

Defence Committee

Oral evidence: [Investigation into Fatalities Involving British Military Personnel](#), HC 1064

Tuesday 7 March 2017

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Members present: Dr Julian Lewis (Chair); Douglas Chapman; James Gray; Johnny Mercer; Mrs Madeleine Moon; Gavin Robinson; Ruth Smeeth; Mr John Spellar; Bob Stewart.

Questions 1-115

Witnesses

[I](#): Professor Richard Ekins, Tutorial Fellow in Law, Oxford University, and Head of Policy Exchange's Judicial Power Project, Professor Kieran McEvoy, Professor of Law and Transitional Justice, Queen's University Belfast, Professor Peter Rowe, Professor Emeritus of Law, Lancaster University and Professor Philippe Sands QC, Professor of Law, UCL.

Written evidence from witnesses:

– [Professor Kieran McEvoy \(IFB0002\)](#)

Examination of witnesses

Witnesses: Professor Richard Ekins, Professor Kieran McEvoy, Professor Peter Rowe, and Professor Philippe Sands QC.

Q1 Chair: Welcome to this hearing on investigations into fatalities involving British military personnel. Before I ask the panel members to introduce themselves for the record, I would like to make a brief statement about what this session intends to do.

Although the inquiry is concentrating on investigations into fatalities concerning members of the British Armed Forces, our main focus in this session will be on identifying the options that are available to Ministers to prevent former service personnel from being subjected to further investigations when matters that had been disposed of because they were investigated previously have been reopened—or it is proposed to reopen them—without any new evidence being provided. Our work intends to build on the Committee’s report into IHAT and the recommendations contained within that, and in particular those aimed at countering the expansion of what is known as “lawfare” in historic investigations. The inquiry is therefore of a technical nature, focusing on what options are available to the Government. We are not seeking to revisit the Belfast Agreement or to opine upon the broader issues arising from the legacy of the Troubles.

Will the four panellists identify themselves for the record? Professor Sands, I know that you have to leave at quarter past 12 or thereabouts.

Professor Sands: Half-past 12.

Chair: If you don’t mind, slip out seamlessly then and take our thanks for granted at the beginning, rather than at the end, when I would normally deliver them. Would you like to say a couple of words about yourself?

Professor Sands: I am Philippe Sands. I am a Professor of International Law at University College London and a barrister at Matrix Chambers.

Professor Rowe: I am Peter Rowe, Professor Emeritus of Law at Lancaster University.

Professor McEvoy: I am Kieran McEvoy, Professor of Law and Transitional Justice at Queen’s University Belfast.

Professor Ekins: I am Richard Ekins, University of Oxford and head of Policy Exchange’s Judicial Power Project.

Chair: Thank you, and welcome to all of you.

Q2 Mr Spellar: The United Kingdom is a signatory to a number of international legal institutions, such as the International Criminal Court and the European Court of Human Rights. What obligations do those bodies create for the UK in investigating criminal allegations made



against serving and former members of our Armed Forces?

Professor Rowe: Perhaps I could make a start on that. You are quite right: we are parties to those international agreements. As far as the European Convention on Human Rights is concerned, there is the procedural obligation in articles 2 and 3 to investigate potential crimes. There are issues as to when the investigation should begin and the nature of the investigation, with the object of accountability of state agents for, in article 2, acts of killing, and, in article 3, acts of torture, and so on. We know that the International Criminal Court has an obligation, because we are members of and our soldiers will be subject to the ICC, subject of course to the principle of complementarity. That is, if we, the British, are seen to be conducting our own investigations into alleged crimes that occur or that are set down within the Rome statute, then the Court will not have jurisdiction; but individuals can make complaints to the International Criminal Court and that has taken place, as we are all aware. At the moment, the International Criminal Court is at its preliminary examination stage to determine whether there is a sufficiently strong evidential base for making a case to the pre-trial chamber to open a formal investigation. So, both those strands are operating. My own view is that, as far as the UK is concerned, I would be surprised if any case from the UK went to the International Criminal Court.

Professor Ekins: I cannot speak for the International Criminal Court, but the European Convention on Human Rights and the European Court of Human Rights have jurisprudence. Strictly, the text of the ECHR says nothing about an investigative obligation. It was novel when in 1995 the Court wrote that in, or took it to be implied, by the text of article 2. To my mind, that was an unsound construction of what was agreed to by the United Kingdom and other member states. As the Court said in 1995, it gives rise to an investigative obligation and at that stage it was not terribly precisely spelt out. Subsequent jurisprudence does spell it out and requires independent, effective, transparent investigation. The requirements thereof are spelt out over a fairly extensive case law. Of course, that case law has been taken to govern the United Kingdom's actions as a matter of our international obligations, all the way back to entering into the Convention in the first place. It is certainly clear that it is part of the Strasbourg Court's jurisprudence that there is an increasingly far-reaching and specified investigative obligation, although the details thereof do matter and may leave more room for options than one might think. It is worth noting, though, that it is somewhat novel—or at least, it was novel. It is a long time now. If one were to push back against that jurisprudence you are pushing back against an accumulated body of case law that the Court has certainly rallied round; the initial holding was 10:9 on the McCann case, although not on the investigative obligation.

Q3 **Mr Spellar:** That really rather seamlessly leads into my next question, which is about how other countries deal with this. I recognise that some are not signatories to either of these Conventions, but what about those who are? How do they actually deal with these issues?



Professor Sands: I will come in on article 2, and beg to disagree. There is no real novelty in the interpretation of article 2. What the European Court does—it looks precisely to what states do as a matter of domestic law in interpreting and applying their international obligations. The decision back in the '90s, in McCann, really simply takes forward what happens as a matter of national law—to take your question, Mr Spellar: that the obligation to protect the right to life necessarily implies that, if there is a question as to whether it has been adequately protected, there is obviously a corresponding duty to ascertain the circumstances.

The obligation to investigate is not an obligation to prosecute. It is not an obligation to take any particular steps. It is simply an obligation to find out the facts of what has happened, and ascertain. To take an example of why it is a significant obligation, if you were to take, for example, the shooting down of the Malaysian airliner above the airspace of Ukraine, that is the kind of circumstance where something happens and where a situation arises as to the question of who has an obligation to ascertain what happened. It is a conflict zone—the question is whether the missile came on the Ukrainian side or the Russian side. What the Convention does, very sensibly, is to say, “Look, we don’t know what the answer to that is. The right to life appears to have been violated. In those circumstances it is sensible to try to work out what has happened.” The interpretation of the Convention in effect says no more than that, and it draws on domestic practice.

Q4 **Mr Spellar:** That is quite helpful, but—and I am not saying this by way of criticism because I think that was actually helping to expand our understanding—actually I was inverting the question. What I was asking was: how do other countries, either within or outside of the Conventions, actually respond to the existence of the Conventions, or, indeed, decisions or actions of either the European Court of Human Rights or the International Criminal Court?

Professor Sands: In relation to countries that are not parties to either statute, the matter will be governed either by other rules of international law—there is one convention that is worth mentioning, and that is the Convention against Torture, which similarly implies an obligation to investigate; and torture may be an issue here, although not extensively, because torture includes the disappearance of persons, and the continuing disappearance, as you know, in the Pinochet case, implied an obligation to investigate the whereabouts of those persons.

If you are not a party to any relevant international conventions it will be purely a matter of domestic law; and the simple answer to your question is that that turns on each country. So the United States will have its own mechanisms which are legal under the constitution or under state law, or political; and, around Europe, if you are looking at countries that are party to the Convention, their own domestic law will apply different mechanisms. The countries that I know best—France and Germany—both have domestic law mechanisms that if a life has been taken in circumstances that raise a question as to the legitimacy of the taking of life, there will be a domestic law mechanism that cuts in. Both countries,



HOUSE OF COMMONS

as far as I am aware, also respect their obligations in relation to an article 2 obligation under the European Convention.

There will be other situations—I am thinking in particular of the Balkans—where plainly there are issues as to whether article 2 has been complied with in terms of the conflict that began in the 1990s. I think no one would say that Bosnia, Serbia or Croatia have come close to fulfilling those kinds of obligations; so I would say it is a mixed bag in terms of compliance.

- Q5 **Mr Spellar:** Have those countries that you have mentioned prosecuted their own soldiers, and have there been inquiries at the sort of level that we have seen here in the UK?

Professor Sands: I am just thinking, off the top of my head. I spent a lot of time involved in that conflict. I am aware of prosecutions in Serbia. I am aware of one prosecution, but there may be more, in Croatia. I don't know in relation to Bosnia.

- Q6 **Mr Spellar:** What about France and Germany?

Professor Sands: I have not been involved in conflict situations so I don't have personal knowledge of what they do. One other place where they have done it is the Netherlands, where, as you will know, there was a very unfortunate incident involving Dutch nationals who were peacekeepers for a UN force. The Dutch did indeed carry out a very far-reaching investigation, including a criminal investigation at the end. I think you would need to dip in to expertise in each of those countries. I am not able to give you that overall picture beyond what I have just said.

- Q7 **Mr Spellar:** Professor Rowe, how would you say that legal accountability has changed and evolved in recent years? You have given some examples. Are there any other aspects we ought to be aware of?

Professor Rowe: I think the principles have remained the same. I cannot see that there is anything substantially different here. In the circumstances 10 or more years ago, we might not have foreseen what would happen in Iraq and Afghanistan and the large number of cases that arose there. We can go back to Northern Ireland, for example, in the so-called Troubles. Soldiers were prosecuted and a small number convicted during that particular campaign.

It is difficult to compare the Northern Ireland situation with Iraq and Afghanistan. To some extent, the Iraq and Afghanistan issues have been affected by the decision of the European Court of Human Rights to say that "within jurisdiction" has a wider meaning than we thought it had before. Given that, it is perhaps inevitable that if soldiers are acting within jurisdiction outside the United Kingdom, issues will arise calling for some form of investigation.

To pick up Professor Sands' point, I agree entirely that this is an issue of national law. The national law of England and Wales is obviously different from that of other countries. If you look at the European Court of Human Rights, it is looking at English law. It is not saying, "Well, the French do this and the Germans do that, and maybe the British should do that." So it



HOUSE OF COMMONS

is very country-specific, as far as I am concerned, if we have not looked wide enough. It seems to me to be very country-specific: "What are you doing within your law to show that you are investigating properly?" But there are many other issues here as to when an investigation should begin and so on.

- Q8 **Mr Spellar:** That is very helpful. Finally, apart from questions about the impact on morale and recruitment, what are the national security implications of these obligations? Can the UK derogate for investigating historical allegations when such investigations might put national security at risk?

Professor Ekins: I think the answer is no. I don't think you are going to have a realistic chance of arguing the conditions in article 15.

Professor Sands: There is a slight caveat on that. I think that is right, but there are mechanisms in the case law of the European Court of Human Rights. In circumstances where national security is invoked, the Court has quite rightly said that some of the material ought not to be in the public domain and the state is entitled to protect sources and information. So it is not that once there is an investigation, everything goes public. The point is accepted that a national security issue may lead to a situation in which certain things remain confidential.

