes TCG Meeting, “Tracing Desk reported that Army cases are causing difficulties for AM3 &4; June 14 2006, Minutes TCG Meeting , “DCI---- spoke about the difficulties he has encountered with identifying soldiers...”; June 28 2006, TCG Minutes Meeting, “DI--- updated the meeting around identifying and tracing ex-soldiers. The only method available to RMP to identify soldiers from the early years, where no written record exists of the ciphred soldiers’ identity, is a convoluted one....”. etc etc.

¹⁶¹ Identification, Tracing and Interviewing of Military Personnel, Historical Enquiries Team (August 8, 2006) (on file with author).

¹⁶² The Risk Register documents ‘how the risk is managed (existing mitigation): challenge negative actions, MOU with Army, Specified Person of Contact (SPoC)’ Risk Register, Historical Enquiries Team (May 2007) (As noted above the HET SPoC is a former employee of MoD previously stationed in NI.

Tracing emerged as a significant issue in June/July 2007 as a result of NGOs pressure for clarification of procedure¹⁶³ and negative media coverage of the HET review of a case involving the North Belfast killing of a civilian by the Army in contested circumstances.¹⁶⁴ In response, the Deputy Director raised the issue with HIT/ RMP and MoD HQ. The result of these meetings was the MoD stated they did not have the names. They did, however, commit to forwarding broader information such as regiments in question at the time of the incident. This could result in 30 to 150 names being supplied to the HET to take forward and trace. The HET stated that this would entail a long process and have significant resource implications. Furthermore, in the event of the HET obtaining a positive identification, a letter would have to be sent asking for cooperation from the individual concerned.¹⁶⁵ The HET can not compel suspects or witnesses unless there is substantial new evidence and a realistic prospect of prosecution. The evidential standard applied is identical to that used by the police.¹⁶⁶ The author acknowledges that in “cold case” reviews tracing throws up particular problems where the passage of time has been significant. But the inability to identify and trace military personnel allegedly involved in killing civilians and/or eyewitnesses tends to cast doubt on the effectiveness of HET investigations. It may also fall short if measured against the standards and obligations as required under Article 2 of the Convention that an effective investigation is a component of the right to life.¹⁶⁷

The responsibility for failing to identify and trace soldiers as suspects and/or eyewitnesses illustrates the limitations of cooperation with a partner institution. While direct responsibility rests with the MoD, this does not mean that HET could not undertake the task. HET senior management was aware as far back as 2005 of the MoD “destruction policy” and the likely difficulties it would present. Despite this, they allowed the tracing process to extend over an eighteen-month period. HET did not challenge negative HIT responses to tracing requests¹⁶⁸ and it did not set about initiating steps to carry out their own identification and tracing process themselves. While the position adopted by the MoD presents obvious difficulties for the HET, it is suggested that these are not insurmountable. In one case the HET was able to trace the soldier in question. It is accepted that this

¹⁶³ The tracing issue was compounded even further a few months later with what is referred to as “RMP Cases” and “Tea & Sandwiches Agreement.” These cases are discussed in a separate forthcoming article.

¹⁶⁴ Posting of Sean Mac to the Irish Political Status Committee's Forum, <http://b4.boards2go.com/boards/board.cgi?action=read&id=1185656378&user=ipsc&page=3> (July 28, 2007, 15:59:38 BST).

¹⁶⁵ Interview conducted with Assessment Manager, responsible for tracing matters, in CITY, Ireland. (December, 2007).

¹⁶⁶ Committee of Ministers, *supra* note 10, at 30.

¹⁶⁷ Bell & Keenan, *supra* note 85.

¹⁶⁸ My records indicate the first recording of a case getting sent back to HIT regarding non-identification of soldier is - Review Panel Meeting, July 5th 2007, the case was on the AM2 (1971) and in focused investigation.

case was resource intensive.¹⁶⁹ Nevertheless it provided HET with a model for proactive tracing which could be utilized effectively in subsequent cases and which over time would become less time intensive as experience builds.

The HET's policy of transparency and openness has gained the Team support and respect, particularly within the NGO "community." This appears to be dependent upon the approach and credentials of a number of key individuals in HET who have earned this "trust." Trust and openness are said to be key goals and this is underscored by a policy of honesty in disclosure of information, no matter how difficult. The HET further state that they will be honest and up front around constraints. This philosophy does not appear to have been extended to the tracing process, given that the HET failed to be transparent about tracing difficulties. In initial contact meetings that I attended with families and HET, it was not made clear that the MoD had destroyed documents up to 1975 and the re-examination of cases would be further hampered by the "enciphered soldier" practice. NGOs should have been fully informed when they first initiated engagement with HET; most discovered the tracing issue at a meeting held in Belfast in September 2007.¹⁷⁰ Had the HET been more open about the limitations of this process, it could have avoided raising expectations unnecessarily and families would have been able to make a more informed choice as to whether or not to continue engaging. Instead, the HET continued to participate, despite an obvious pattern of negative 'no trace' responses. The slavish adherence to procedure (irrespective of outcome) and what appeared to be simply going through the motions could be construed in a number of ways including stalling, inaction, unjustified delay, or being complicit in the "shielding" process.¹⁷¹ The inability to identify and trace suspects and witnesses is a clear obstacle to HET achieving its stated key objectives. It impacts on the ability to ensure that all investigative and evidential opportunities are subject to thorough and exhaustive

¹⁶⁹ There is only one case that I am aware of where a soldier as suspect has been identified, traced and interviewed. The case was subsequently forwarded to the PPS for consideration. It remains the only forwarded to PPS to date. The family in this particular case was assisted by the Pat Finucane Centre.

