CAJ
Committee on the Administration of Justice
Promoting Justice / Protecting Rights

CAJ's submission S419

Dealing with the Past:
Investigating Troubles-Related Deaths:

Submission to the multi-party group chaired by Richard Haass

August 2013

2nd Floor, Sturgen Building
9-15 Queen Street
Belfast BT1 6EA

Tel – 028 9031 6000
Email – info@caj.org.uk
Web – www.caj.org.uk

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About CAJ

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

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Introduction

Northern Ireland is a region attempting to overcome a legacy of violence and division and to build a new society based on human rights and equality. In spite of the "fresh start" represented by the Belfast Good Friday Agreement and the St Andrews and subsequent agreements, it is widely recognised that "dealing with the past" is unfinished business. This is a difficult and multi-faceted task and there is no consensus on how the many elements should be dealt with – hence the inclusion of the issue on the agenda of the multi-Party Group.

In relation to dealing with the past, the *Together: Building a United Community Strategy* contains commitments on the delivery of services to victims and suggestions on responsible remembering, celebration of culture and identity and a variety of mechanisms of reconciliation. CAJ recognises the importance of such initiatives as well as community based activities such as storytelling, community histories, organised dialogue and a variety of forms of memorialisation. We also recognise that there is a range of continuing real and perceived injustices arising out of the conflict that remain to be resolved, including many cases where people were tortured or seriously injured. However, we are convinced that the main obstacle to coming to terms with the past is the almost 3,000 cases involving Troubles-related deaths where the perpetrators were not identified or brought to justice, were inadequately investigated or are otherwise unresolved. If these cases were properly dealt with, then we believe the way would be open to engage with other serious cases and to undertake the many sided truth recovery and reconciliation measures that comprehensively dealing with the past demands.

Why full investigation of Troubles-related deaths is vital

Poisoning the present

Many families of those killed during the Troubles feel that the deaths of their loved ones were inadequately investigated or that the full truth about the circumstances has not been revealed. These families come from a variety of backgrounds, their loved ones were killed in a range of circumstances and the alleged perpetrators were both non-state and state actors. Their views tend to be broadly shared in the particular communities from which they come and they become powerful symbols of perceived denial of justice. There is therefore a widespread sense of injustice and grievance which is bound to poison and weaken attempts to bring about both reconciliation and increased trust in state institutions. The perception of injustice may be more or less justified in

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different cases but it has been recognised that there is an outstanding task of investigation and truth recovery – not least by the establishment of the Historical Enquiries Team – and until it is completed the sense of grievance will continue to undermine all efforts to deal with the past.

Re-traumatising victims

The present, patchwork system is subject to endemic delays, inevitable and justified legal challenges and "passing the buck" between different agencies. These factors involve re-traumatising the families of those who have been killed and prevent any aspect of closure. Ineffectiveness and delay in investigations can amount to new violations of the rights of victims. This is particularly true in complex cases, especially those where the unlawful involvement of the state is alleged, but it has a knock on effect throughout the system. Society owes it to the victims to bring the investigation of all conflict-related deaths to a speedy conclusion.

Failure to properly investigate is a violation of human rights standards

The right to life is perhaps the most basic human right and it is protected under Article 2 of the European Convention on Human Rights. This Article means that the State must not take life unlawfully, it must protect life and, where "lives have been lost in circumstances potentially engaging the responsibility of the State"[1], it must properly investigate the circumstances and, if the death was unlawful, endeavour to bring the perpetrator to justice. The "procedural obligation" to investigate deaths is a clear requirement and applies to all deaths involving the use of force,[2] as well as in other questionable circumstances.[3] The UK's international commitments and domestic law in the form of the Human Rights Act therefore require that these cases be properly investigated. Further prevarication would not only be unlawful but would undermine faith in state institutions and the rule of law. CAJ acknowledges the suffering of the many thousands injured during the conflict and recognises that, in certain circumstances, similar investigative obligations arise under Article 3 (Prohibition of Torture).[4] We would be very willing to engage in debate on a process for dealing with these cases, but we think it reasonable to concentrate, in the first instance, on Troubles-related deaths.