- Q9 **Chair:** Thank you. I would like to zero in now on Northern Ireland and the circumstances that apply there. We are talking about the prospect of just over 300 cases where service personnel were involved in fatal shooting incidents. We are obviously particularly concerned with the period of the Troubles up to the date of the Belfast Agreement in 1998. If we are looking at that, we are talking about cases that occurred almost 20 years ago at the latest, and in some case 40 years ago.

By way of preamble, so you understand exactly what we are trying to get at, we have with us Johnny Mercer, who led our sub-Committee's inquiry into the Iraq Historic Allegations Team and successfully recommended that it should be closed down. The issue was not one of people being prosecuted long after the event, because I think I am correct in saying that in that case nobody was prosecuted long after the event. The trauma all lay in the investigative process that in the end led to nothing.

I think I am right in saying—I am looking to you in particular to enlighten me, Professor McEvoy—that that is likely to be what will happen here if all of those 300-plus cases are reopened. We don't want that to happen, and we are looking to you to advise us not on what you think should happen, but on what could happen or could be done to prevent that happening. That is our objective here.

I would like to start with a couple of bar charts that are in my briefing material that show that the historical team have already completed quite a lot of investigations—over 1,000 in cases attributed to the republicans, over 500 in cases attributed to the loyalists, 32 in cases attributed to the Army and nine in cases unknown. Do you happen to know whether any of those completed investigations have led to a prosecution?



HOUSE OF COMMONS

Professor McEvoy: I should preface my remarks by saying that late last night I sent the Committee quite a detailed paper on a lot of the conversations; apologies that it came to you so late, but you were asking for quite a lot of stuff.

Chair: We will take it into account when we do our transcript.

Professor McEvoy: There is quite a lot of material in there on some of the specific questions you asked. In terms of the prosecutions, there have been a small number related to legacy events. The Director of Public Prosecutions in Northern Ireland, Barra McGrory QC, issued a statement relating to the prosecutions since he came into office. There have been 17 decisions made in his office since 2011, when he came in, on legacy-related prosecutions. Eight involved republicans, and seven decisions were taken in that context to prosecute. Three decisions were taken to prosecute loyalists. There were three cases involving soldiers, and there were two decisions to prosecute and one not to prosecute from that. Three related to legacy cases from police officers, with one decision to prosecute from that. Those are the most recent figures from the DPP a few weeks back.

Q10 **Gavin Robinson:** Just to confirm that, the republican figure that you mentioned actually includes Freddie Scappaticci cases—state-led cases. As a state agent, that actually impinged on the state rather than the republicans. That is what those cases are looking at, so that state figure and republican figure isn't so clear cut as the high-level figure suggests.

Professor McEvoy: It is a very good point that Mr Robinson is making. As the Committee will be aware, the normal figure that is used relating to state killings is approximately 10% of the conflict as a whole but, as Gavin says, in cases where there is an allegation of state collusion, which is the case in the Scappaticci case, it is possible that other state actors could be subject to prosecution. In other words, the prosecution net could spread more widely in the context of allegations of collusion if state actors had been involved in murders that were committed directly by the paramilitaries. That is a good point.

Q11 **Chair:** So, in relation to the Army and the number of deaths that occurred—we are told there are 300-plus cases—how many prosecutions resulted at the time as a result of an immediate investigation? Do you have any reason to believe that any of those 300-plus cases were not investigated in any meaningful sense at the time? If so, how many?

Professor McEvoy: There are two important elements to that question. First, in terms of prosecutions against British soldiers, as Professor Rowe pointed to earlier, I reviewed the data on that, including the official report on Operation Banner. There were four "successful" prosecutions—four prosecutions that resulted in British soldiers being found guilty. That data from Operation Banner seems to leave out people from the Ulster Defence Regiment. I looked at a bit of the data on the Ulster Defence Regiment. According to Chris Ryder's book on the history of the regiment, I think there were 18 convictions for murder and some more for manslaughter. Of



HOUSE OF COMMONS

elements of the British Army, not including the UDR, four people have been prosecuted out of the 300 Army cases, and the other 50 or 60 were RUC killings.

On your second question about the effectiveness of the original investigation, that is the absolute crux of the matter. Indeed, that is the issue that led, as Members will be aware, to the wheels coming off the work of the Historical Enquiries Team, in terms of whether or not investigations involving state actors were being carried out properly and whether they met the article 2 test of an effective investigation.

- Q12 **Chair:** But those investigations are being carried out now. My question was whether there is any reason to believe that proper investigations were not carried out at the time for any of these 300-plus incidents.

Professor McEvoy: Unfortunately, Dr Lewis, there is reason to believe that. In the earliest period of the conflict, between 1970 and 1973, there was an agreement between the Royal Ulster Constabulary and the Army that the police would not be involved; the police investigating Army deaths would not be involved in the interrogation of British soldiers. That was done by the Royal Military Police. That arrangement was abandoned in 1973 at the insistence of the Director of Public Prosecutions, Sir Barry Shaw—himself a former soldier—when he came into office. It was also criticised by the Lord Chief Justice in a case in 1974. For cases in that period in particular, which is the most violent period of the conflict—I think over half of the Army killings were in that period—there were strong suggestions in case law and concerns expressed at the time that those were not effective investigations.

- Q13 **Chair:** And from 1973 onwards, you would say that there is no evidence that proper investigations were not carried out.

Professor McEvoy: It is not as simple as that. It would be more on a case-by-case basis. The real concerns for a category of cases relate to those cases where that agreement was in place, between '70 and '73. It is very difficult to make the argument that they were effective investigations during that period.

- Q14 **Mrs Moon:** May I ask for clarification? There is a suggestion that the majority of the 354 deaths were between '70 and '73. Do you know how many?

Professor McEvoy: One hundred and sixty-nine—I have it somewhere; it's in that paper.

Chair: It says over 150.

Professor McEvoy: The data I have is 169 up until 1974, or something like that. So it is over half of the overall number.

- Q15 **Chair:** Right. So we are focusing on that particular period 40 years ago.

Professor McEvoy: Yes.

- Q16 **Chair:** May I clarify a point of law? It seems strange to have an article of



HOUSE OF COMMONS

a convention on human rights enshrining the right to life applied in a warzone—which this is not. If the right to life had applied during the Second World War, we would not have been able to fight any of the battles that were fought in that conflict. In a wartime situation, the law that applies is what I think is generally known as the law of armed conflict. I believe it is now called international humanitarian law but, if you don't mind, I would rather keep calling it the law of armed conflict, because that makes it clearer—there are so many humanitarian terms flying around here that it is easy to get confused about which convention we are talking about. Just for the sake of clarity, what we are saying here is that in Northern Ireland, because this was not a warzone—this was the Army acting in support of the civil power—the law of armed conflict does not apply and the civil law does apply. Is that basically the situation? Would someone like to explain it to me?

Professor McEvoy: As you will be aware, there was significant controversy—indeed, there still is—as to whether to term the Troubles in Northern Ireland a conflict or a war or a terrorist campaign, and so on. Successive British Governments were determined not to apply humanitarian law and to maintain the position that the Army were there operating under the normal domestic law, albeit amended by emergency legislation. The position of successive British Governments was not to apply humanitarian law.

Professor Rowe: I would support that. The British Government have always taken the view that in Northern Ireland the law of armed conflict did not apply. Otherwise, it would have been a non-international armed conflict. They saw this situation as one of criminality and the ordinary criminal law applying to it, admittedly enhanced by terrorist legislation. That puts it in a category apart from what you might normally call armed conflicts.

May I address the point that you made about armed conflicts generally and the right to life? People often say, "How can the law of armed conflict apply in a warzone?" Say in Iraq or—do you want to keep to Northern Ireland?

Q17 **Chair:** You are not talking about the Convention on Human Rights; you are talking about the law of armed conflict.

Professor Rowe: No, the European Convention on Human Rights.

Chair: Is that what you are referring to?

Professor Rowe: Yes, sorry.

Chair: Sorry, you did say "law of armed conflict." This is precisely the confusion I wanted to avoid, so I am sorry for stopping you, but we need to get it clear. So, what you are talking about is how the European Convention on Human Rights could apply in a warzone.

Professor Rowe: Yes—my apologies. As you will be aware, the European Convention on Human Rights, by extending the meaning of "within



HOUSE OF COMMONS

jurisdiction", has of course included certain what we might call armed conflicts within the European Convention net, but in my view this would not cover what might be called an international armed conflict, where the people the British Army would be dealing with would not be within jurisdiction. That would be governed solely by the law of armed conflict and not the European Convention.

- Q18 **Chair:** Fortunately, whatever we think about the application of the European Convention on Human Rights to far-flung conflicts, on this particular occasion we know that this has been classified as a matter of aid to the civil power and not an armed conflict, and therefore we have to deal with the fact that the ECHR does apply to the circumstances we are talking about.

Professor Ekins: That is a very good point. There is, in one way, no controversy about the ECHR applying to Northern Ireland in the way that there is controversy about it applying in Iraq, Afghanistan and elsewhere. There is no surprise, in one way, in the ECHR coming to bear in Northern Ireland.

This is a minor point, but I would not say that the law of armed conflict dispenses with the right to life; in important ways, it protects and preserves the right to life. It does so by prohibiting the killing of civilians, limiting the way in which lethal force may be targeted and so forth. It is a particular mode of specifying the right to life in a particularly challenging and complicated scenario.

- Q19 **Chair:** Yes, but the law of armed conflict accepts the fact that an awful lot of innocent people are going to get killed in a war, but you shouldn't deliberately do it.

Professor Ekins: In certain ways, with limits on how we can tolerate that.

Chair: Sure.

Professor McEvoy: I just want to come back on that point. This is in the paper that will be circulated to you. Paradoxically, within the jurisprudence of the European Convention on Human Rights, there is potentially more space for legal creativity around punishment, with regard to article 2 and the right to life, than there is to article 3 and torture. There is potentially more space for creativity in terms of punishment and sentencing in that context. The prohibitions on torture are arguably stronger in terms of the punishments than they are in article 2.

- Q20 **Chair:** Can you just explain this to me? We are accepting the fact that the ECHR does apply to the circumstances in Northern Ireland to these 306 cases—it might not have been exactly that figure but we will use that for the time being. Those 306 cases are covered by the ECHR. Under what circumstances does article 2 of the Convention require that cases be re-investigated if they have already been disposed of through legal processes? Presumably it does not require it if they have gone to court and the person has been found not guilty, but very few of these cases go



HOUSE OF COMMONS

to court, as we know. We are concerned about the trauma of a long investigative process of 20, 30 or—in the case of half of these incidents—more than 40 years after the event. What are the circumstances under which we could be in breach of article 2, if we did not reopen these cases?