¹⁷⁰ The first time many NGOs learned of the MoD destruction policy and 'enciphered soldiers' practice was at a meeting held between HET and NGOs at CAJ offices in Belfast September 2007. The meeting was called to raise concerns with the HET about their review of cases involving Army killings, and HET reliance on the original problematic investigations carried out by the Royal Military Police (known as RMP cases), and other tracing matters. Minutes of meeting between HET, the Pat Finucane Centre, British Irish Rights Watch, and the Committee on the Administration of Justice (Sept. 13, 2007) (on file with author).

¹⁷¹ According to the Impunity Watch proposed model, "shielding relates to alleged instances in which formal or informal mechanisms, practices or ad hoc actions on the part of state bodies have prevented persons from being subject to investigation, prosecution, vetting, or lustration or have prevented information disclosure or the making of reparations to such persons." This broader definition of shielding applies to the work of 'truth seeking' endeavours and other transitional justice processes. See IMPUNITY WATCH, *supra* note 7, at 44. The Rome Statute sets out three key indicators of unwillingness in article 17(2); firstly proceedings shielding a person from criminal responsibility, secondly unjustified delay and thirdly lack of independence or impartiality or otherwise conducting a process in a manner that is inconsistent with an intent to bring the person to justice.

examination. This in turn could undermine a key element in the HET “purpose” to establish, maintain and promote community confidence in the HET and the wider PSNI. It is a matter of public concern that the identity of soldiers involved in killing civilians is apparently not known. What this example illustrates is that the HET did not demonstrate prudence, until challenged. NGOs were the drivers in the process. This is a pattern that is discernable in other aspects of HET work and a number of case reviews. The above discussion has, however, to be balanced against feedback from some NGOs’ and families’ that HET have been very open and honest about the review of cases and what information they can and cannot share.¹⁷² In the context of the current debate in Northern Ireland regarding the reality of prosecutions, the HET has a duty to be frank and transparent about limitations and not to raise expectations.¹⁷³

Opening Up or Delimiting Access to “Truth” Recovery

South African Justice Albie Sachs, speaking of the International Criminal Court (ICC) makes the point that, “justice is not only in the outcome. It must be in the process.”¹⁷⁴ It is widely recognised that the process can be important for victims’ healing, and as such international standards on victims’ rights provide that victims should have opportunities to voice their concerns.¹⁷⁵ The HET describes itself as having a family focused approach and families are said to be at the heart of the process. HET bases its legitimacy on this and the assistance it is able to provide families in terms of answering their questions. This section examines the ways in which HET methodologies facilitate or impede the recovery of “truth” or micro level information.

The HET terms of reference clearly state: “the Review Officer will concentrate their efforts specifically to the identification of evidential opportunities within the eight disciplines.”¹⁷⁶ The eight disciplines, as noted above, include analytical review, forensic review, fingerprint review, intelligence review, original case paper review, contact with original investigating officer, contact with families, and open source material. The Review process, it is argued, is designed to be exhaustive, and includes a re-examination of all documents, any exhibits associated with the case and any intelligence on the case (internal, external and open source). The focus of the process is on what evidence, if any, exists and what potential remains for gathering new evidence. It involves assessing each case to identify whether any investigative opportunities were missed originally or particular issues raised by families. New developments provide a fresh chance to progress the enquiry. This could result from any source, such as new forensic processes (e.g. DNA) or new witnesses being identified either people whose

¹⁷² Interview with PFC staff, in CITY, Ireland. (December, 2008).

¹⁷³ See Lord Robin Eames, *supra* note 72.

¹⁷⁴ Goetz, *supra* note 15, at 68.

¹⁷⁵ *Id.*

¹⁷⁶ HET, *supra* n.47, at 11

statements were never taken in the original investigation or where the passage of time allows for changed loyalties. The Review process focus is on identification of evidence because prosecution remains an option if evidence is found to implicate suspects in individual cases. If evidential opportunities are identified the review moves to the next stage (Focused Investigation), and where credible evidence has been established, files will be submitted to the Public Prosecution Service (PPS). The evidential standard applied is identical to that used by the police.¹⁷⁷ Only one file has been referred to the PPS, and the decision was not to prosecute “in the public interest.”¹⁷⁸ The UK authorities have stated this particular case “demonstrates that the system allows for prosecution where appropriate and that no further measures are necessary.”¹⁷⁹

Importantly, according to the CARIR process, a case can only be authorized to the next stage (i.e. from Review to Focused Investigation) for two reasons:

1. To exploit a realistic evidential opportunity.
2. In order to answer a family question.¹⁸⁰

As discussed above, there would appear to be limited realistic prospects of new evidential opportunities being available in the majority of cases; or at the very least, the task faces formidable difficulties. Assuming that the first criterion will be achieved in only a very small number of cases, the second criterion is likely to be the most generally applied and will enable a case to progress to Focused Investigation. It is my view that rigid adherence to this criterion [to exploit a realistic evidential opportunity] has delimited access to “the truth” in cases, and appears to be self-limiting. In many of the interviews I carried out with families, it was clear they did not fully understand the process or failed to recognize the importance of framing their questions in the “right way” at the outset, necessary to receive details and answers to questions of importance to them. There was an assumption that the police officers would understand what was required and would investigate accordingly. FCO’s are instructed ‘to record an accurate account of matters raised by families and this determines the “basis of the contact strategy with individual families.”¹⁸¹ The families interviewed had mixed

¹⁷⁷ Committee of Ministers, *supra* note 10, at 30.

¹⁷⁸ As the article goes to press 11 men have been charged in connection with the murder of a leading loyalist paramilitary in 2000. This killing is outside HET timeframe but has been opened as part of a linked series of cases triggered by the Police Ombudsman Operation Ballast Report. See POLICE OMBUDSMAN FOR NORTHERN IRELAND PUBLIC STATEMENT, *supra* note 40; Alan Erwin, *Loyalist feud victim's family "received threat"; Bail refused over intimidation fear*, Belfast Telegraph, Feb. 6, 2009, at 10.

¹⁷⁹ Cases concerning the action of security forces in NI, Council of Europe, Council of Ministers *supra* note 99.

¹⁸⁰ Strategic Assessment & Evaluation, Historical Enquiries Team (2007), at 42 (on file with author).

¹⁸¹ HET, A Guidance for the Resolution Process 04 (2007) (on file with author).

views about the FCO's who are retired police officers from services outside Northern Ireland. Some spoke very positively about their respectful approach and the way in which they had conducted meetings. Others were more critical of the process and felt officers did not have even basic contextual information and knowledge of events which lead on occasions to insensitive comments. The seniority of HET staff in attendance at the first contact meeting is determined by the individual circumstances of the case. What this means is, if a case is defined as "high risk" (ECHR case, allegations of collusion, high profile and/or media attention, or when a family is represented by an NGO, or other third party (solicitor, councilor) a Senior Manager will accompany the FCO's at the first contact meeting.¹⁸² Deviation from this procedure requires approval from a member of the Command Team. In the high profile case first contact meetings that I attended, the Director and Deputy Director were in attendance. This procedure indicates that from the first contact meeting there appears to have been a differentiation in treatment. Dave Cox has argued, "this ascribes a sinister motive around image protection; in fact it is a demonstration of good leadership and good management for senior staff to face the more difficult events ... any family, if dissatisfied with the HET process, can ultimately meet with us personally to discuss their case."¹⁸³

As noted, the questions and concerns recorded play a pivotal role in determining the nature and direction of the review to be undertaken. It is of significance that the majority of cases do not progress to Focused Investigation. At the time of the research, out of 572 cases on AM1-14, only 71 deaths (60 operations) progressed to Focused Investigation, the majority of which are allocated to the Red Team. There are an equal number of exemption and chronological cases in Focused Investigation.¹⁸⁴ Where cases cannot be progressed, the HET stated objective is to address as far as possible questions and issues that remain outstanding for families. If a case ends at Review and does not progress to Focused Investigation the re-examination is largely based on a regurgitation of existing documents and the content of previous investigations, supplemented by secondary sources. There is of course potential for new information to be forthcoming from two other sources out the eight disciplines – i.e. the original RUC investigator, and intelligence. As we have already seen, disclosure is tightly controlled on a "need to know" basis and there are legal and other constraints. From the statistics available at the time, co-operation of original RUC Senior Investigating Officers (SIO) has been limited; 22 percent of SIOs of the 572 cases on AM1-14 have positively engaged with the HET.¹⁸⁵ It is my opinion that a

¹⁸² HET, *supra* n.181, at 4.

¹⁸³ Letter from Dave Cox, Director, HET, to author (Sept. 30, 2008) (on file with author).

¹⁸⁴ Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author).

¹⁸⁵ Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author).

very creative use of language has been employed to describe a process which in the majority of cases is essentially a 'desktop review'.¹⁸⁶ In many of the interviews I carried out with families it was clear they did not fully grasp that the process was not a primary investigation.

This is particularly problematic in cases where an NGO, solicitor or person with experience in casework does not represent families. At the conclusion of the process families receive a Review Summary Report (RSR).¹⁸⁷ The RSR details the findings of the HET case Review or Focused Investigation and contains responses to families' questions. In some cases NGOs have "negotiated," or been asked by HET, to receive a draft copy of the RSR before they go to families and comment where appropriate. The resolution process and outcome is very different in these cases. On occasions, RSR have gone through several drafts after input and further questions and concerns posed. NGOs and other representatives have different views on the nature or level of engagement appropriate at this stage of the process. Some "are uncomfortable seeing the reports before the families' do, but hope to spare them some of the angst of getting really bad reports."¹⁸⁸ Others are of the view that this raises ethical issues and have suggested it is important to remain "neutral" and receive the report in the presence of the client.¹⁸⁹ Families are told they can raise further questions and many of them do. After several years into the process, negative press coverage, and NGO/solicitor criticism of the quality of some RSR have highlighted the need for procedural changes, and led to "the formation of a Gold Writing Team" to oversee the quality and standard of RSR.¹⁹⁰ This has been further refined with the employment of individuals from a non-policing background to oversee the quality/content of RSR. The RSR is the main means of encapsulating and communicating HET findings. As the Deputy Director put it, "the RSR is a vitally important document to the HET, its content is designed to reflect the depth and scope of the work that the HET has undertaken including

Original SIOs have declined to engage due to health reasons however the reason for negative response or no response is not recorded in all cases (8% deceased, 4% negative response, 19% no response, 30% no trace, 16 % not contacted).