"Criminal justice" versus "transitional justice"

It is sometimes argued that the "criminal justice route" to dealing with past deaths is impractical, may re-open old wounds and may be inimical to the peace process. "Transitional justice" is sometimes posed as a "softer" alternative whereas in fact it is simply a way of describing human

[1] Onerylidiz v. Turkey [2004] 48939/99
[2] McCann and Others v. UK [1995] 17/1994/464/545
[3] Calvelli v. Italy [2002] 32967/96 §39
[4] Assenov and Others v. Bulgaria [1998] 90/1997/874/1086. Satik and Others v. Turkey [2001] 31866/96

rights compliant ways of moving from violent political conflict to the consensual rule of law and may well involve prosecutions and punishment. However, alternatives proposed to the route of investigation and prosecution vary and include various forms of truth recovery processes often with incentives to participation and truth telling such as amnesties. CAJ believes that some such mechanism is worth considering – we are open to participating in debate and believe it is possible to have Article 2 compliant processes which do not necessarily involve prosecutions and punishment. However, at this moment in time there is no prospect of societal or political consensus around any particular such mechanism, any variant of which would engage hugely contentious issues around the nature of the conflict, competing hierarchies of victims and equivalence or not of perpetrators. We believe there could be more agreement around a system that reviewed unresolved cases, investigated any evidential opportunities uncovered, moved to prosecution where possible and, only where those avenues were exhausted, provided as full an account as possible of the circumstances surrounding the death.

We also ought to note that a modification of the criminal justice system already exists for some conflict-related offences in the form of the Northern Ireland (Sentences) Act 1998. This provides for the early release of prisoners and a maximum limit of two years in prison (followed by release on licence) for later convictions for qualifying offences and offenders. This may still be a contentious piece of legislation, but it already exists and is capable of simple amendment to include, for example, state actors who would not currently be eligible.

In any event, we believe that it is perfectly possible to include special elements to deal with deaths during the conflict, especially in the area of reduction of sentences, imposition or not of criminal records and incentives to truth telling in any new process, such as amnesties, but the core should be a robust investigative mechanism that fully respects the requirements of Article 2. Furthermore, lack of consensus on any modifications in the current criminal justice process should not be allowed to become an obstacle or delay to the establishment of an investigative mechanism.

Why the existing "package of measures" is inadequate

In a series of Northern Ireland cases at the beginning of the millennium, the European Court of Human Rights severely criticised the UK for not properly investigating deaths where the individuals may have been killed unlawfully by state actors.[5] The UK responded with a "package of measures" which, they claimed, together would satisfy the Article 2 obligation. These included:

- The 'calling in' of other police forces to investigate deaths –the establishment of a 'Serious Crime Review Team' (2003) replaced with the Historical Enquiries Team (2005);

[5] Jordan v UK [2001] 24746/94; Kelly & Ors v. UK [2001] 24746/94; McKerr v. UK [2001] 28883/95; Shanaghan v. UK [2001] 37715/97; McShane v. UK 43290/98; Finucane v. UK [2003] 29178/95

- The ability of the Police Ombudsman to carry out Article 2 compliant investigations into 'grave or exceptional' matters;
- Reform to inquest proceedings including: establishment of an exceptional legal aid scheme; on the rules of disclosure; compellability of witnesses; new practices relating to verdicts of coroner's juries at inquests; and the
- Establishment of the (heavily criticised) Inquiries Act 2005.

CAJ has prepared a separate, more detailed analysis of why each of these mechanisms is inadequate but if we may summarise the points here. The HET, and particularly its actions in cases involving British Army soldiers and other state actors have been severely criticised by CAJ and other NGOs and by University of Ulster Professor, Patricia Lundy. In response the Policing Board asked Her Majesty's Inspector of Constabulary to examine its workings. In a damning report many aspects of HET's workings were criticised and its attitude to the actions of Army personnel were branded "unlawful."[6]Many families have withdrawn from cooperation with it and the Policing Board has declared its lack of confidence in its current leadership.