Professor McEvoy: The article 2 jurisprudence spells out a range of criteria by which an article 2-compliant investigation is adjudged to be effective and lawful. It is complex case law but the criteria within that would include that the investigation be independent, prompt, transparent and effective. Effective is defined in the jurisprudence as—and this is an important point—

- Q21 **Chair:** I just want to ask about that first one. You say it must be independent. Let's try to clothe this in concrete terms. I will deliberately set this up as the killing of a guilty terrorist. An incident happens 40 years ago, where somebody shoots at a soldier, the soldier draws his gun and shoots the person dead. He then reports what has happened and the matter is looked into by the service authorities. They find that the soldier acted perfectly properly. That is not an independent investigation, is it?

Professor McEvoy: No.

- Q22 **Chair:** So, what you are telling me is that, even under those circumstances, where there is a fire fight 40 years ago and the soldier draws his weapon and shoots dead someone who shot at him, according to article 2 of the ECHR that matter should be re-investigated 40 years later. Is that not a ridiculous situation?

Professor McEvoy: Go ahead.

Professor Ekins: Well—

Chair: Professor Sands.

Professor Sands: It is important to situate this.

- Q23 **Chair:** I am asking you about that very specific example.

Professor Sands: To answer that specific example, you have got to situate it in a broader context. There is a legal answer and there is a political answer, and the two are interrelated. You can have the right political response and the wrong legal response. You can have the right legal response and the wrong political response. These things are really complex.

- Q24 **Chair:** Exactly. Please explain.

Professor Sands: I want to put this momentarily into the broader context. I have noticed a couple of times that you said that these things happened a long time ago. I have spent the past 25 years working on conflicts around the world, and if I have learned one thing, it is that things that seem to me, as an outsider, to be innocuous things that happened 50 years ago can have spillover consequences over time.



HOUSE OF COMMONS

It is a complex matter for your Committee in this situation to balance a lot of different things. On the one hand, very reasonably, there is a desire to bring things to a close, to help people move on by saying, "That's it; enough is enough." On the other hand, the danger is that, by bringing it to a close in the wrong way, you exacerbate the situation. Your Committee is involved in a balancing exercise. This is not Iraq; this is at home.

Q25 Chair: Not quite, though. As I have said before, we want to establish today what the Government can do rather than what the Government should do. I don't really want to have a morality debate here about whether 40 years is too long to pursue a veteran who may have done something wrong at that time and been investigated, but not sufficiently independently for the purposes of the ECHR.

What I want to get out of you, gentlemen, with the greatest respect, because you are experts in the law, is not what political decision you think should be taken, but what the law says. I am going to come back to my case, which is a terrorist—I am not saying whether it is a loyalist or a republican—who opens fire on a soldier 40 years ago. The soldier draws his weapon, returns fire and kills the terrorist. No action is taken because of those circumstances, but for the purposes of the ECHR that has not been independently investigated. Is there any way in which the Government can say, "We do not propose to revisit this matter"?

Professor Sands: It depends on how it says it and on exactly what it says. Let us home in on the specific reasoning. I am very grateful to Professor McEvoy for drawing our attention, on page 11 of his paper, to a judgment last Friday—3 March—of the Northern Ireland High Court. It is at the bottom of the page. This is a slightly different factual scenario from yours, but it allows us to tease out the issues and I will then come back to your example. Mr Justice Maguire held, in a case involving allegations of the involvement of the Army's military reaction force in shooting an unarmed civilian in 1972, that both the HET and the LIB lacked the required elements of independence to perform an article 2-compliant investigation of the case.

The judge concludes at paragraph 109 that there was no evidence to suggest that the deceased was other than a wholly innocent person—it is a different case from yours—who was in the wrong place at the wrong time. However, the awkward truth in this case is that the system for investigating serious crime has let her and her family down now over a period of decades.

That principle, regrettably, applies equally to your fact scenario, because your fact scenario embeds certain assumptions when only an independent investigation can ascertain what the facts are. It is chicken and egg. So the general principle that is implied in this recent judgment is the right principle—I would say it is also in relation to your case example. You need an independent mechanism. That does not mean a prosecution—there are lots of different ways of carrying that out—but the short answer from my perspective is: the Government does not have as an option simply to close down all investigations because the Government believes they meet

certain fact patterns or because they occurred beyond a certain period of time. That option, in my view, is not open to you.

Professor Ekins: I am not sure that it is so clear. I would say that the scenario you outlined precisely—not an independent investigation—would be held now to have been in breach of the ECHR. I do not think it follows, however, that the failure to reopen an investigation now into that same fact pattern is a new breach or a continuing breach. It is less clear in the case brought to my mind—although my colleagues may disagree; it is complicated case law—that there is a continuing obligation to investigate matters that were not properly investigated at the relevant time. Certainly, there are some times when new evidence comes to light—the Brecknell case and others—and there is an obligation to open a new investigation. If one chooses to open a new investigation, as has often taken place, then the article 2 requirements are held to come to bear.

In the case Professor Sands outlines, because there is an investigation under way, it has to meet an article 2-compliant standard, because otherwise it will be held to be unlawful at least as a matter of Strasbourg jurisprudence and possibly as a matter of the Human Rights Act giving partial effect to it—that is tricky again. But that is because there is an investigation ongoing. It is not quite so clear to my mind that there is an obligation to investigate in the first place.

Professor McEvoy: Just to come in on your big picture point on our role as lawyers to advise on what can be done and leaving the morality aside, you will see in my own paper that I have tried to look quite pragmatically at this space for imagination around the legitimate concerns that people have, particularly about prosecuting people for events that took place four decades ago. First of all, there are significant legal difficulties in achieving successful historical prosecutions. That may be small comfort to soldiers who are being arraigned, but it is very difficult to make a historical case stick. That is one point.

Secondly, where the space for legal imagination happens is not, as Professor Sands says, at the investigation stage. Families have a right to an article 2-compliant investigation. However, the article 2 jurisprudence, very importantly, does not require punishment necessarily; it requires a case that could potentially lead to punishment, and that is where the space for creativity is. It is not in the investigation—not in the truth-recovery functions of investigations—but in what happens on the other side. I can come back to that in more detail later if you wish.

Professor Sands: May I elaborate specifically on that, because it is also the situation in other parts of the world? Take, for example, Argentina and Chile, which have similar or analogous experiences. There, the problem is not, as Professor McEvoy said, whether you do or do not have an investigation; it's how that investigation is carried out. For example, a process of truth and reconciliation, the sharing of information that allows the teasing out of the facts, can be sufficient. It does not require a criminal prosecution to follow, provided it meets certain minimum guidelines.



Q26 Johnny Mercer: The Chairman makes a really clear point. The idea that the rules of engagement were ambiguous and so on—I just don't buy it. The rules of engagement are very clear, and if an individual whom we have trained is operating on behalf of the state, he operates within those guidelines. Clearly there will be an investigation, as there always is, by a coroner and by the Royal Military Police, and it is absolutely right that there should be, but it is very difficult to accept that then that is somehow not good enough, not up to standard. If that is the case, what is the point of the Royal Military Police; what is the point of these coroners' inquiries if we are just going to keep on revisiting this? Professor Ekins, on the application of human rights, a lot of that is being applied retrospectively, so why can we not derogate retrospectively? I'm going first to you, Professor Ekins, and then I'll come to you, if that's all right, Professor Sands.

Professor Ekins: My understanding is that you simply cannot derogate retrospectively. The reason for that might be that derogating retrospectively would look a lot like—well, it would be saying, "We are unhappy with the case law, so we are going to carve ourselves an exception from it." The power to derogate would not be understood by the Strasbourg Court, which would in the end be deciding whether this was a sound derogation.

Q27 Johnny Mercer: But we are leaving the EU. The French don't do it, and we're leaving the EU.

Professor Ekins: Not the European Convention on Human Rights, though. For the time being, that is the relevant body of law. I am not saying that the United Kingdom always has to follow decisions of the European Court, but if you are wondering whether derogation will work, I think a derogation that attempts to be retrospective will be held, probably first by our courts, not to be an exercise of the power and so not to actually work as a derogation, and then it will be held by the Strasbourg Court not to be a derogation.

Q28 Chair: May I just ask this very quickly? Could we have derogated at the time?

Professor Ekins: I think so, but not from article 2. You can derogate from article 2 in respect of—correct me if I'm wrong—lawful deaths caused in war, so one could have made a pretty good case, I think, that there was a national emergency and so on in Northern Ireland, plainly, but—

Q29 Chair: Sorry, but we have said this wasn't a war; it was aid to the civil power.

Professor Ekins: Indeed.

Q30 Chair: So could we have derogated at the time?

Professor Ekins: Not from article 2, and the article 2 investigative obligation obviously did not arise—was not conjured—until 1995.



HOUSE OF COMMONS

Professor Rowe: We could not have derogated from article 2 at the time. We did derogate from article 5, dealing with detention for short periods, but not for article 2.

Q31 **Johnny Mercer:** Why could we not derogate from that?

Professor Rowe: Because the Convention provides that you can't derogate from article 2.

Q32 **Johnny Mercer:** The Americans said, "We're just not going to sign up to the ICC. We can see this issue coming, so we're not going to sign up to it." So why didn't we do that?

Professor Rowe: Sorry, are we talking about—

Q33 **Johnny Mercer:** They are two different matters, but the Americans took the approach with the ICC.

Professor Sands: The Americans are not a party to the ICC.

Q34 **Johnny Mercer:** Yes, because they chose to come away from it, didn't they?

Professor Sands: They chose never to join it.

Q35 **Johnny Mercer:** Exactly. They saw this issue coming down the road; that's the point. What I'm saying is that with this issue coming down the road, could we not have seen it and derogated from that?

Professor Rowe: As far as the European Convention on Human Rights is concerned, the Convention does not permit you to derogate from the right to life in article 2. As far as the International Criminal Court is concerned, once you have joined it, you buy the whole package and you cannot make any reservations to that.

Q36 **Chair:** We have been talking all the time up to this point about the ECHR. Is anyone seriously suggesting that the British Government are likely to find themselves before the ICC if they do not reopen all these investigations, or can we at least put that one to bed?

Professor McEvoy: I think you can put that one to bed in the context of Northern Ireland.

Q37 **Chair:** Right. I just want to get this absolutely clear. If the Government say to this Committee, "We cannot do this because we will end up in front of the International Criminal Court," that is nonsense.

Professor Rowe: That's right.

Q38 **Chair:** Why is that?

Professor McEvoy: In the context of Northern Ireland?

Chair: In the context of Northern Ireland.

Professor McEvoy: [Interruption.] Sorry, Professor. I think we are going to be saying the same thing.

Professor Rowe: Yes, I think so. It is because the International Criminal Court began in 2000, or was it 2002?

Professor McEvoy: 2002.

Professor Rowe: Sorry, 2002. It has no jurisdiction over crimes committed before that particular time.

Chair: Right, that is very helpful. Johnny, please come back in.

Q39 **Johnny Mercer:** I know you are going to think I am terribly thick, but this is a fundamental point. We train our blokes up, we send them on operations, they operate within the parameters we set them, we investigate that, and then that issue is not finished. Anybody can come back and say that that investigation at the time was not good enough.

If we, as a sovereign country, are prepared to accept that, that is another matter, but I would suggest that a lot of us are not prepared to accept that. If that means that we derogate from European human rights law, we come out of the European Court, or whatever it is, we need to do that to make sure that our processes and our integrity towards these people are upheld. What is wrong with that statement?