¹⁸⁶ HET states, "the emphasis on 'review' is important to manage expectations and potential criticism of the level of examination of individual cases by HET," *supra* n.56, at 11.

¹⁸⁷ The completed RSR is then delivered to victims/families. The meeting usually takes place in the victims/family's home and is often attended by various family members and the assigned FCO. The method of delivering the RSR is determined on a risk-assessment basis. There are three risk-assessment levels. If a case is categorized as Risk Assessment Level C (high risk) the instructions for the delivery of the RSR are as follows, "resolution meeting to be conducted by FCO's and appropriate member(s) of Command Team in the more challenging cases e.g. linked series; potentially sensitive; allegations of collusion; involvement of NGOs; high public interest; lack of confidence/trust in the PSNI/HET". Again, this indicates a differentiation in treatment.

¹⁸⁸ E-mail from Jane Winter, Director, British Irish Rights Watch, to author (September 22, 2008) (on file with author).

¹⁸⁹ Interview with Abed Natur, Legal Adviser, CAJ, in CITY, Ireland. (October, 2008).

¹⁹⁰ Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author).

the crucial discipline of answering the families concern.”¹⁹¹ There were numerous examples in RSR that I examined where families simply asked the generic question “we want to know what happened.” This is highly problematic in a process that hinges on families asking the “right questions.” As one senior manager put it, “the complexity of the questions asked affects the quality and content of the answers given thereby impacting on the research required to enable questions to be answered.”¹⁹² NGOs are adept at this. According to the statistics available at the time of the research, only 87 families out of the 572 cases on AM1-14 are represented through a NGO, solicitor or other representative.¹⁹³ I estimate that up to 60 of these are nationalist cases. In contrast, the unionist community does not have NGOs with experience in casework that can represent families in the same way. Victims’ families outside Northern Ireland, such as those of British soldiers, appear to be the least well represented. If, as I have argued, the investigation and outcome is significantly influenced by representation, this may raise questions of access to justice. Any truth recovery process that might emerge in the future should ensure that families have access to independent advice and/or representation.

It is important to take cognizance of the fact that the HET falls within the criminal justice system, and the re-examination of cases is therefore conducted to criminal standards of proof. The process is driven by the identification of new evidential opportunities. This legalistic way of “seeing” is narrowly framed; it tends to value objective facts, the “hard” factual or forensic “truth”. It tends to disregard certain kinds of facts that may be useful to families in understanding what happened. As I have argued, this underpins the progression of cases. This, however, is not the failing of the HET if it had been set up within a criminal justice mandate. This broadly legalistic approach is however juxtaposed alongside a more “therapeutic,” or “cathartic” process of truth recovery. In many significant ways the HET departs from traditional policing, such as in the scope of questions it attempts to answer, many of which are not related to typical investigations. A written resolution report is produced and families are to be the key drivers of the process. The “police part,” namely assessing old cases for investigative opportunities, sits uneasily within this process. Indeed, the HET “prescribed vocabulary” is framed in language more akin to that associated with a truth commission than a policing initiative. Therapeutic language and concepts like resolution, answering unanswered questions, “story-board,” “story telling” and “family centered” feature heavily in HET discourse.¹⁹⁴ Standard Operating Procedures describe the Review process in terms of “building a storyboard, and under the heading of “Resolution Stage” or “Story Telling Phase”

¹⁹¹ Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author).

¹⁹² Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author).

¹⁹³ Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author).

¹⁹⁴ HET, *supra* n.56 at 15 & 23.

instructions are given on the delivery of a “story board” that details the findings of the Review. The “story telling” phase is the conclusion of the Review Stage or Focused Investigation if the case is progressed. As I have already noted, this is viewed as the most important part of the process, given the unlikelihood of a large number of prosecutions. It is built on the assumption that the majority of families simply want answers to questions. This may be the case for many families. Initially the HET considered delivering the “story board” to families verbally, and/or by way of a slide presentation, and families could take notes. NGOs raised concerns that a verbal presentation was not appropriate and only a written report would be acceptable. The idea of a “story telling” slide presentation was dropped and replaced with a written report, the Review Summary Report (RSR). This again illustrates the significant role of NGOs in shaping the process; it also demonstrates that senior management were listening and responding positively to constructive criticism.