In our view, the Police Ombudsman's Office has the capability to conduct Article 2 compliant investigations but its independence has been "lowered" in the past,[7] it can only deal with alleged police crime or misconduct and it is unable to compel retired police officers to cooperate with it.

In spite of the reforms to the coronial system, "legacy inquests" suffer from a number of serious defects: endemic delays and obstruction by state parties breach Article 2 as has recently been confirmed in two judgements from the European Court;[8] juries need to reach unanimous verdicts; there is inadequate provision for vetting biased jurors; and a limited range of verdicts and restrictions on material, especially intelligence related, provided to the court.

The Inquiries Act 2005 gives *carte blanche* to the Secretary of State to determine the composition, proceedings and material provided to Inquiries, thus vitiating their independence. However, even under this legislation, the British Government has refused to hold an Inquiry into the most significant case involving admitted state collusion, that of Pat Finucane. Notwithstanding the particular role of inquiries in complex state cases in these circumstances, it is clear that Inquiries are not a suitable method for the generality of cases.

As well as the particular weaknesses of each element of this "package of measures," we can now clearly see that this piecemeal approach is itself ineffective. There are gaps in investigative measures

[6] Inspection of the PSNI's Historical Enquiry Team http://www.hmic.gov.uk/media/inspection-of-the-police-service-of-northern-ireland-historical-enquiries-team-20130703.pdf
[7] An Inspection into the independence of the Office of the Police Ombudsman for Northern Ireland. Criminal Justice Inspection. September 2011. Belfast
[8] McCaughey and Others v. UK [2013] 43098/09 and Collette and Michael Hemsworth v. UK [2013] 58559/09

with different agencies passing cases to and fro and overlaps in jurisdiction. Some victims' families have to engage with various processes and can be waiting years for one to finish before another begins. There are also value-for-money questions raised by the operation of very different agencies all, in one way or another, trying to do a similar job.

We now know in some detail, from the judgements of the European Court and domestic courts, from the reports of regulatory mechanisms (specifically Criminal Justice Inspection, Her Majesty's Inspector of Constabulary and the Policing Board) and from the experience of families and the NGOs that support them, what the weaknesses of the existing mechanisms are. Reversing those criticisms and putting in place structures that would turn those weaknesses into strengths is now a practical possibility and a process which could gain wide political support. This paper is designed as a contribution to that process.

The procedural requirements of Article 2

In *Jordan*, in a judgement applying to the "McKerr group of cases,"[9] the European Court held that in cases involving the use of lethal force by agents of the State an effective investigation in compliance with the requirements of Article 2 must be carried out and set out the minimum requirements for this as:

- *Independence* – individuals investigating a death must be fully independent of those implicated in a death; this independence must be both hierarchical and practical;
- *Effectiveness* – an investigation must be able to determine the lawfulness of the actions of those responsible for the death and to lead to the identification, and where appropriate, punishment of those responsible[10]. All reasonable steps must be taken to secure evidence concerning the incident, including eye-witness testimony, forensic evidence, and where appropriate an autopsy;
- *Sufficiently open to public scrutiny (transparency)* – there should be a sufficient element of public scrutiny of the investigation or results to secure accountability in practice as well as in theory and the next-of-kin should be involved to the extent necessary to safeguard their legitimate interests;
- *Prompt and carried out with reasonable expedition* – to maintain public confidence in the maintenance of the rule of law and to prevent any appearance of collusion or tolerance of unlawful acts. Investigations into deaths caused by state agents must be initiated by the state of its own motion and not by the next-of-kin or other concerned parties.

[9] See note 6.
[10] See Mahmut Kaya v. Turkey [2000] 22535/93 §§ 124-6 for how Article 2 interacts with Article 13 (right to an effective remedy) in cases involving the unlawful deprivation of life

These principles are now the established law of the European Court and have been fully accepted by UK courts.[11] They were originally established in the context of cases where unlawful state involvement in killing was alleged, but have been extended well beyond that.[12] They also represent minimum standards and must be applied to particular circumstances with flexiblity. However, there is no reason why these principles should not be applied to the investigation of all Troubles-related deaths and there are good reasons why they should be.

Should there be one system for investigating Troubles-related deaths?