Professor McEvoy: If we look at the context of the original investigations that happened in the 1970s and the investigations that happen now, the reality is that police officers—or indeed soldiers, I suspect—who are involved in investigative duties are well aware of the article 2 responsibility. When you are sitting down to design your investigative process, you think, “Here is what we are going to have to do to make this article 2 compliant. We know now what it looks like; this is the framework within which we operate.” So your investigations would be designed around the challenges you face, and here is your jurisprudence. I know, for example, that police officers are regularly trained along the lines of, “Here is what article 2 looks like, here is what it requires” and so forth. It is built into the investigative process now, certainly in the police force. I don’t know enough about the Army.

Q40 **Gavin Robinson:** Now?

Professor McEvoy: Yes, now.

Q41 **Gavin Robinson:** Not then?

Professor McEvoy: No, not then at all. Absolutely.

Professor Sands: May I respond? For me, there is a very simple answer to it. No country in Europe is more peripatetic than the United Kingdom.

Johnny Mercer: I am sorry, I don’t know what that word means.

Professor Sands: We travel around the world. We take up residence in all sorts of places. We take flights, some of which get shot down by foreign countries. We go on holidays in Tunisia, find ourselves on a beach, open to attack by people doing things. These instruments protect our people also. In this room, we are looking at it from one angle. I would invite you to

pause, look at it from another angle, and ask yourself what your reaction would be were it not a British serviceman or woman being focused on, but a British holidaymaker or 30 British holidaymakers.

- Q42 **Chair:** We are getting back to the question of “What should we do?” I want to concentrate on “What can we do?” Your collective answer to Johnny’s question appears to be that the only way you can escape from article 2 of the ECHR is actually to leave the ECHR. Do you all agree with that?

Professor Ekins: I do not think derogation works—

Johnny Mercer: OK—*[Interruption.]*

Chair: Sorry Johnny, can we hear the answers?

Professor Ekins: I do not think derogation works, but the obligations under the European Convention are obligations in national law. One could take the view that the European Court has misconstrued article 2 and that Britain is simply not going to conform to rulings that are adverse on that basis.

- Q43 **Chair:** So we could just defy them and not necessarily be thrown out?

Professor Ekins: It is a possibility. There are risks to it, plainly, but it is a possibility.

Professor Rowe: Taking forward the issue of European Court, it seems to me that if a previous investigation must now, as a matter of law, to be opened—I am not sure whether that is the case, or whether it should only be opened if there is fresh evidence to suggest that something is wrong with that particular investigation—then one possibility is to say, “Here is the event,” to use Mr Mercer and Dr Lewis’s example, “Here is the shooting that has happened; here is the investigation.” This is obviously difficult for the soldier, or the former policeman, even if it does not result in a prosecution which is over here. This is perhaps the issue that we should be looking at. If you were to say that if fresh evidence comes up, then you were to have what the International Criminal Court calls a preliminary examination before it gets to the investigation stage, then at the preliminary examination stage you could weed out any cases in which there is not sufficient evidence to, for example, proceed to a full investigation.

- Q44 **Chair:** But how far does that preliminary investigation have to go? How intrusive does it have to be? Does it require opening all 306 cases and then saying, for example, “We’re going to interview all the people all over again”? That in itself is traumatic and questionable after such a long period of time has elapsed.

Professor Rowe: It is, and the European Court of Human Rights is aware of the difficulty of some of these historical cases. This applies not only to the difficulty of managing a prosecution—because the evidence has gone stale—but also the difficulty of mounting a defence because, again, the evidence has gone stale. This is an issue that could to some extent be



HOUSE OF COMMONS

separated from current investigation if an event happened now, such as the case that was brought to the European Court of Human Rights on the shooting by the Metropolitan Police of the person on the underground a few years ago, because of the difficulties that any historical investigation or preliminary examination could cover. You might, for example, say that previous investigations may not have been independent, but if fresh evidence comes to light, then you might need to look at this evidence and assess its credibility before you move on to an investigation.

- Q45 **Chair:** I am very tempted to try to work out a regime for how we deal with present and future cases, but we have our work cut out with how we deal with the ones that happened 20 to 40 years ago. You made that point about the idea of having just a preliminary look at it. Would the historical teams not say that this is precisely what they are doing?

Professor Rowe: But then you could perhaps have some judicial involvement in this, in the sense that the IHAT process has been assisted by the designated judge, Mr Justice Leggatt. You could build a judicial element into this.

- Q46 **Chair:** Okay. Where we were at before was that if we wanted to stop article 2 applying to these cases, even those from 40 years ago, we would either have to leave the ECHR or we could actually defy article 2 and argue a good reason for doing so. Professor Ekins, you were saying this.

Professor Ekins: It would not persuade the Strasbourg Court, so one would end up in a position where the European Court thought one was in breach, as is the case with prisoner voting.

Chair: But they think we are in breach over not giving votes to prisoners, for example.

Professor Ekins: Indeed. I think one has to be careful before one concludes that there is a continuing obligation to investigate all cases simply on the grounds that they were not investigated according to article 2 standards at the time of the investigation. New evidence is a different matter from simply having another look at the material because it was not looked at in accordance with an article 2-standard independent person answerable at the time.

- Q47 **Chair:** Does simply having a fresh look at the material require bringing people in for intense interrogation, or does it simply mean looking at the old casefiles?

Professor Ekins: It might depend on what has been alleged and so forth as to how thorough or comprehensive or trying the investigation is to be. There is complex case law on this from Strasbourg, but it looks like there is at least some capacity for variation depending on what is involved.

- Q48 **Mrs Moon:** I am still not clear as to how they are actually proceeding, as opposed to how they could proceed. In terms of IHAT, the evidence we received was that, in a number of cases, they looked at the evidence, decided there was nothing there and that was the end of it—it didn't go



HOUSE OF COMMONS

any further forward. Often, they didn't seem to interview the personnel who were named as being involved in the case because the evidence was just not there.

Are we saying that, as is proceeding at the moment, when they look at the case, they always reach out to the ex-serving personnel and interview them, or are they looking at some cases and saying it was thoroughly investigated, there was no case to be met, and that case is therefore over and done with? If that is the decision, are the personnel informed that they are no longer part of an investigation? That is part of the issue—everyone feels that this is hanging over them. How is that process being managed? Am I being clear enough in my question? Does anyone know?

Professor Rowe: Personally, I don't. I have read Sir David Calvert-Smith's report on IHAT, but so far as Northern Ireland is concerned, I don't know.

Q49 **Mrs Moon:** Are serving personnel told that the case in which they were involved is under investigation? Are they told that?

Johnny Mercer: No.

Mrs Moon: No?

Johnny Mercer: Not in my experience, but—

Mrs Moon: Let's hear it from the experts, Johnny. Do we know whether people are informed?

Professor McEvoy: I am slightly confused. Are we talking about historical cases relating to Northern Ireland or are we talking about contemporary cases involving, for example, the British Army in Iraq?

Q50 **Mrs Moon:** No, we are talking about historical cases in Northern Ireland, in which the case file has been brought out of the cupboard and is going to be re-examined. I understand that. Are individual personnel then contacted and told, "We're looking at a shooting in which you were involved in 1971 and are examining that case. We need to inform you that we're doing that, and should we need to interview you, we will tell you. If we decide not to interview you and find that there is no need to take this case for further examination, we will notify you"? Is that happening?

Professor McEvoy: As you know, investigations were originally being carried out by the Historical Enquiries Team. That has now passed to the Legacy Investigation Branch of the PSNI. If the Stormont House Agreement is established, we will have a new mechanism called the Historical Investigations Unit, so there will be three. It is an evolving process.

I don't know what the protocols were for the HET or whether they wrote to any affected soldier. I assume, as a matter of common sense, that they should; I don't know.



HOUSE OF COMMONS

Mrs Moon: Indeed.

Professor McEvoy: Common sense would dictate that they should, of course; if a soldier or anyone was being investigated in a case—particularly the state actors—you would think they would be writing to them as a matter of course. I don't know the answer. Common sense would dictate that they should.

- Q51 **Mrs Moon:** So we don't even know what the process is going to be, in terms of notifying people whether they are being investigated, whether they will be called as witnesses and whether they will be notified whether or not further action is to be taken?

Professor McEvoy: Going forward, in terms of the Historical Investigations Unit?

Mrs Moon: Yes.

Professor McEvoy: No, because I imagine what will happen. As you know, this is part of negotiations that are happening right now in Belfast on legacy-related issues.

- Q52 **Chair:** Can we distinguish between two situations? We have talked about the business of new evidence and that that might justify it. When we are talking about new evidence arising in an old case, are we simply talking about something happening and, unlikely as it is, there is DNA stuff in the old file that couldn't be analysed then but can now—in other words, some new evidence has been presented—or are we talking about carrying out a re-investigation of the whole thing in the hope of turning up some new evidence? Those are two very different things, aren't they? Which are we talking about?

Professor Sands: I think we are talking about the former, in the form of either new scientific or technical evidence or a new witness or fact emerging. We are not talking about carrying out an investigation in order to find new evidence.

- Q53 **Chair:** But Professor Sands, that would appear to suggest that these 306 cases ought to be left alone unless or until somebody comes forward with new evidence, or should at least be confined to just looking at the existing archive to see if any evidence spits out at you.

Professor Sands: Or there is a middle ground. Unless someone is saying, and I don't know whether someone is saying, that the existing assessment—the prior assessment of the existing evidence—was in some way inadequate.

- Q54 **Chair:** But if that is all we are talking about, that should not involve having to go out and interview witnesses or anything of that nature at all, unless or until something new is found in the archive or someone comes forward.

Professor McEvoy: Going back to our earlier conversation, it is important to make a distinction between those 1970 to '73 cases and cases going



HOUSE OF COMMONS

forward. It is very difficult to mount an intellectually or legally credible case that those cases were properly investigated. If you look at the jurisprudence on this, you see it is a very difficult case. In some cases it is quite clear that those interviews by the Royal Military Police were managerial in tone—they were about operational improvement and were not criminal investigations potentially leading to prosecution. They were actually managerial, so for that category of cases it is very difficult to say.

- Q55 **Chair:** That is a different point. That is going back to whether things were investigated properly at the time and is not relevant to the point about new evidence, isn't it?

Professor McEvoy: The test for new evidence is developed in a range of jurisprudence. On page 15 of the report I prepared for you there is a quote from the Brecknell case that may be useful for Members. It says: "where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures." So, plausible, credible, allegation, piece of evidence or item of information—that is the kind of area you are looking at for it to reopen.

Professor Sands: Just to be clear, it is not sufficient to park yourself in, "Is there new evidence?" It is also the question of whether there is an allegation that prior evidence was adequately assessed or not.

