

**Briefing to members of Congress and  
other interested parties on continuing  
breaches of the Right to Life in  
Northern Ireland**

**Washington D.C. March 2012**

## **Committee on the Administration of Justice Washington March 2012**

### **The Right to Life – Continuing Breaches in Northern Ireland**

#### **About CAJ**

The Committee on the Administration of Justice (CAJ) is an independent non-governmental human rights organisation that was established in 1981. CAJ's areas of work are extensive and include policing, emergency laws, criminal justice, equality and the protection of rights. Its activities include publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

#### **Introduction**

Article 2 of the European Convention on Human Rights promotes and guarantees the right to life. Recent jurisprudence in the European Court has held that, amongst other duties, a state must properly investigate any apparently unlawful killing, especially where state agents may be involved. An investigation must be effective, prompt, transparent and independent and involve the next of kin to the extent necessary to protect their interests. The UK is a signatory to the Convention and has partially incorporated it in domestic law through the Human Rights Act 1998.

In CAJ's opinion, the United Kingdom is seriously in breach of its European Convention Article 2 responsibilities to protect the Right to Life in respect of cases where state involvement in unlawful killing is alleged. In a number of high profile cases, including the Finucane case, it has refused to carry out proper investigations into possible direct or collusive involvement in killings. In our view, this is not a matter of the past but of the protection of the right to life in the present and the future. The reality is of a major Western government failing to put in place the investigative and regulative mechanisms necessary to prevent its agents from engaging in extra-judicial executions or other unlawful killings. We are deeply concerned that this failure is leading to a culture of impunity amongst British military, intelligence and security agencies and may result in their involvement in further unlawful killings. There is also evidence that the failings by the UK government give cover and encouragement to those states – including Council of Europe members – engaged in much more egregious human rights abuses. These cases arising from the past in Northern Ireland are therefore vital to pursue for all those who care about human rights and the responsibilities of major Western powers to take the lead in their protection and promotion.

There are various mechanisms that can be used in Northern Ireland to investigate past unlawful killings that might involve state collusion. The Historical Enquiries Team (HET) of the Police Service of Northern Ireland is, in our opinion, deeply flawed as to its independence and effectiveness and we share the concerns that colleagues in this delegation are reporting on. New inquests are now being held into some cases and the UK Supreme Court has held that they must be Article 2 compliant. The

first of these inquests has just started and we are monitoring its progress. Inquiries are possible in some cases and are the most appropriate mechanism when there is evidence that wrongdoing may go to the highest levels of the state – as in the Finucane case. The other mechanism is the Office of the Police Ombudsman for Northern Ireland which is the main focus of this briefing.

## **Subverting the Office of Police Ombudsman**

The Office of the Police Ombudsman for Northern Ireland (OPONI) is a product of the peace process and specifically of the Patten Report into policing. It is a powerful and independent office with extensive powers and it is a significant part of the architecture of human rights-compliant policing. CAJ fully supports the Office and believes that the legislation guiding it allows it, in principle, to carry out Article 2 compliant investigations into unlawful killings that may have involved the actions of the police or their agents. As well as investigating current complaints against the Police Service of Northern Ireland (PSNI), OPONI has a role in investigating past cases where police (the old Royal Ulster Constabulary) wrongdoing is alleged. In relation to these cases, CAJ believes the independence and effectiveness of the Office has been subverted over the past few years.

In June 2011 we published a major report into OPONI's investigation of past cases. This report took the criteria for human rights compliant investigations and examined OPONI's record against them. In terms of effectiveness, the report found that OPONI did not use any consistent definition of the concept of "collusion" in relation to involvement of state agencies in unlawful activities including murder. In general, it now takes a narrow and restrictive view of the term with the result that police misconduct tends to be exonerated in the absence of evidence of a formal conspiracy. In relation to analysis of past investigations, the Office now tends to use the term "failings" which covers both incompetence and wilful perversion of the course of justice.

The report expressed concern that the current levels of efficiency or 'promptness' offered by the Police Ombudsman's Office were not Article 2 compliant. The investigative process is agonisingly slow and it is often difficult to ascertain why the research requires such an extensive period to conduct. The length of time it takes for historic cases to be investigated and once opened, completed, is particularly stark given that many families have already waited decades to uncover the truth of their loved ones death.

Transparency was regarded as fundamental to accountability and the building of public confidence by the Patten Commission. It also forms part of the core legislative responsibility of the Police Ombudsman's Office to exercise his or her powers in such manner and to such extent as appear best calculated to secure public confidence. Thus, while the role of the Office is to investigate complaints against police, in doing so it needs to be accessible and to provide information to families. In fact, in addition to unacceptable delays, the treatment of families by the Police Ombudsman's Office has often been painful and distressing for family members. In particular, concerns exist around the frequency and nature of communication, willingness to consider views of relatives, and inequality of treatment in relation to prior access to reports. As regards historic cases, the requirements for transparency and openness to public scrutiny form a core part of the Article 2 obligations, and have



particular relevance in the context of building confidence in policing and accountability in a post-conflict society.