There are reasons why special processes to investigate alleged state abuses of law might be necessary. First, though the damage to the victim is the same, the damage to the rule of law is much more serious if the perpetrator of a crime is a police officer or soldier. Breach of law by those mandated to uphold and implement the law clearly weakens public confidence in the rule of law. Second, the normal criminal law and investigative processes led by the police are there to deal with actions by criminals. If the alleged perpetrator is a police officer or soldier – and particularly where the allegation is of organised and sanctioned criminality within these forces – these processes are likely to be less than effective and would not satisfy the Article 2 obligations. Third, the state endures. It is to be hoped that organised, non-state armed groups will, at some point, go away completely. The state, however, is always with us. Unfinished business in terms of allegations of past illegalities is bound to affect confidence and trust in the future.

However, the Article 2 jurisprudence gives us a clear template for the construction of a human rights compliant way of dealing with alleged unlawful state involvement in killings. If such a mechanism were constructed, there are good reasons why it should be applied to all "legacy" cases involving suspicious deaths, including those where the alleged perpetrators are non-state actors. First, as we have noted, the European Court has extended the investigative obligation to suspicious deaths in general.[13] Second, given the complexity of the interacting forces during the conflict and the increasing evidence of penetration of armed groups on all sides by the state security forces, it is arguable that proper investigation of any Troubles-related case requires independence from any of the parties involved. If we tried to separate cases of state involvement from the rest there would, at the very least, be many cases in a grey area between them. Third, to apply the same mechanism to all deaths would prevent any sense of there being a hierarchy of cases or victims, or that one group or another was being scapegoated. Fourth, the fact that society, backed by legislation and state institutions, was prepared to institute a dispassionate, objective, human rights compliant

[11] See e.g. McCaughey and Grew [2011] UKSC 20.

[12] Dimitrova v. Bulgaria [2011] 44862/04 §75 "Even in situations in which there is no suggestion that a violent or suspicious death is due to official action, the authorities are under the obligation to carry out an independent and impartial official investigation that satisfies certain minimum standards as to its effectiveness."

[13] Dimitrova v. Bulgaria Op. Cit.

mechanism to examine all Troubles-related deaths would demonstrate a willingness to deal properly with past crimes and so increase public faith in justice and the rule of law.[14]

The implications of establishing one Article 2 compliant investigative mechanism include its taking over the current "legacy" functions of the Police Ombudsman and the review and investigatory functions of HET and PSNI C2 branch. More detailed discussion would be necessary to assess the impact on the inquests which are still outstanding.

We should note, however, that the proposal for setting up one system to deal with all Troubles-related deaths does not necessarily contradict the various demands for public inquiries into possible patterns of human rights abuses. Nor does it contradict the long-standing demand, which CAJ fully supports, for an inquiry into the full circumstances surrounding the death of Pat Finucane. The UK government promised to hold an inquiry (in a formal international agreement)[15] and has reneged on that promise. Furthermore, the Prime Minister has apologised for collusion in the killing but we are still unaware of what precisely he was apologising for. In these circumstances, and given the extraordinary lengths to which the government has gone to avoid an inquiry the gravest suspicions of high level governmental collusion can only be confirmed or allayed by a full, public inquiry.[16]

The principles of Article 2 put into practice

This section will look at each of the principles and how they might be put into practice in Northern Ireland taking into account our experience hitherto and the views expressed by the courts and others.

Independence

The European Court has said that independence "means not only a lack of hierarchical or institutional connection but also a practical independence."[17] We take that to mean that those who are investigating the case must not be under the command or control of any person or agency who was involved in the case, they must not be, or have been, part of the same institution and they must not be subject to any interference by people who may have an interest in the case. We will look at what that might mean in practice under a number of headings.