- Q56 **Gavin Robinson:** May I pick up on that? We considered retrospective derogation, and the consensus is that that is not possible, but what about viewing the past through the prism of today? This obligation for a satisfactory investigation of state actors did not arise until 1995. So whether it was 1969, '70, '71, '72, '73 or even beyond—if we take Professor McEvoy's period, when he says there were significant issues—they were operating entirely lawfully and in line with the jurisprudence of the day. I am interested to hear your four reflections, because on some things there is unanimity, but on others there is severe disagreement. How do you feel about operating through today's prism looking at the standards, the jurisprudence and the practice of the 1970s? For me, it does not sit comfortably.

Professor Sands: You make a very good point. It is a question that is put beautifully simply, but is actually really complicated. There are certain situations in which there is a continuing obligation. For example, although it does not appear in many cases for Northern Ireland for that period, when someone disappears—when someone is disappeared—as happened in 1973 in Chile, and then the legal obligation cuts in in 1988, 15 years later, the logic of your position, which is powerful, is that what happens in 1988, or the change, cannot affect something that occurred in 1973. The exception to that is if there is a continuing violation. The act of disappearance is a continuing wrong that carries forward. The answer to your question—I don't know what it is—would be whether that obligation to investigate is a continuing obligation in the event that new evidence comes up.



HOUSE OF COMMONS

Q57 **Gavin Robinson:** You open an investigation, you consider the investigation and you close the investigation—

Professor Sands: In accordance with the standards that applied in, say, '73.

Q58 **Gavin Robinson:** It's closed, so it's not a continuing event. It's closed, to the standard of the day in line with the obligations at that time.

Professor Sands: It depends. The obligation is not in relation to the nature of the investigation; it is in relation to the underlying wrong that might have occurred. If it is a murder or a torture or some other act, that goes forward in that particular way. I know it sounds absurd—

Q59 **Gavin Robinson:** We can't say "murder," because that only follows a conclusive investigation—you have got a death and whether it is right or wrong, it is investigated to the standards at that time and then the investigation closes. So, there is no continuance, in response to your Chilean example.

Professor Sands: The continuance is of the wrong that originally occurred. I cannot answer your question because I—

Q60 **Gavin Robinson:** There was no wrong if it was investigated and closed.

Professor Sands: We don't know if there was a wrong, because that is precisely what the investigation is trying to ascertain.

Q61 **Gavin Robinson:** But if there was an investigation, it was closed.

Professor Sands: There are certain things that are very difficult to close down. Go to Spain, go to Chile, go to Argentina—they face exactly the same problem.

Chair: Yes, but they were under military dictatorships. We are a democracy.

Q62 **Gavin Robinson:** There is no need to hypothesise. Here we are having investigations which were opened, considered and closed. So there is no hypothesis required as to whether they ever closed down. They do close with a satisfactory outcome.

Professor Sands: I beg to disagree.

Professor McEvoy: The point about retrospective judgment is an important one, Gavin. However, it is important to recognise that actually at the time there were serious misgivings within the most senior echelons of the Northern Ireland criminal justice system.

As I said earlier, for example, in 1973, when Sir Basil Shaw took over as Director of Public Prosecutions, my understanding is that it was at his insistence that this arrangement between the Army and the RUC was got rid of. In a case the following year, Lord Justice Lowry said: "This practice has been discontinued, but we deprecate this curtailment of the functions of the police and hope that the practice will not be revived". That was in 1974.



HOUSE OF COMMONS

- Q63 **Gavin Robinson:** Which, of course, was not a challenge to the operation of article 2. Do you accept that was not a challenge to the operation of article 2? It was the desire to have fully functioning police in charge of that role in justice. So it was not a critique and there will be no quote in the judgment there of a critique of failure to comply with article 2.

Professor McEvoy: But I think both of those instances speak to very serious misgivings at a senior level.

- Q64 **Gavin Robinson:** That is a political comment. The legal argument was not a failure to comply with the obligations that had been seen throughout this time. Would you accept that? It was about the full operation of the police in the justice process. That is a separate argument.

Professor McEvoy: By way of illustration, if you look at the data for those killings—this goes back to the point that Dr Lewis was raising earlier—in, I think, 63% of those cases the person was unarmed.

- Q65 **Gavin Robinson:** If you are just on data, Chair, I think I will pick up Professor McEvoy on this. Earlier you talked about four successful prosecutions, as if that was in some way injurious to the view that there were not successful investigations. Do you want to clarify that?

Professor McEvoy: The point on the investigations, whether there were only—

- Q66 **Gavin Robinson:** You talked about four “successful” prosecutions, which in no way was injurious to the view that there was a successful investigation. A successful investigation, you would accept, does not have to end in a prosecution.

Professor McEvoy: Absolutely. I think I have made that clear several times. There is a distinction between investigation and punishment.

Chair: Professor Ekins, then Professor Rowe and then Colonel Bob.

Professor Ekins: There was a kind of retrospectivity here—the later standard is being brought to bear. It is an unusual kind of retrospectivity, because in one way the same substantive legal standard upholds the criminal law of murder. People are rightly subject to that the whole way through. The question is whether we treat them unfairly in a certain way by imposing a later investigative standard again later on.

If it had been 1974 and you had applied civilian investigations to all the killings that took place over the prior three years, I certainly would not say there was any unfairness in so doing or any kind of problem. Forty-something years later you might have more of a problem, precisely because the investigative materials have broken down. It is hard to do this fairly and people could maybe rightly have a sense that, “It has been 40 years and the matter is behind me”.

In one way you are never entitled to insist—at least as has been enacted along these lines—“I was investigated and so you can’t investigate me



HOUSE OF COMMONS

again." You are always subject to the relevant substantive legal standard. Investigations are at the standard they are when you investigate.

- Q67 **Gavin Robinson:** Which is a separate point, with respect to the obligations under article 2, is it not?

Professor Ekins: Article 2, in relative terms, is changing the investigative standards we have to impose. It is saying, "You were in breach back then for not having conformed to a standard we came up with later."

- Q68 **Gavin Robinson:** Yes, but a failure to do so now, 11 years on, does not show a continual breach of article 2.

Professor Ekins: I don't think there is necessarily a continuing obligation to investigate to an article 2 standards.

Chair: Professor Rowe?

Professor Rowe: I am not clear if the case came before the European Court of Human Rights it would say that the obligations in relation to investigation would apply way back in 1970. It might do. I can't be sure. None of us can be sure what view it would take.

One must not jump to conclusions. Admittedly the investigations were not, or may not have been, independent at that time, but the decision—if there was some form of investigation, I am not sure whether I agree that it was entirely managerial. For example, let's say that the Royal Military Police at the time investigated whether the soldier had complied with his rules of engagement and they took the view that he had, having taken into account what is required, which is—as the courts have said over a number of cases—whether the soldier had an honest and genuinely held belief that when he used force, it was reasonable in the circumstances. If it turned out to be a mistake, the courts take that into account, and the courts illustrate that point well.

That is not a point of law that applies just to Northern Ireland. A good example would be the Gibraltar case in 1985. The soldiers there were found by the coroner's court to have complied with their rules of engagement and article 2.

- Q69 **Bob Stewart:** Gentlemen, I am sorry I was late; I was somewhere else, but I did not want to miss this session.

I operated in Northern Ireland from 1970 onwards; I went right through on some seven tours. Perhaps you have covered this before, but was there a change in how fatality shootings were investigated after 1977, I think, when police primacy came in and the Army was told to step back? I was not involved in a fatality shooting before 1977, but in '78 I was—not directly but indirectly. I gave my word to the two soldiers concerned, as their superior officer, that if they appeared in court charged with manslaughter and they were found not guilty—and they objected strongly, I can tell you. I was called all kinds of things for abandoning them. I didn't abandon them but they thought I had by making them go to court over something they had saved their lives doing. I said to them



HOUSE OF COMMONS

that if they went to court on manslaughter, which was the charge, they would never, ever hear anything else about it. I said, "That's it. You will not hear about it again". May I ask all of you whether I was wrong? The police told me at the time, "That is what you tell your soldiers." I am really concerned now that I have broken my word to the men that were under my command, because I told them they would never, ever hear about it again, having appeared in court. Was I wrong?

Professor Sands: No, you were right, because going to court is one thing and putting yourself before an inquiry and investigation is another. You were right.

Q70 **Bob Stewart:** What if new evidence comes up?

Professor Sands: Well, as things stood—

Bob Stewart: I am not quite sure about double jeopardy; you know about it very well. What about double jeopardy and new evidence appearing? Does that mean they could be called back into court?

Professor Sands: As you know, the House passed legislation following the Stephen Lawrence events that changed previous law. You were right prior to that change. I do not know to what extent the change that occurred then would govern facts that occurred back then, but you were right at the time you spoke.

Q71 **Bob Stewart:** Am I right now? Can I still put my hand on my heart and say that what I told those men was right and they will not be charged? Professor McEvoy, you are nodding—everyone is nodding, so I am relieved.

Professor McEvoy: You were right. On your previous question about the change on police primacy, it was not in '77. Actually, the change on police investigations started in '73—that is when the process came in where the police had primacy in investigations, including interviewing soldiers. That was in '73.

Bob Stewart: Thank you, Chairman.

Q72 **Johnny Mercer:** Briefly, I will come on to the Good Friday Agreement, but listening to everything that has been said, I find it extraordinary. I think you are right, Professor Sands. We had a point from Mr Robinson about very simple principles that we adhere to; but he said they are much more complicated. You can always complicate anything if you try hard enough.

I was sent an email recently from a chambers in London—someone who used to be in the forces, who works in a chambers in London. I won't mention them, because they will sue me for all the clothes I have got. They are making an effort to train people up to go to Northern Ireland because "There is money to be made in Northern Ireland" over this process. To your average individual—bearing in mind the vast majority of the population are not lawyers—it seems like an absolute farce that you can investigate somebody and just keep going and keep going and keep



HOUSE OF COMMONS

going: a persistent roll of investigation, until something happens. Either put people on trial, like Colonel Bob has just said, and then that is it, they are done; and if new evidence comes out, fine, that is justice—but this isn't about justice. This is about money and an effort to—

Chair: Settle old scores.

Johnny Mercer: Yes—to keep going. You can shake your head at it, and I understand that, but we can't send people from this country to uphold the rule of law, and they uphold the rule of law as they have done in this case and then, ad infinitum, we will just go over and over this case until they come up with something. I do not believe that British people want that.

You talked about the European Court of Human Rights. We are a sovereign nation. The laws are made in this place. The laws are made here. So if that does not work—if that is being abused as it was so blatantly abused in Iraq, this Government needs to legislate strongly, to stop this process. I don't understand why you would go against that.

Professor McEvoy: There is a lot in that question, but I will focus on one element. There is a structure, a framework, in process, which is designed to deal with all of this. You are right in the sense that what has happened in the absence of an overarching mechanism to deal with the past in Northern Ireland is that we have had a piecemeal approach of different bits of the criminal justice system, including people taking judicial reviews, people taking civil actions, and so forth. So what happened over the last number of years, as you will be aware, is that Gavin's colleagues and other politicians, along with the two Governments, have agreed the Stormont House Agreement. That is the big picture framework for dealing with all of this once and for all.