The requirement for independence is a statutory duty of the Office of the Police Ombudsman and a key requirement for compliance with Article 2 of the ECHR. The CAJ report identified a number of issues that impact upon the independence of the Office. There were irregularities in the appointment process of the current Police Ombudsman (who has since resigned but is still in post). CAJ became aware that the criterion of prior Northern Ireland experience appeared to have been added at a very late stage in the recruitment for the current Police Ombudsman, potentially favouring a particular candidate. It has also emerged that there were irregularities in the manner in which security vetting procedures were conducted with respect to the current Police Ombudsman. The way in which the process appears to have been conducted raises questions as to whether normal procedures were applied, suspended or circumvented.

An important issue relating to independence is the fact that all intelligence material for historic cases is provided by the Police Intelligence Branch now known as C3. It is believed that a number of former RUC Special Branch officers are still employed in this branch which is of concern given that the old Special Branch is at the heart of many allegations of collusion. Furthermore, probing by CAJ and the BBC has now brought to light the fact that the PSNI employs over three hundred ex-RUC officers as "civilians" working in many areas of policing including intelligence.

Since the CAJ report was published, two other reports, by the Department of Justice (June 2011) and the Criminal Justice Inspection Northern Ireland (September 2011) have broadly concluded that the effectiveness and efficiency of the Office have been severely undermined due to political and police interference as well as "weak leadership." The Criminal Justice Inspection further determined that reports into historic cases were altered or rewritten to exclude criticism of the RUC with no explanation; senior officials in the Office requested to be disassociated from reports into historic matters after original findings were dramatically altered without reason; staff investigating some of the worst atrocities of the conflict believe police have acted as 'gatekeepers' to withhold key intelligence from them; and major "inconsistencies" exist in the Police Ombudsman's investigations of Loughinisland, McGurk's Bar and Claudy. The report also found a "fractured approach" to governance and management and expressed concerns over the handling of sensitive material. It also noted the lack of respect for the demands of civilian oversight in a previous restructuring of the Intelligence Unit of the Office. This report therefore concluded that the Police Ombudsman's Office should be suspended from conducting historic investigations due to what it called a "lowering of independence."

After intense public pressure, the current Ombudsman, Al Hutchinson, resigned (although he continues to exercise some of his functions) and a recruitment process for his successor is now taking place. A process of reform is now supposedly going on and a public consultation was launched on 13/03/12 on the legislation and structure of the Office, including the mechanisms for dealing with historic cases. We are concerned that the delay in implementing this reform is causing further traumatising to families who have already waited years to have their cases properly investigated by OPONI.

In another development, in late November 2011 news reports indicated that the Office had decided to "reinterpret" its legislation in a manner which means the Office reportedly argues it can no longer conduct investigations into nearly 50 cases where RUC officers were responsible for deaths. CAJ issued a Freedom of Information request on the 1 December 2011 seeking information to clarify the basis of the Office's reinterpretation of the legislation and documentation indicating what had prompted the Office to re-examine the legislation. Only a partial response has been provided. However, a recent government reply to a CAJ complaint to the European Council's Committee of Ministers states that "an expert legal opinion provided to the Police Ombudsman in late 2011 confirms that in the absence of new evidence, not reasonably available at the time the matter originally occurred, he cannot investigate any matter that has previously been investigated by police." This view conflicts with the understanding of the previous Ombudsman, Baroness Nuala O'Loan, and the practice of the Office up to this point.

There are other clear derelictions of duty by the current Ombudsman. One of the last major reports published by the previous Ombudsman, known as Operation Ballast, found systemic collusion by RUC Special Branch with a murderous unit of the Loyalist Ulster Volunteer Force in North Belfast. It appeared that police agents had been allowed to get away with murder by their handlers and forensic and other evidence had been systematically destroyed to cover up their involvement. After an enquiry by the HET, investigation into civilian criminality was handed back to the PSNI and prosecutions (albeit botched) have taken place. However, the investigation into the possible criminal activities of police officers was made the responsibility of OPONI which appears to have done little or nothing to pursue the matter. In a BBC documentary broadcast on 14/03/12, Nuala O'Loan commented that if she had still been Ombudsman she would have investigated fully.

CAJ believes that the reinterpretation of legislation mentioned above is an attempt to circumscribe the scope of operation of the new Police Ombudsman when he or she is appointed. Together with the "lowering of independence" created by police and government interference, with the complicity or complacency of the current Ombudsman, this amounts to a subversion of the role of the Police Ombudsman. We believe that these subversive developments can be reversed, but it will take concerted and continuing pressure on an establishment which appears to resent independent investigation of past human rights abuses.