[14] See UN Committee Against Torture (UNCAT) Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013) §23 **"**The Committee recommends that the State party develop a comprehensive framework for transitional justice in Northern Ireland and ensure that prompt, thorough and independent investigations are conducted to establish the truth and identify, prosecute and punish perpetrators. In this context, the Committee is of the view that such a comprehensive approach, including the conduct of a public inquiry into the death of Patrick Finucane, would send a strong signal of its commitment to address past human rights violations impartially and transparently."
[15] Weston Park Agreement http://cain.ulst.ac.uk/events/peace/docs/bi010801.htm
[16] UNCAT Op.Cit.
[17] Jordan v. UK Op. Cit. §106

Governance

The person or body in charge of the investigation must be capable of acting independently without control or interference, direct or indirect, from government, any agency of the state, any political party or any other interest group in society. In our legal system that probably means that an organisation needs to be set up by statute as a legal person, with the requisite powers (see below).

There are different possible models for this. So, for example, the Police Ombudsman's Office (OPONI) is a "corporation sole" giving the power and responsibility to an individual. This is clearly a very different arrangement from the Historical Enquiry Team, which was set up by the Chief Constable without any separate statutory basis. However, as CAJ pointed out in its response to a DOJ consultation on the operation of OPONI last year[18] the independence of this Office was undermined even with this structure. The lesson is that a separate governance structure is a necessary but not sufficient condition for practical independence.

In the same submission we put forward reasons why a corporate Board might not be a good idea for this kind of institution. We noted that the Police Ombudsman, like the Director of the Public Prosecution Service, had to take decisions in a quasi-judicial manner and also had to take personal responsibility for the robustness and independence of investigations. We noted that: "It would be quite wrong for such conclusions and decisions to be subject to a process of debate and compromise within a collective body. In investigating complaints against the police, the issue is not reflecting the different interests, currents and attitudes within Northern Ireland society but of exposing wrongdoing without fear or favour and of vindicating proper actions equally robustly when appropriate." We think these considerations are also relevant for the possible investigative body under consideration. We would not rule out a collective body as such, but all its members would have to be wholly disinterested and impartial and not beholden to any particular interest group or political party. The point here is that any governing body, sole or corporate, must take decisions based solely on the law or clear, objective and public criteria relating to the progress of investigations.

This raises the issue of an appointment process. We believe that the appointment process for the second Police Ombudsman was flawed and was one of the elements leading to a lowering of the independence of the Office. It is sometimes suggested that there should be an international element to any legacy mechanism. That in itself is not a guarantee of independence – Al Hutchinson was a Canadian ex-police officer. It may be, however, that having some international involvement in an appointment process would be a good idea – the history of public appointments in Northern Ireland, even in recent times, is hardly impeccable. However, the fundamental point is that the appointment process must be transparent and end up with a postholder(s) completely independent of all special interests in Northern Ireland.

[18] http://www.caj.org.uk/files/2012/06/07/S386

Financial constraints and manipulations have been a factor both with OPONI and HET. No body can be given a blank cheque, but a budget, adequate to resource proper investigations of all unresolved cases within a reasonable time scale, must be allocated and ring fenced.

Legislation

As we have said, any new body has to have a statutory basis. One issue would be whether the legislation should be passed at Stormont or Westminster. Policing and Justice are devolved except when it comes to "national security." This is nowhere defined but there is, for example, a document extant – *Protocol on Handling Arrangements for National Security Post Devolution*[19] – which states:

> "All records created by the NIO prior to devolution, whether they are held electronically or on paper files, remain Crown Public Records and continue to be subject to the Public Records Act 1958. The NIO therefore retains ownership of and control of access to all pre-devolution records."

If this is an indication of a general government position, although the protocol has no legal power, it suggests that "the past" is regarded as a national security matter. In any event, it is likely that national security issues will be invoked in the area, for example, of provision of intelligence – dealt with below. We might note that the European Court has recently held that the destruction of relevant records (and we might think by extension, the withholding of records) itself breaches Article 2.[20] It will be necessary to explore the views of the UK government as well as the devolved Executive on where legislation would be best placed.