Now, the issue has got caught on one particular issue around national security. I personally am hopeful that that issue can be resolved; but that is the big picture mechanism for dealing with all of it. The mechanisms that are agreed in the Stormont House Agreement—all of that very complex architecture: that is the way forward, which then takes all of this out of the criminal justice system. The criminal justice system has been the stopgap, because we haven't had an overarching mechanism to deal with the past, so it has, you are absolutely right, been piecemeal.

On the question of whether lawyers in Northern Ireland are making lots of money, obviously I teach lawyers—only 30% of our graduates are actually going on to be lawyers, now, from the law school at Queen's, because—

Q73 **Johnny Mercer:** The only people this process is actually serving are the lawyers; because it is not working for families. It is not getting justice. It is not getting justice for those who perceive that they have been wronged, and at the bottom the people who are bearing the price for this are the blokes who are sent out there to serve.

Professor Sands: All I was shaking my head at was the idea that anyone is getting involved in this just to make money.

Q74 Johnny Mercer: I have seen that evidence.

Professor Sands: There may be some people—

Johnny Mercer: “Go and get trained up in Northern Ireland, because there is money to be made.”

Professor Sands: Frankly, I don’t think most people are doing that. Can I refer you to paragraph 21 of the Stormont House Agreement, because that takes us back to first principles? This is what the participants agreed. They agreed that “As part of the transition to long-term peace and stability...an approach to dealing with the past is necessary” and they identified a number of principles. The task for this Committee—and it is a really important task—is to balance the interests of soldiers who are exposed, because of these things that hang over them; it is a very legitimate thing to protect. But it is also legitimate to protect the interests of victims; and it is a difficult balancing exercise.

Q75 Chair: I am sorry, I must interject. That is not the task of this Committee. We are not responsible for overall policy in Northern Ireland. Our task is to find what the options are for protecting British soldiers from prosecution 40 years after the event. It may well be that other people above our pay grade decide that none of those options should be taken, for the sort of reasons that you are talking about; but it isn’t our role to do that, even though it may add to our understanding as to why we are in this situation.

Professor Sands: Indeed, but it is your role to work within the Good Friday Agreement. That role commits you to doing a number of things.

Chair: No, with respect, it isn’t. We set the terms of reference to our own inquiries. The terms of reference that we have for this inquiry are to explore what mechanisms are available to the Government to stop what seems to us to be the persecution of serving personnel an unconscionable amount of time after the event. It is the role of the Government to take in these wider factors. We are putting in our piece of the jigsaw.

Professor Sands: So would that piece in the jigsaw include proposing amendments to the Good Friday Agreement and the Stormont House Agreement?

Q76 Chair: Let’s go on to that now. At a later stage we will be discussing one particular point and I am anxious to do so before you leave us, Professor—that is, the question of a statute of limitations. If you can give me an indication at least five minutes before you have to go, we will bring that forward.

Professor Sands: I have to go in five minutes.

Q77 Johnny Mercer: On the Northern Ireland agreement, the average person in the street has a perception that we have given those who have committed crimes on one side of the argument a different deal from those who served the state. What is the reality behind that? If we have to amend the Good Friday Agreement—we are looking at all the options. As



HOUSE OF COMMONS

the Chairman said, we are not the Government. If you amend the Good Friday Agreement or whatever, is there any mechanism available to the Government to apply the same set of rules and regulations that has overseen the release of prisoners and so on, to certain personnel? That is not equating them; no one is talking about the moral argument; we are just asking whether that is possible.

Chair: Just to clarify, Johnny, if a terrorist has killed 16 people and gets prosecuted, for example, they are let out after two years. Is that right?

Johnny Mercer: That's exactly right.

Chair: Whereas if a soldier has killed one person wrongly and they are prosecuted, they serve a life sentence. Is that what you are referring to?

Johnny Mercer: Yes. Do you see the imbalance that that appears to be, to the average man on the street in the United Kingdom?

Professor Sands: Plainly, balance is what is needed. If there are those imbalances, that is a problem.

Chair: There are.

Professor Sands: There are—that is a problem.

Q78 **Johnny Mercer:** What can we do about it?

Professor Sands: That's what we are here talking about. I was under the misapprehension—

Johnny Mercer: What, in the legal world, can we do about that? We have identified the problem. What is within the realms of possibility?

Professor McEvoy: I can say something very concrete about this, if you want. I have looked quite closely at this issue in particular. There is the potential—for me, as I have already suggested, the way forward is to implement the Stormont House Agreement, and go through that process of historical investigation. If there is sufficient evidence for a prosecution the prosecutor makes a determination—a judge makes a determination. The rule of law is upheld. However—and this is what you are pointing towards—where the flexibility lies is in the architecture of the Good Friday Agreement around the mechanisms that were there for releasing prisoners. That mechanism was a Sentence Review Commission—an independent commission that made a determination.

It would be possible to amend the terms of reference for the Sentence Review Commissioners to take into account a range of other variables. The kind of variables that one could include might be age or the length of time since the offence occurred. For me, it would also be important that the truth recovery elements of the broader architecture were not impeded by this. It might also be possible—although this is not in the Stormont House Agreement—to nudge either former state actors or, indeed, former paramilitaries towards one of the other mechanisms. Another mechanism in the Stormont House Agreement is the ICIR, which is the Independent



HOUSE OF COMMONS

Commission on Information Retrieval. It is modelled on the “Disappeared” commission in Northern Ireland. Essentially it means that victims can approach the commission looking for information about their case. If the perpetrator agrees to take part in that process, none of the information can be used against that person for a prosecutorial purpose. So it is discrete from the Historical Investigations Unit.

For me, it would be possible to have a process whereby the rule of law has run its course and out the other side, if, for example, state or non-state actors had co-operated with that, where a person says “I have gone to the ICIR—none of the information in that mechanism can be disclosed publicly”. There could be some form of certification process, for example, where someone who works for that body says, “We can confirm that this individual has and we have triangulated the data that they have given us, and in the round we can make a determination that they’ve given full disclosure.” It seems perfectly reasonable to me for that then to be fed back into a decision by the Sentence Review Commissioners as to the length of time within a two-year framework that will be served or, indeed, whether any time will be served. For me, that keeps the rule of law aspect of all of this sacrosanct, but the space for imagination is in the administrative process out the other end.

Q79 Johnny Mercer: Yes, so you say if you have the right people in the right places with the right imagination and the will to do it, this can be resolved.

Professor McEvoy: I think this issue can be resolved, yes.

Q80 Mrs Moon: I want to look at what principles the Government should be looking at to underpin the investigation of the Historical Investigations Unit to prevent us from having a repeat of what happened with IHAT. What happened there was almost a get-rich-quick scheme and harassment took place. We are desperate to prevent that from happening again. What are the principles that should underpin the unit that would make sure, as far as possible, that we get some of the justice that you have talked about for those who were shot and give their families the opportunity to explore what happened and whether an illegal action took place, but at the same time protect individual soldiers from judicial harassment where there is no need for it—where there has actually been full process and there is no action to answer for? What can we do?

Professor Sands: I’m afraid I am about to have to go. I think that what you ought to look very closely at is a move away from criminal law as the means of doing this. The way that these things have worked in other jurisdictions is variations on mechanisms of truth and reconciliation, in which people come forward with information and, as part of providing that information, effectively take themselves out from a criminal process. That has worked in several jurisdictions, it is much more cost-effective, it tends to create harmony rather than discord, it is quicker and it is cheaper, if—this is the crucial point—you can get political will by the participants.

Q81 Chair: But if they won’t agree between themselves in relation to the



HOUSE OF COMMONS

crimes of republicans and loyalists, is it an option for us to do that just for the solders? As you know, they are our concern in this inquiry.

Professor Sands: Coming back to the realities, as a legislating Chamber you can do whatever you want. You are sovereign. Would it be a wise thing to do? Absolutely not. You will exacerbate the disharmony.

Gavin Robinson: Sorry, say that again.

Professor Sands: I think you will exacerbate the situation. If you adopt a statute of limitations on only one side and not across the board, you will just store up further difficulties. The need for balance is essentially the problem that you have.

- Q82 **Gavin Robinson:** I hope you don't mind me pursuing that, Chair. We have a situation where in 1998 there was an agreement. We did not support it, but the agreement is there. It has a disproportionate balance in favour of paramilitaries and those who brought mayhem to our streets. It was swallowed by people who believed in peace but was not supported by my party or by a large section of the community. You then had the British Government—a Labour Government—doing everything in their power to provide an off-book scheme that would give protection to on-the-runs, who have never been investigated, have never been pursued and for whom there are still extradition orders sitting out there in countries around the world, including the Irish Republic, which is meant to be our nearest neighbour and a co-guarantor of what is a balanced agreement. This proposal is not going to cause disharmony or imbalance; this proposal is to bring a level of balance.

Professor Sands: May I just focus on one point? We have all read about the off-the-books stuff. I have read what I have read—what is in the public domain. The crucial—

Gavin Robinson: It wasn't even off the books, of course; there was legislation tabled in this House of Commons.

Professor Sands: There are also other allegations about agreements that were cut behind the scenes. We are all aware of that. That is inherently problematic. The need for transparency in how it works is absolutely core. If you have secret agreements with one side, that is a recipe for disaster.

- Q83 **Chair:** Thank you for your very stimulating contribution today, Professor Sands. Before you leave, could you give us a quick opinion? We will come to this in more detail after you have gone, I am afraid, but is there any legal reason why the Government could not decide to bring in a statute of limitations, either just for all military involved in Troubles-related episodes up to the date of the Belfast Agreement, or for republicans, loyalists and military?

Professor Sands: I wish I could give you an absolutely clear answer. I think the answer I would give you is that there may or may not be.

Chair: No wonder you're a QC.



HOUSE OF COMMONS

Professor Sands: The devil is in the detail. It depends how you do it. I think one issue that would immediately arise would be that, if it is only on one side—I am not saying which it is—you would get into a difficulty under domestic UK law on discrimination. To essentially say that one category of persons is off the hook simply because they belong to that category—

- Q84 **Chair:** Well, we are doing that already with the differential sentences for murder, are we not? The soldiers serve a life sentence and the criminals get out after two years, so we are doing a bit of differentiation there.

Professor Sands: I am not sufficiently expert on that area, so I am going to defer, but there is a problem once one discriminates. If you are inclined to go for a mechanism, you need to find a mechanism that is applied in the round more or less evenly.

- Q85 **Chair:** This is my last question to you on this—as I say, gentlemen, we will be coming back to this shortly. If we tried to bring in a statute of limitations for everybody, but it could not be agreed in Northern Ireland—I think I am right in saying that they have jurisdiction on whether it would apply to the loyalists and the republicans—we could bring it in for everybody, but it would not be applied to those two groups because of the powers that the Northern Irish have in relation to them. We might then end up, de facto, in the position that we were protecting the soldiers but not the other two groups. Would that be the fault of the Northern Irish politicians and not the fault of Westminster?