The therapeutic imperative and construction of a victim-centered approach provides an insight into the nature and likely rationale behind the original project. The concept and principles that underpin it are certainly laudable. This rationale may also be critically assessed in terms of whether key elements of its implementation are designed to open up or delimit the scope of truth recovery. The therapeutic approach tends to correspond with developments that have taken shape in Northern Ireland over the past few years and the apparently growing official interest in “storytelling” evident as far back as the Bloomfield Report published in 1998. In this context, the government has endorsed the HET as a vehicle for “closure,” as opposed to its potential for prosecutions.¹⁹⁵ This official gravitation towards “storytelling” perhaps reveals the problematic nature of investigative and judicial approaches in terms of consolidating stability and moving the peace process forward. Moreover, a “storytelling” approach and the individualization of cases avoid the bigger picture macro level analysis that would focus on patterns, policies, institutional responsibility, the State and other actors’ role in the conflict.

Concrete Results

The principle focus of this article has been analysis of policies, procedures and processes. Nevertheless, it is necessary in order to contextualise the discussion to give a brief commentary on output. In 2007 the Committee of Ministers (ECHR) invited the British authorities to ‘continue to keep them informed as regards the progress made in the investigations of historical cases, and in particular to provide information concerning concrete results obtained’ by the

¹⁹⁵ Press Release, Northern Ireland Office, Hain welcomes the formal launch of the Historical Enquiries Team (Jan. 20, 2006), *available at* <http://www.nio.gov.uk/media-detail.htm?newsID=12696>.

HET.¹⁹⁶ When the observational stage of the research ended in December 2007, which was almost two years into the HET process, only 101 RSR had been completed arising out of 95 incidents.¹⁹⁷ In its first year, the HET completely failed to meet its anticipated target output of forty cases per month by producing no RSR for the entire period. In February 2008, the Northern Ireland Affairs Committee reported HET overall performance rate indicates “there are 1,026 cases now open.”¹⁹⁸ What this figure actually tells us is the number of cases that have “gone into the system.” As noted earlier, every four weeks, forty cases go into the CARIR process; the cases are automatically opened by way of the analytical data base (HEAD). The performance statistics therefore mask the reality of the backlog. Moreover, the cases highlighted by the NIAC, referred to by HET as Complete Pending Family Engagement (CPFE), are essentially fast track cases that do not require families’ questions, liaison with original SIOs, or a report (‘story board’) to be written. Their inclusion tends to bolster overall performance rates.¹⁹⁹ In November 2008, the Committee of Ministers noted, ‘the HET has still not concluded reviewing 65% of the cases before it (only 471 have been completed...).’²⁰⁰ The Secretariat proposed, “to look into whether or not the HET has the necessary organizational structure and the means to be able to finalise its work in the near future.”²⁰¹ The HET has been in operation since January 2006 which is well over three years; this is a much longer timeframe than many truth commissions have had. It also had an additional preparatory year, which incidentally is longer than most commissions have had (El Salvador and Guatemala had 6 and 7 months between appointment and start).²⁰² The reasons

¹⁹⁶ Cases concerning the action of security forces in NI, Council of Europe, Council of Ministers *supra* note 99.

¹⁹⁷ Management Information & Evaluations, Historical Enquiries Team (Nov. 2007)(on file with author).

¹⁹⁸ Northern Ireland Affairs Committee, Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past, 2007-8, H.C. 333, at Ev 3.

¹⁹⁹ The HET Guidance Manual for the resolution process specifically states, ‘Review officers do NOT need to prepare a draft Review Summary Report (RSR) in cases where the family has not engaged with the HET’ (p.1, original emphasis). In cases where families have not engaged their case is defined as Complete Pending Family Engagement (CPFE). HET write a second letter ‘advising [families] that the review is completed and they can engage at a future date’. HET, *supra* n.181.

²⁰⁰ Committee of Ministers, *supra* note 10, at 50- 51.

²⁰¹ *Ib*

²⁰² The author is not suggesting that the HET and truth commissions are comparable; TC remit and goals are much broader often including reconciliation and establishing an objective authoritative narrative of the past. Nevertheless, it is worth pointing out the operational period generally given to Truth Commissions is between 6 months and 2.5 years. The Guatemalan commission was initially given six months, and operated for a total of 1.5 years. At its peak it had a staff of two hundred and fewer than one hundred for the months of investigation, analysis, and report writing. Its staff included both nationals and non-nationals. In extremely difficult conditions staff managed to visit almost 2,000 communities and register 7,338 testimonies. Thousands of audio-taped and transcribed testimonies from two NGO projects were also incorporated. It thoroughly investigated a total of 100 cases; (and like other commissions) in addition to examining details of particular cases, it was also responsible for analysing and clarifying historical events and causes dating back a quarter of a century, including internal and external factors and

for this unsatisfactory result include “teething problems”: high staff turnover, quality of staff, sheer volume and complexity of cases and resource issues. Despite the efforts of the Team, given the increasing demands and staffing difficulties it appears likely that the backlog will not improve. In order not to raise families’ expectations, the reality of this situation and the likely delay in processing cases should be publicly discussed.

In addition to the quantity of output, a further and more important issue is the quality of HET reports. Some of the most controversial cases under review have taken well over 3 years to process, albeit that the subject matter is highly complex, and several remain outstanding. These are European cases that raise serious allegations of collusion. The families and their representatives have stipulated they want analysis of the “bigger picture” and answers to questions about policies, patterns and institutional responsibility. As already noted, macro level analysis is beyond the HET remit, which is to review individual cases from a perspective of trying to answer families’ questions. Inevitably questions centered on suspicions of collusion had to be confronted by HET because families and their representatives raised them.