Access to Intelligence

Access to intelligence records, which we believe include all the Stalker-Sampson-Stevens material, has been a problem in legacy cases whether relating to OPONI, inquests or the HET. The recent HMIC report makes the issue crystal clear when it says:

> "... the HET's intelligence unit is staffed largely by former employees of either the RUC or the PSNI. Staff in the PSNI intelligence branch, some of whom are former RUC special branch officers, are the gatekeepers for intelligence being passed to the HET. The assembling of relevant intelligence material plays a central role in the review process and in any subsequent investigation."[21]

[19] This is an unpublished Northern Ireland Office document, shared with OFMdFM and the Assembly and Executive Review Committee (16 March 2010) and released to CAJ under Freedom of Information
[20] Finogenov and others v. Russia [2011] 18299/03 and 27311/03
[21] Inspection of the Police Service of Northern Ireland Historical Enquiries Team (HMIC Report) P.91

In this respect, what goes for HET goes for every other existing or future investigative mechanism. The HIMC report goes on to say:

> "For this reason, it would be preferable to institute some independent procedure for guaranteeing that all relevant intelligence in every case is made available for the purposes of review, to ensure compliance with the Article 2 standard."[22]

This is an extraordinarily important recommendation. While it may be appropriate for the PSNI to be the custodians of past RUC, and perhaps other source, intelligence, it is clear that HMIC do not regard the relevant officers, including ex-RUC special branch officers, as independent to Article 2 standards for the purpose of investigating the past. We therefore need some mechanism, entirely independent of the PSNI and government, with access to all intelligence records, including those held by other bodies, such as the Security Service and the Army, to ensure that "all relevant intelligence in every case" is made available to the new body. This cannot be a person appointed by the government on a "trust me" basis, who reviews matters in private and asks the public to "trust me" that everything is fine. Preferably, it should be a security-cleared element of the body itself who are able to become familiar with all intelligence held and also who are kept abreast of the needs of all live investigations being carried out.

Personnel

In the current HET, cases potentially involving former RUC personnel are supposed to be investigated by teams comprised of officers with no connection with Northern Ireland. The teams were colour coded to reflect this aspect of sensitivity of the work they carry out. If there is to be one mechanism for all cases, this kind of distinction, which is difficult in any case, as we have noted

above, would be invidious. The implication is, of course, that no investigators should be ex-RUC or PSNI officers, or have been involved in any armed group, or be involved in any political party with an interest in Northern Ireland and other criteria about connection with Northern Ireland may need to be developed. It should not need saying that this kind of arrangement, which is common practice in UK investigatory bodies,[23] does not reflect in any way on the integrity of individual officers but is necessary to avoid the perception as well as the reality of any bias or lack of independence.

The implication from the above is that police officers from other regions of the UK or elsewhere would be eligible to serve in such a body and it would be desirable to have access to specifically police investigatory skills. However, there are other investigative disciplines and it might be desirable to have a leavening of personnel from a non-police background.

[22] HMIC Report p.92
[23] See e.g. IPCC Statutory Guidance http://www.ipcc.gov.uk/en/Pages/statutoryguidance.aspx §9.

PSNI

We are not sure of the extent to which anyone would currently argue that the PSNI has the requisite level of independence to undertake the kind of investigations we are here considering. It certainly seems to be accepted, by the very existence of OPONI and its involvement in legacy cases involving possible misconduct by RUC officers, that it cannot be independent in such cases. Certainly, the HMIC's references to the control of intelligence, quoted above, tend to assume that one part, at least, of the PSNI, is not Article 2 independent in relation to these cases. The HMIC report elsewhere does say that the HET structure could "in principle" mean that it was independent, but that is hardly a ringing endorsement.

In the 2007 case, Brecknell v. UK[24] the European Court commented that it was satisfied that the PSNI was "institutionally distinct" from the RUC. That does not necessarily amount to the required level of independence and it is arguable, in any case, that that finding was *obiter* in that the court's finding of a breach of Article 2 relied on the fact that the RUC was in charge of the investigation for many years. In any event, that case was argued before the revelations about the rehiring of ex-RUC officers in sensitive posts and the HET debacle.

It appears clear that few people would argue for the PSNI to take over OPONI's role in legacy cases. If, therefore, we are to have one system for cases involving both alleged state and non-state perpetrators, it would be inappropriate to lodge any new mechanism under the auspices of the PSNI.