Professor Sands: Well, you can pass the buck, but if you are really serious about going down that route, you might have someone talk to you about the experience in places like Chile or South Africa. Whether you call it an amnesty or a statute of limitations—whatever you want to call it—it tends to work where it is coupled with a process which allows information to come forward. The mere act of curtailing legal process and not creating some other means to allow the information to come out—

- Q86 **Chair:** So we could put forward a statute of limitations for everybody, which may or may not get through the Northern Irish Assembly in relation to those elements—to republicans and loyalists—and we could set up a forum at the same time, saying, “As a result of the fact that you now know that you will not be prosecuted, please come forward and help clear up some of these unanswered questions.” We could do that.

Professor Sands: Or variations on the theme.

Chair: On that note of agreement, thank you very much, Professor Sands.

- Q87 **Mrs Moon:** Before you go, Professor Sands, I have a number of questions that I am going to pose now, and I know colleagues have questions. Would it be possible for us to send you the text of the proceedings and for you to come back if you have any comments?

Professor Sands: Whatever reasonable disagreements there may be, I think everyone wants to find a way to make things move forward in a decent and proper way. That is clear.



HOUSE OF COMMONS

Q88 Johnny Mercer: And if the Government left the Committee to it, we could sort this out.

Professor Sands: Absolutely. You can absolutely count on my support, and I can recommend other people who have worked much more closely in South Africa and Chile, who faced exactly the same problem in relation to forces, armies and police officers who have faced difficulties. How do you deal with this real issue?

Chair: Thank you. I hope you feel your time has been well spent.

Professor Sands: It has indeed. Thank you all very much for your questions.

Q89 Mrs Moon: Can we move on to the Historical Investigations Unit? The Government has said that cases are going to be looked at in chronological order. What is the significance of that, and is it the best way to proceed?

Professor McEvoy: Gavin may have views on this. The discussions around the original design of the Historical Enquiries Team were the same: the assumption was that it would be chronological, but if there were elderly relatives who were perhaps coming towards the end of their life, they could jump the queue—I think there was a space for that. That was the way it was organised.

Gavin Robinson: The significance of the chronology was that it was the alternative to what had previously been the case, which was that it was thematic. So you are looking at state issues first and then going down the tracks. Rather than looking at one section and then another and another, chronology will let you go along the timeline. It is a fairer way.

Q90 Mrs Moon: Thank you. We have touched on the lessons to be learnt from examples of what has happened in other countries. Rather than going into that now, I wonder, as with Professor Sands, is that an area you could give us further comment on? Indeed, as has been suggested, again by Professor Sands, others could comment on the lessons to be learnt from other countries' investigation in this way. Will you come back to us on that?

Professor McEvoy: Absolutely, 100%. You will see in the document that is before you from me that we have been working a lot on international issues around amnesties, then looking at the relevance to the Northern Ireland context. There is a website with several reports on specifics, drawing specific international examples that are relevant to the Northern Ireland context. It is called Amnesties, Prosecution and the Public Interest, and it is based at Queen's School of Law. If people are interested in any particular issues or anything technical, that is exactly what we are set up to do, and we are happy to do it.

Q91 Mrs Moon: Thank you very much. The Government have said that they will provide the fullest support to ex-servicemen facing criminal allegations in relation to Northern Ireland. What does that mean? What is the full extent of support that the Government can provide, consistent with international obligations? What sort of "fullest support" can people



HOUSE OF COMMONS

expect to receive that will not in fact be damaging to the investigation?

Professor Rowe: I cannot personally think of anything under international law. What comes to mind is the Armed Forces covenant and the obligations there—admittedly not legally binding. One would expect, I suppose, at least two features of support. The first would be legal assistance, clearly, at the very earliest stage, so that a lawyer has a particular soldier under his or her ambit for the whole of the process, so that the soldier is not passed from one to another. The other, because of the historic nature of these allegations, would be some form of social help—some post-traumatic stress-type of support. For anyone facing this, if things are done properly and soldiers are not just rung up out of the blue, it will be very traumatic for them in particular, because they will know—apart from age and the problems they will have had—that they were sent there to do their duty on behalf of the country, and therefore the country owes them some obligations if this has now cropped up.

Professor McEvoy: They will also be getting legal support. Presumably the MoD is picking up the legal bill for the lawyers representing soldiers in these cases. That would be an additional element of the support, one would assume.

Q92 **Mrs Moon:** So this will also require the Government to know what cases are being investigated? What was said earlier was that an individual might not know that an incident in which they had been involved was being looked at. One of the things that would be essential would be for notification to be given at least to the Ministry of Defence that a particular shooting was being investigated, so that they could then go to the individual and say, "The incident in 1971 is now being investigated. This is your legal support. This is your welfare support. We will provide you with that and keep you informed."

Professor McEvoy: That sounds very sensible. I think you would want that kind of a joined-up system, essentially, for all the different bits in terms of the provision of support and the police investigation. All of those protocols, mechanisms and how they communicate with each other you would want in place when the HIU begins work.

Q93 **Mrs Moon:** Is it more "We will talk you through this process," rather than waiting for a knock on the door and someone says, "Right, we're taking you to Northern Ireland. You're under arrest"?

Professor McEvoy: That makes much more sense as a way to proceed.

Q94 **Mrs Moon:** Lovely. I think we could all live with that. Another thing the Government have said is that they are absolutely adamant the legal system will not be abused as it was under the IHAT investigation. Quite honestly, having sat through that inquiry, I can say that the legal system was most certainly abused at so many different levels. What can the Government do to make sure that does not happen? What would you, from your combined knowledge, say has to ideally be put in place right from the start to stop that happening? If you don't know now, will you take it away, think about it and come back to us?



HOUSE OF COMMONS

Professor McEvoy: It's a complex one. I haven't read enough detail on the IHAT case to know where the structural flaws were and then read across to the Northern Ireland context and see how relevant, if at all, that is. I would have to do that properly to see what the read-across implications were.

- Q95 **Mrs Moon:** Will you look also at the read-across implications of what happened in IHAT, in terms of the handling of criminal investigations against those personnel, and how the Government can learn lessons to protect service personnel who went through an horrific experience of being investigated, sometimes two and three times, and then there being no charges? Can you come back with suggestions for how we can make absolutely sure that we don't get into that debacle again; that service personnel are not faced with that sort of horrific experience; that we don't waste money in the public purse; and that families are not subject to the death of a family member being under investigation again and again?

Professor McEvoy: Certainly.

Professor Ekins: The multiple investigations in IHAT owed something to the collateral challenges that were going on in the courts to the adequacy of the investigations, the need for further independence and so forth. You had a condensed run through the article 2 jurisprudence in relation to the investigations.

I might just confirm a general point. If you change your investigative structure and protocols partway through and then run them back to the other cases, that's very messy. Make a clear-eyed decision about the right way to proceed, whether that is to investigate or not, and how so, and then stick to it.

Mrs Moon: Absolutely. That is the sort of clear guidance we need, so that Government are quite clear and we don't end up with the debacle we had in relation to IHAT.

- Q96 **Chair:** Thank you very much, Madeleine. We have been considering some of the pitfalls and mechanisms in carrying on investigating these cases. We slightly went ahead of schedule because of Professor Sands having to leave. With the remainder of our time, we want to talk about the legal practicability—not the political ramifications—of bringing in a statute of limitations for Troubles-related incidents, until at least the date of the Good Friday Agreement. To recap, we have heard previously that none of this relates to the International Criminal Court, so that is out of the picture. We have heard in relation to the ECHR that there might be problems with article 2, but it also appears that we could, in principle, decide to do what we did on the votes for prisoners issue, which is simply to say to the European Court of Human Rights, "We are not prepared to take your view on this matter"—we can simply defy it. I have not noticed any great ramifications from our defiance over giving votes to prisoners, and I suspect the same would happen here, but we would like to know your view on that.



HOUSE OF COMMONS

Gavin will lead on this question. Professor Sands seemed to say that there was no legal bar to our legislating for a statute of limitations. If the Westminster Parliament did it, the question would arise of whether we could, not should, just do it for the soldiers or whether we could do it for everybody. If we did do it for everybody, was I right in what I said earlier about the Northern Ireland Assembly having powers in relation to having to sign off such an issue with regard to Northern Irish citizens? If they declined to do that in Northern Ireland—I know Gavin has problems with some aspects of that—would that necessarily prevent the Westminster Parliament, having got the legislation through, from saying in relation to this matter, “It is a clean break. A line has been drawn and there shall be no further investigation or prosecution of Troubles-related incidents involving the Armed Forces”?

Professor McEvoy: I have gone into this issue in some detail in the paper that is before the Committee. First, on the statute of limitation that was discussed in the House of Commons last week or the week before, it is an amnesty.

Q97 **Chair:** We do not wish to get into any of that. We are asking about the legal position, not the political connotations.

Professor McEvoy: Absolutely. It is not a political point; it is a legal point. If it walks like a duck and it quacks like a duck, it’s a duck. So the statute of limitation as proposed is an amnesty. That is fine. I am a pragmatist on amnesties. I think that amnesties are useful, too, in conflict transformation. You can design amnesties in a way that is human rights compliant. It requires some careful attention, so a statute of limitation could be designed in a way that is human rights compliant.

Q98 **Chair:** So when the Secretary of State says to us, as he has sometimes in the past, “I simply don’t have the power to do this”, that is not right?

Professor McEvoy: As Philippe said earlier, Parliament can stop him. Parliament has the power. In the design of a carefully crafted statute of limitation, first it is outside the terms of the Stormont House Agreement. As far as I understand it, none of the political parties argued in favour of that, so you have a significant political issue, but that is a political issue. Parking that for a moment, the kind of things that one looks to in a statute of limitation are an amnesty to see whether or not it could be legitimate. Does it try to negate the right to truth—the article 2 right to an investigation? If your statute of limitation does that and in effect negates the article 2 rights in terms of truth recovery, not prosecution, then I do not think it is law. That is your first significant challenge.

Q99 **Gavin Robinson:** Having considered it two weeks ago, you would have realised it was framed for those cases that have been previously investigated.

Professor McEvoy: That takes us back to our earlier conversation about what constitutes an effective investigation and whether or not it is article 2 compliant.

Gavin Robinson: Presumably you could pass a statute of limitation. If it



HOUSE OF COMMONS

was for 20 years and applied to Operation Banner, and if it was in the purview of Westminster, whether you tacked on the RUC or not, you could do all of that—someone could challenge it if they wanted to press that point, but there is no impediment to doing it.

Q100 Chair: There would be nothing to prevent, as suggested earlier, setting up some form of tribunal to which anybody, after the statute had come into effect, could choose to come forward and tell their stories.

Professor McEvoy: The ICIR—the Independent Commission on Information Retrieval, which is one of the four constituent elements of the Stormont House Agreement—is not a million miles away from precisely that. That is why earlier I suggested that if you are going down this route, you look closely at that process and see whether there could be the potential for a nudge towards that. You already have an architecture that has been agreed by the political parties and the two Governments.

Q101 Chair: And if that were to be incorporated with and referenced in the legislation for the statute of limitation, do you think that would meet the article 2 point?

Professor McEvoy: It depends on the nature of the investigation and what the truth recovery functions are in terms of the Historical Investigations Unit.