This was problematic from the perspective of the HET for a number of reasons. By its own admission it was not equipped to deal with those classes of case. Collusion cases are for the most part, but not exclusively, directed at one side of the community in Northern Ireland (i.e. Nationalist) and that recognition was itself seen as a threat to the HET due to the differing community perspectives. They were keen to avoid being perceived as turning into a single issue unit and/or one Super Stevens Enquiry, simply investigating issues of Security Force collusion, at the expense of other cases within its remit. Nevertheless, the HET was sensitive to the need to tackle these cases not least because it was acknowledged that, various social and political groupings will be monitoring our commitment and ability to do so and report accordingly. An overarching concern and legitimate aim was to build public confidence particularly within the nationalist community and engage NGOs perceived as working within this community. It was therefore imperative to be seen to be tackling allegations of collusion. The risk of not dealing with the issue was categorised as “high” and one that could jeopardise the stated objective of building public confidence in the wider PSNI. A further related issue impacting on the formation of the White Team and already discussed in depth, many of the cases within its remit have Article 2 implications and as such are open to the scrutiny of the Committee of Ministers of the European Court of Human Rights. The setting up of the White Team was regarded as a “third way,” of dealing with this class of case. It is my view that the strategic response in effect created a space to “separate” the more controversial collusion issues while at the same time enabling individual cases to be processed and good relations with families and NGOs to be built and maintained.

writing a final detail report consisting of numerous volumes. Truth Commission Project, <http://www.truthcommission.org/> (last visited Feb. 6, 2008); See also Quinn & Freeman, *supra* note 25, at 1130.

This allowed the broader strategic needs to be met and the process time to “bed down.”

The resolution reports written by the White Team and delivered to families to date are interim reports that individualize cases. The HET Director has stated that a final overarching report on these cases “will probably” be written in the future.²⁰³ Whether, and when, an overarching report will be written remains to be seen. In a forthcoming article, I examine in detail HET reports, families’ assessment and NGOs’ views.²⁰⁴ However, at this point it can be said, from interviews carried out with this group of families and their representative (PFC), it is apparent that they are “relatively satisfied” with the outcome; for some individuals there appears to be ‘closure’. According to the PFC caseworker, “it may not necessarily be the fault of the process that some questions cannot be answered in these cases but more to do with the legacy of previous investigations.”²⁰⁵ NGOs have given HET access to their own case files and research material collated over many years. Most of these cases have been the subject of significant formal and informal inquiries, reports and research. While NGO reports can lead to broad insights, their weakness is they lack official standing.²⁰⁶ The HET have used NGOs’ material in RSR and on occasions it has provided the answer to families’ questions; the HET report added “the official stamp” and gave weight to the findings. By adding “the official stamp,” the HET officially acknowledged long held allegations of state wrongdoing made by the families that had been denied over many decades. Official acknowledgement is what most families want, and the symbolic value should not be underestimated.

What then is the added ‘value for money’ in the HET process? Significantly, the boundaries have been pushed on what was previously considered appropriate levels of disclosure of information, including ballistics history. Some of this information was previously contained in the Barron Report- the HET added to it and officially acknowledged it. What can be drawn for this discussion is HET has delivered satisfactorily in a number of controversial cases. Given the obstacles and deficiencies discussed earlier, it is important to acknowledge what has been achieved in these cases. This is down to some reasonable thinking at senior management level and the dogged intervention of NGOs. After several years in operation, the HET appear to have achieved a “more robust” approach and standard of case. A number of “best practices” appear to be emerging (or could be fine tuned) that may well provide a template for best practice historic investigations. The challenge now for the HET is to ensure that this standard is applied in all cases. These are, however, prioritized gold standard cases which received a considerable amount of time and attention. If HET were to be judged on these cases, it would provide a very skewed and inaccurate account of overall performance. Interestingly, commenting on the first of the gold standard cases to

²⁰³ Informal interviews with Dave Cox, HET Director, in CITY, Ireland.

²⁰⁴ Lundy, *supra* note 12.

²⁰⁵ Interview with Alan Brecknell, PFC, in CITY, Ireland. (December, 2008).

²⁰⁶ Louis Bickford, *Unofficial Truth Projects*, 29 Hum. Rts. Q. 994, 1027 (2007).

be completed the HET made the following observation: “whilst clearly there may be advantages to families and family representatives in a more robust reporting approach by the HET there are significant dangers to be considered ... reporting negatively in this fashion will cause considerable animosity in certain quarters” (a list of policing associations were given); and “the NIO/MOD/MI5 will not want HET to report in this fashion.”²⁰⁷ HET is preoccupied with balancing competing interests. The objective of a truth recovery process is to uncover as much information as possible, free from any political or other consideration. Lars Buur’s concept and theoretical framework of “backstage” performance, which draws on Evin Goffman’s work, is of interest here. Speaking of the South African Truth Commission, Buur suggests there is the celebrated “on stage” public representation of truth recovery, that goes together with the invisible ‘backstage’ dimensions of the functioning, management and production of “truth”.²⁰⁸