## **Conclusion**

The right to life is the most important human right and we could argue that government's foremost duty is to protect it. While there have been huge advances in Northern Ireland and human rights including equality are better protected than ever before, the lack of effective investigations into unlawful killings is a dangerous gap. It has the capacity to undermine the peace process and to weaken confidence in policing and the new society as a whole. Although these cases happened in the past, this is not a historical question; it is a matter for the present and the future. It is a central human rights issue – if we cannot trust the government to fully investigate cases where its agents may have killed citizens, what can we trust it with?



## **Why human rights in Northern Ireland are still internationally important – a general comment by CAJ**

### **The significance of the conflict**

Over 3,600 people died out of a population (in the North) of about 1.5 million. If that figure is extrapolated to Britain, it is the equivalent of 144,000 deaths – well over twice the number of British civilians that died in the Second World War. Extrapolated to the United States it would give a figure of 720,000 deaths – more than one and a half times the total US casualties in the Second World War or the equivalent of eight 9/11 attacks for each of the 30 years of the conflict.

Ten times as many people were injured as were killed – over 36,000. It is estimated that at least 20,000 people were imprisoned for offences arising out of the conflict. If we take people's immediate families into account, that makes at least 300,000 people directly affected by the conflict. That does not take into account those forced out of their homes, intimidated, beaten up, harassed, made to leave their jobs and all those who lived in fear and constant tension.

This occurred in Western Europe, amongst the population of one of the leading liberal democracies in the world. The causes, features and responses to such a conflict are therefore of abiding significance.

### **The nature of human rights abuses during the conflict**

The proved or alleged human rights abuses that were perpetrated by the UK state during the conflict include state sanctioned murder, torture, collusion with non-state armed groups, detention without trial and denial of a fair trial, accompanied by a culture of impunity, together with toleration of religious and other forms of discrimination. The exposure and holding to account of elements of the state for these crimes is a so far uncompleted task and therefore amounts to an impediment in the creation of a society fully based on human rights and the rule of law.

### **The nature of the peace process**

In spite of the deep trauma caused to Irish and British society by the conflict, a relatively successful peace process was undertaken and consolidated. The process of negotiation and agreement involved an inclusive approach to all political parties and armed groups and a lengthy period of demobilisation, disarmament and reintegration of state and non-state forces. The fundamental foundation of the settlement was a serious commitment to human rights and equality. The political settlement guaranteed a place in governance for representatives of the two main communities but this was underpinned and guaranteed by an infrastructure of legislation and institutions designed to promote human rights and equality. These included:

- Fundamental police reform with extraordinarily powerful oversight and accountability mechanisms
- Reform of the criminal justice system with new oversight and inspection institutions
- Incorporation of the European Convention of Human Rights in domestic legislation

- Uniquely strong (for the time) equality legislation
- A human rights commission and equality commission to oversee all elements of society

Civil society organisations like CAJ played a significant role in the negotiation, settlement and consolidation elements of the peace process and are well-equipped to reflect upon and generalise from the experience.

The lessons from Northern Ireland in how to deal with fractured societies, rebellion by armed groups and the characteristics of inclusive peace processes – all on the basis of a commitment to human rights – are of wide applicability.

## **Unfinished business and continuing problems**

The major unfinished business of the peace process is the UK government's failure to legislate for a Bill of Rights for Northern Ireland including identified rights supplementary to the European Convention. The significance of building in human rights protections to a constitutional document – or failing to – is demonstrated by the Northern Ireland experience. There are other failures to carry out commitments which have a tendency to weaken the stability of the peace settlement.

There are continuing problems with attempts to roll back the human rights elements of the peace settlement, especially with regard to policing. The ways in which exemplary institutions can be subverted and the methods of preventing and opposing that process are being demonstrated in the current situation in Northern Ireland.

There is no comprehensive method of dealing with past abuses and unsolved crimes in Northern Ireland. Although there are many interesting projects within civil society, neither the state nor political society has been willing to agree a thorough truth recovery or reconciliation process. This is a fundamental weakness and efforts to use international examples and to continue the debate on dealing with the past are important not just for the local situation but also to demonstrate the problems and possibilities in such processes.

The UK state is seriously in breach of its European Convention Article 2 responsibilities to protect the Right to Life in respect of cases where state involvement in unlawful killing is alleged. In a number of high profile cases it has refused to carry out proper investigations into possible direct or collusive involvement in killings. This is not a matter of the past but of the protection of the right to life in the present and the future. The reality is of a major Western government failing to put in place the investigative and regulative mechanisms necessary to prevent its agents from engaging in extra-judicial executions or other unlawful killings. There is evidence that this failure has led to further unlawful killing by British forces in Iraq and elsewhere. There is also evidence that the failings by the UK government give cover and encouragement to those states – including Council of Europe members – engaged in much more egregious human rights abuses. These cases arising from the past in Northern Ireland are therefore vital to pursue for all those who care about human rights and the responsibilities of major Western powers to take the lead in their protection and promotion.