On the technical point I made earlier about the Sentence Review Commission, Dr Lewis, you made an important point about the distinction between the terrorists and the non-terrorists in terms of the Good Friday Agreement. A lot of people make that argument. I am not so sure I accept that that is what the Good Friday Agreement actually says. There were two soldiers in prison when the Northern Ireland (Sentences) Act 1998 was passed. My understanding, having talked to the head of the Sentence Review Commission—a lawyer called Brian Currin—is that originally there was an assumption that those two soldiers would be released via that process. Indeed, he was approached to that effect originally by the MoD. The two soldiers were subsequently released, so far as I understand it, using the royal prerogative of mercy; they didn't go through the Sentence Review Commission.

The point is that the two-year cut-off point has not been tested. I have looked closely at the legislation, and I think soldiers are eligible to apply to the Sentence Review Commission. The distinction between terrorists and state actors has not been tested, because soldiers weren't run through that system when they were released.

Chair: And then, of course, you have to ask yourself, if we had a level playing field—you are saying we may indeed have one and just not realised it yet.

Professor McEvoy: It may be already.

Q102 Chair: If we have a level playing field, in which we are saying that anybody who killed anybody during the Troubles is not going to serve



HOUSE OF COMMONS

more than two years, how much of a jump is it from there to saying we should have a statute of limitations, coupled with some form of tribunal or commission for people to get to the truth? We would then not have to put people, especially the innocent, through the trauma of an investigative process 40 years after the event, which at most will lead to a maximum of a two-year sentence. We would then not do it at all, but what we will do is put everybody's mind at rest and draw a line, but there will be this mechanism that you just described that will perhaps be more likely to arrive at the truth, will it not, when people know that they are not going to jail?

Professor McEvoy: From a personal point of view, that probably would have been my position. If in the design of, and the political conversations around, the Stormont House Agreement we had actually been more honest—I was going to say frank—about the limitations of prosecutions, the difficulties associated with historical prosecutions and, traumatic though it may be for people who are put through that process, the small numbers who will end up going to jail, that is probably where I would have ended up on this.

I probably would have ended up saying—the Stormont House Agreement is what has been agreed by the political parties, and I recognise that different parties required there to be some kind of a punishment, albeit only two years. That was the political reality, and that is the compromise where we ended up.

Q103 **Gavin Robinson:** The Stormont House Agreement is the agreement between the parties in Northern Ireland. What we are proposing here today, and that you are considering for us, is a matter for the British Government.

Professor McEvoy: But the Stormont House Agreement is an agreement between the two parties and the two Governments; it is not just about parties.

Q104 **Gavin Robinson:** Yes, and so all are still tied in with that process, but there is nothing to restrict this Government from acting outside of that in a different sphere for those involved in operational matters.

Professor McEvoy: It would be up to the Committee to make the political judgment as to the consequences of operating outside the Stormont House Agreement. I suspect it would mean the Stormont House Agreement would be dead in the water.

Q105 **Chair:** Can we just check this point that was alluded to a couple of times earlier? If it was the case that the Westminster Parliament decided to pass this sort of legislation covering terrorists, soldiers and police—the whole lot—am I right in what I said earlier that the Northern Ireland Assembly might be able to have some sort of veto over it, as it relates to any particular group from Northern Ireland, or would they have no veto over it at all?

Professor McEvoy: Again, it is in the paper before you. There is quite a substantive section on the legislative consent motion, which is what we are talking about here, in effect.

Q106 **Chair:** Yes, what's the status of that?

Professor McEvoy: It's clear from the recent Brexit judgment that it is a constitutional convention but it is not enforceable in the courts. Therefore, if the Westminster Parliament decided to introduce an Act, Parliament is sovereign, and there is a constitutional convention, but it is not enforceable in the court's legislative consent motion.

Gavin Robinson: But, more than that, national security is a reserved matter and Defence is a reserved matter. Even whether it might be appropriate or not, those issues rest with Westminster.

Professor McEvoy: Absolutely.

Q107 **Chair:** Just for clarity, what you are saying is that the Westminster Parliament could pass a statute of limitations, either just to protect the soldiers and/or the police, or the soldiers, the police and the terrorists?

Professor McEvoy: I am not convinced that you can make the distinction. I think I agree with Professor Sands.

Q108 **Chair:** So you think it would have to be for everybody?

Professor McEvoy: Yes, because, apart from anything else, if you introduce a statute of limitations that is only directed at state actors, it looks like state impunity, in effect; there are international legal obligations around state impunity. You have a stronger case to make, legally, if you are saying that this is part of a genuine effort at conflict transformation and dealing with the legacy of the past, and we are applying it evenly across the piece to all of the actors. If you just apply it to the state, it looks like old-fashioned impunity.

Professor Ekins: I think that is highly plausible. You could argue that it is symmetrical to the Good Friday provision for paramilitary groups and so forth—not literally symmetrical—

Q109 **Chair:** Sorry, what do you mean by symmetrical?

Professor Ekins: Well, a statute of limitations—if this was the only legal measure that had been taken in relation to killings and serious offences arising out of the Troubles, then you would have a very strong argument that this was just state impunity. But if you already have a separate legal architecture for dealing with paramilitaries and just take for granted no separate provision for soldiers and police, then here is a separate provision for soldiers and police. Viewed in isolation, it might look like impunity, but you have got to view in the context of the larger settlement, if you like.

Professor McEvoy: As I said earlier, my own view is that actually the architecture of the Good Friday Agreement applies to both state and non-state.



HOUSE OF COMMONS

Professor Ekins: I can see the argument, but one can argue—

Q110 **Chair:** Theoretically, we do have that option. The reason I raise this is because one would want to minimise the amount of friction that it would cause in the existing arrangements if possible and therefore we want to have as many options put forward at the end of this inquiry as possible. What you are saying is that we could, at least in theory, put forward a statute of limitations targeted just on the soldiers, or one on the soldiers and the police, or one on everybody. We could do all of those and there is an arguable case to be made for any of them. I appreciate your stance is that you think the case for some is stronger than others. Is that right?

Professor Ekins: I agree with that.

Professor Rowe: If I could just take a purely legal point—because I am not up to date with the Northern Ireland Stormont House Agreement and the Good Friday Agreement and the politics of that—in my view a statute of limitations would be perfectly permissible, but it would have to be applied to everyone. I don't see that there is really a possibility of applying it to one group or another, from a purely legal point of view, let alone a political point of view. For those who might be interested, there is a concurring judgment in the European Court of Human Rights in which two of the judges said some very supportive things about a statute of limitations, referring to the fact that the individual has a right to be left alone after a particular time.

Q111 **Chair:** Could we have that reference?

Professor Rowe: Certainly.

Chair: Thank you. We are coming to the close. Madeleine has a quick point and then Gavin, and then I think we will be done.

Q112 **Mrs Moon:** My point is small in terms of this inquiry, but big in terms of our overall view around our personnel being called back over retrospective reinterpretations of the law. If in relation to the Historical Investigations Unit in Northern Ireland there was a suggestion that there should be a statute of limitations, whether for one group or all, would it be possible to draft that in a way that it applied for wherever British personnel have fought or have been engaged? Or would it apply only in this one scenario? Do you see where I am going? What I wouldn't want is that we do this only in terms of Northern Ireland because it looks like, "Ah! There's a cover-up here." Actually, this is a universal principle that this particular Committee, after its investigations into IHAT, is deeply concerned about. This is not just an issue in relation to Northern Ireland; it is a wider issue.

Chair: Before you reply—Gavin, would you like to put your point as well?

Gavin Robinson: Yes. Very simply I am thinking about what Professor Rowe had said about having to include everyone, because we are thinking of this in Northern Ireland's context when indeed it is much wider. A statute of limitations is not going to be a one-off event. If we pass a limit in statute, it would be there until Parliament decides to remove it, expand



HOUSE OF COMMONS

it or alter it. On that basis, if you take 20 years as a target, we are only four years away from the 20th anniversary of the commencement of operations in Afghanistan. So as a continuing point of principle, we do not need to cloud it with the Northern Ireland experience. Keep it within the military sphere or the public service sphere—I mentioned the police—given the Northern Ireland context. That principle means you do not need to worry about the issues around Belfast agreements or the throwing up of red herrings, because Government gave amnesty to the other fellas a long time ago.

Mrs Moon: It is a heavy question for you to consider, and if you would rather go away and consider it—

Chair: No. I am sorry, but I want a response now. If you want to write to us afterwards with your further thoughts that is fine, but I am not going to leave that one hanging in the air. We would like your response now.

Professor Rowe: I think that it is an excellent idea to have it wide-ranging so that it applies wherever. Wherever British forces serve, they take English law with them—

Mrs Moon: Absolutely.

Professor Rowe: So, it would latch on to the English law element of their duties.

Gavin Robinson: Albeit, it may then be used by the ICC in considerations—

Professor Ekins: Possibly.

Professor McEvoy: I think that's what—

Professor Ekins: You could limit it by type of case.

Q113 **Chair:** Sorry, I will take you in order. On that point about the ICC, do you have anything to add, Professor Rowe? We don't really want to extract ourselves from one frying pan and jump into a fire.

Professor Rowe: Under the Rome statute, we cannot have a statute of limitations for crimes committed under the Rome statute.

Q114 **Chair:** Sorry, that signifies what exactly?

Professor McEvoy: War crimes, crimes against humanity, genocide—

Professor Rowe: Yes. War crimes, crimes against humanity and genocide. You cannot have a statute of limitations that covers those.

Mrs Moon: I do not think anyone would be looking for that at all.

Q115 **Chair:** So, presumably the statute of limitations, if it were a more general one, would have the appropriate exceptions written into it.

Professor Rowe: It would have to, to comply with our obligations under article 29.



HOUSE OF COMMONS

Chair: Very good.

Professor McEvoy: I agree.

Professor Ekins: A short point to say that you could try to limit by type of case. I am not sure how practical this is, but if the type of case in question were excessive use of force in what would otherwise have been a lawful action, that might be importantly different to a radical different departure from anything one would expect of a soldier or policeman. If it were calibrated more along the lines of the type of action rather than if you were a serving soldier or police officer, that might help on the ICC point too.

Professor McEvoy: Sorry, I should clarify, I agree to that legal analysis rather than to the idea of—*[Interruption.]*

Gavin Robinson: Let me speak over you—*[Interruption.]*

Professor McEvoy: For the record, I agree to Professor Rowe's legal analysis to the last point on the ICC, rather than to the idea that this is a good idea, particularly because of its consequences for the Northern Ireland context. That is what I agree with.

Chair: Right. So, we have the option of a statute of limitations that might be targeted on certain groups, but a preference for a statute of limitations that would cover everybody in Northern Ireland, and a possibility of a statute of limitations that might go wider than Northern Ireland. Those are at least three options to put into the mix, quite apart from trying to manage the present system, which I think we all regard with a certain amount of disdain if not horror. On that happy moment of consensus, may I thank all three of you and Professor Sands in his absence? It has been a long session, which covered an enormous amount of ground. We are very grateful to you. The hearing is concluded.