The needs of victims’ families, their desire for information and expectations of truth recovery processes are diverse. Correspondingly, HET cases present a variety of challenges and demands for different “categories” or “levels” of information recovery. I found many examples throughout the research where the HET Review has undoubtedly provided answers to families and they were highly appreciative of the effort involved. Families have returned with further questions and the HET have conducted additional work. Such cases are by no means all driven by NGOs. The Team has gone to great lengths in many instances to answer micro level questions, such as tracking down a commemorative crystal rose bowl presented to the regiment of a dead soldier, whose whereabouts had concerned the family for many years; or locating and presenting photographs of dead loved ones and the scene of the incident on the request of a family. Significant effort has gone into finding open source material (newspapers, books, videos, television footage of the incident or even funeral records), that could be used to fill the gaps in an otherwise “thin” and/or ‘empty” file or at a family’s request. These items and the specifics of particular events are extremely important and helpful to families in piecing together “the story.” However, the process has also proven to be unacceptable to others who feel that their questions have not been answered and they have not received any new information. These families are critical of the delimiting nature of the process and the fact that the onus is on them – the victim - to frame the right questions. The above has explored some of the obstacles, deficiencies and tensions that have emerged in the HET process.

²⁰⁷ Strategic Assessment & Evaluation, Historical Enquiries Team (2007) (on file with author).

²⁰⁸ Lars Buur, *Monumental Historical Memory: Managing Truth in the Everyday Work of the South African TRC*, in Posel & Simpson, *supra* note 18, at 66-93.

PART 5: Lessons Learned

While this article provides a critical in-depth analysis of the HET, it is nevertheless written from a perspective that values the basic objectives and goals underpinning the concept and enterprise of answering families' questions. I would argue that the HET concept has great potential and something to offer other countries seeking to meet the needs of victims. The article however posits that the process is flawed in a number of ways. The engagement of retired RUC officers throughout various stages from collection, intelligence gathering to delivery of resolutions taints the process with an appearance of bias and presumption of conflict of interest in circumstances where the police may be regarded by certain sections of the community as policing themselves. This is particularly evident in cases where deaths were occasioned by security forces or involved collusion, which raises issues of compliance with European case law and the independence imperative. As noted, often there is no way of knowing in advance whether collusion exists in a case, which makes the distinction between Red and Purple Teams somewhat irrelevant. There are obvious tensions in whether or not former members of the RUC who served during the period in question go back over old investigations and essentially judge former colleagues' work. My view is that in deeply divided societies where policing itself has been contested, attempting to police the past is hugely problematic. In other transitional societies that have undergone a truth recovery process, the commission has usually been staffed by an independent multi-disciplinary team, with the involvement of some local police.²⁰⁹ This avoids any criticism of actual or perceived bias inherent in the process. Because the HET is part of the PSNI, policing imperatives drive decision-making. This manifests a preoccupation with balancing competing interests, and a differentiation in quality of treatment. Reliance on families getting the question right, or understanding the process at an early stage, results in a "lottery of process" for those lucky to have good representatives. As Gready argues, "voice without control may be worse than silence."²¹⁰ Moreover, if one accepts there is little prospect of securing prosecutions, why is it essential for the HET to work to criminal justice standards of proof to progress cases? As I have discussed, there have to be realistic evidential opportunities for a case to be progressed and certain lines of inquiry pursued. If HET is "seeing" all potentially relevant information through an evidentiary optic, it is almost certain that they will reject or not look for information of interest to victims and society because it is not relevant to proving guilt. It also delimits the HET CARIR process and access to micro level information. Other more creative ways of enabling cases to progress for the purpose of pursuing meaningful answers to questions should also be considered or explored. If the

²⁰⁹ Chapman & van der Merwe, *supra* note 6; Mark Freeman, Truth commissions and procedural fairness (Cambridge University Press 2006); *See also* Quinn & Freeman, *supra* note 25; Gareth Newham, Centre for the Study of Violence and Reconciliation, Investigating Units: The Teeth of the Truth and Reconciliation Commission (1995), <http://www.csvr.org.za/wits/papers/papnwhm2.htm>; Posel & G. Simpson, *supra* n.18.

²¹⁰ Ross, *supra* note 15, at 337 (citing Gready).

judicial imperative were removed from the equation, as a result for example of immunity provisions, this might open the way for alternative developments. The lack of MoD co-operation and the limited response of original SIOs and eyewitnesses, in my view strengthen the case for an immunity provision to encourage participation. International truth commissions provide useful examples with regards to relevant powers and practices.