Effectiveness

The effectiveness of an investigation depends on the relevant body having sufficient powers to determine the full circumstances and nature of the actions of those responsible for the death and to lead to the identification, and where appropriate, prosecution and punishment of those responsible. In practice the body must have a sufficiently wide brief in terms of *what* is to be investigated and the actual powers on the ground so that *how* it is investigated is effective. So, in this case, the brief would have to be the ability to examine all conflict-related deaths except for those where it is clear, and no-one claims otherwise, that the perpetrator(s) were caught and brought to justice.

In terms of investigatory powers, it would be necessary that investigating officers had the powers of a constable, as with OPONI investigators, including the power of arrest. Presumably, the powers of search, requirement to produce evidence and so on, would be the same as in a normal police investigation. It would probably be helpful if there was a requirement for serving and ex-members of security forces to cooperate as appropriate with investigations. It would also be useful for a specific obligation to be placed on all public authorities to cooperate with the new body when relevant.

[24] Brecknell v. UK [2007] 32457/04

In terms of possible prosecutions, in cases where sufficient evidence had been uncovered, we would anticipate that files would be prepared for the Public Prosecution Service. In turn, they should quite properly provide reasons for cases where the decision was not to prosecute (as the remit of the single mechanism should encompass past prosecutorial decisions). This is without prejudice, of course, to any limitation on prosecutions that might be generally agreed by Northern Ireland society and politicians and enshrined in law. Unless and until that happens, however, the obligations of Articles 2 and 13 of the European Convention mean that prosecutions must be proceeded with where the evidence justifies it.[25]

Transparency

There should be regular public reports and continuing liaison with the next-of-kin and families of the deceased. While there is always room for improvement, generally speaking the procedures of the Police Ombudsman's office have been acceptable in principle, if not always in practice. In particular, the responsible officials of any new body should always be ready to explain its actions or lack of them.

Promptness

At one level, this principle cannot, by definition, apply in historic cases. However, the essence of the principle is a demonstration of the determination of the state to act properly and forcefully to

uphold the rule of law in all cases without exception. Given that there will always have been delay, wilful or not, this determination must be demonstrated by the proper resourcing of a new body and the vigour with which it undertakes its duties.

Conclusion

CAJ is convinced that the major obstacle to dealing properly with the past remains the many conflict-related deaths which are unresolved or were inadequately investigated. The fall-out from this not only poisons the present but the failure to properly investigate represents a continuing violation of human rights obligations. The patchwork system we currently have is in complete disarray and no amount of tinkering or running repairs will make it fit for purpose.

We believe we now have the clear evidence of what is required in a comprehensive system to deal with all conflict-related deaths in a manner compliant with Article 2 of the European Convention on Human Rights. This paper is a first contribution to the urgent and necessary debate on this matter.

[25] "Given the fundamental importance of the right to protection of life, Article 13 requires…a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life…" Mahmut Kaya v. Turkey Op. Cit. §124

Summary of Proposal

In summary, CAJ proposes the following:

- A new mechanism should be established to investigate unresolved cases of Troubles-related deaths, follow up any evidential opportunities uncovered, move to prosecution where possible and, only where those avenues are exhausted, provide as full an account as possible of the circumstances surrounding the death

- The organisation should be established by statute as a fully independent entity with a ring-fenced budget and take over the current responsibilities of the Police Ombudsman, HET and the PSNI in respect of investigating Troubles-related deaths

- The structure should be a corporation sole or, if collective, all members should be independent and the appointment process should be fully transparent

- The organisation should have a security-cleared unit, answerable only to its own governing body, with access to all intelligence material held by the PSNI and other agencies, to ensure that all relevant intelligence in every case is provided to investigators

- The personnel of the organisation should not include any current or former Northern Ireland police officers, nor anyone involved in the past with any armed group involved in the Northern Ireland conflict, or anyone involved in or connected with a political party with an interest in Northern Ireland, and it may be necessary to add other criteria to ensure demonstrable independence from any faction in Northern Ireland society

- The body must have sufficient powers to determine the circumstances and nature of the actions of those responsible for the death and to lead to the identification, and where appropriate, punishment of those responsible

- There should be regular public reports and continuing liaison with the next-of-kin and families of the deceased