A number of key changes need to occur in order for the process to gain acceptance from all sides of the community. For all of the above reasons, there is a compelling case for a truth recovery process to be removed from policing. A recent Northern Ireland survey found there was almost universal distrust of all the organisations, parties and agencies that had been involved in the conflict, to run a truth recovery process.²¹¹ A restructured truth recovery process could include police from outside Northern Ireland, preferably with knowledge and experience of Northern Ireland. This should be balanced against a more central and active role of non-state actors. Such a structure might include representatives from Human Rights Organisations, NGOs, Victim Support/Advocacy Groups, research organisations, non-governmental criminal justice sector and public sector organisations such as the Human Rights Commission. These individuals would require training and orientation. It is accepted that there are security implications. There is no suggestion that Government should give 'unfettered and unlimited access to its most sensitive and classified data and material'.²¹² Obviously, issues of security, confidentiality and privacy would need to be carefully considered. However, as mentioned above, other countries have successfully dealt with this challenge and managed to achieve the right balance, so this should not be an insurmountable impediment. The security aspect and the need to have suitably vetted individuals does not in my view necessarily have to result in personnel who are exclusively drawn from a police environment. There are a number of civilian staffed and multi-disciplinary investigation models including the Criminal Cases Review Commission, the various Ombudsmen, the Social Security Agency and public inquiries in Northern Ireland²¹³ and Great Britain that draw upon employees from a variety of backgrounds. Internationally there are many examples of non state actors assisting truth commissions extensively in key aspects of their work including statement/testimony taking and recording, research, and investigations (South Africa, Guatemala, and Ghana, to mention but a few).²¹⁴ Truth commissions induct staff from a variety of backgrounds in a

²¹¹ Lundy & McGovern, *supra* note 76, at 45-52.

²¹² Letter from Dave Cox, Director, HET, to author (Sept. 30, 2008) (on file with author).

²¹³ Northern Ireland Policing Board, Record No. 71309, Minutes of a Meeting of the Northern Ireland Policing Board Held on Thursday, 5 July 2007 at 12:00pm in Waterside Tower, Belfast 4-5, 8-9, 10, 33 (2007).

²¹⁴ M. Freeman, *Truth Commissions & Procedural Fairness*, 2006; Hugo van der Merwe, Polly Dewhirst & Brandon Hamber, Centre for the Study of Violence and Reconciliation, *Non-governmental Organisations and the Truth and Reconciliation Commission: An impact assessment* (1999), <http://www.csvr.org.za/wits/papers/paphvvpb.htm>; Pigou, *supra* note 27, at 37 & 97.

number of different contexts (volunteers, full-time staff, temporary contracted workers etc).

A fundamental weakness identified in the work of the HET is the over-reliance on RUC corporate memory and the absence of “competing memories” and “alternative voices.” It is accepted that police have particular investigative skills and expertise; however this is not the sole preserve of policing, other professionals have invaluable local knowledge and aptitude for investigating historic cases, representing and supporting victims. Numerous tasks in the HET do not require a policing background. Non-state actors and organisations could carry out such functions equally well and act in an advisory role. This is already taking place on a number of levels, but in most instances it is informal and private. There is a marked under-representation of women in the HET and a clear need for gender balance in the process. The quality, calibre and high turnover, particularly of external staff who commute weekly to Northern Ireland from Great Britain, has been an acknowledged impediment to HET progress. There is a pool of local civilian talent and expertise that could be drawn upon and, if necessary, this could be complimented with external expertise from a variety of countries. There are a range of actors and well-respected international organisations that have assisted truth commissions in multiple ways, including international NGOs such as International Centre for Transitional Justice (New York), Impunity Watch, Amnesty International and the Centre for the Study of Violence and Reconciliation (South Africa). These actors and organisations could provide skills training and capacity-building based on years of comparative experience and knowledge of best practice.

Drawing on the lessons learned, to gain the widest possible acceptance a truth recovery process should contain a more civilianised multi-disciplinary team as described above. In the context of the HET, this will necessitate fundamental restructuring and not simply cosmetic changes to reporting structures. This more inclusive participatory approach could have positive effects in terms of developing trust and strengthening the integrity and legitimacy of the process. It would further create a sense of ownership, genuine partnership and reduce the ‘us-and-them’ dialectic for some sections of the population. A model of this kind should have a strong management board made up of the various stakeholders and non-state actors. The process would work best as a truth recovery tool, if operating in parallel with an independent truth commission. It is not possible in this article to describe what such a process might entail. It is suggested that a commission would undertake macro level analysis and produce a report on the context, causes, consequences and patterns of the conflict; which is what truth commissions are best at delivering. A HET type truth recovery process dealing with individual or micro information could feed into such a commission and in turn would be freed-up from demands of macro level analysis.

This article has aimed to provide an in-depth critical analysis of the HET. It is recognised that the HET is a significant departure from the past and a positive development in policing. There has been considerable effort and commitment in

developing and delivering a creative response to dealing with the past. At present, it is apparent to me, that the “cracks are being papered over” and there is a reluctance in some quarters to constructively criticise. This may be related to the huge investment by some in the process and in “making it work.” If we are to learn anything as a society, and if a model of this kind is to be emulated elsewhere, there needs to be an informed, honest and public discussion of the positive and negative lessons; a “warts and all” assessment so that shortcomings can be avoided. This is crucial in order to achieve positive social change and create a process that will deliver for the greatest number of victims equally. As we have seen, the HET is an imperfect process. But the concept and model of addressing families’ needs for a case-by-case individual “truth” has great strengths. This is often missing from transitional justice mechanisms. The concept offers considerable potential locally and is likely to be of interest internationally. Transferability would, however, need to take account of the costs and the feasibility of micro study for large scale conflicts.