



## **CAJ's submission no. S430**

**Does the PSNI have the “Article 2” level of independence to investigate potentially unlawful killings where agents of the state may have been involved?**

## 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.

## Introduction

The purpose of this paper is to explore the issue of the “independence” of the PSNI in relation to Article 2 compliant investigations into cases of potentially unlawful killings where state agents may have been involved. This is connected to the issue of whether the HET can be made Article 2 compliant while it remains part of the PSNI. Nothing in this paper should be taken to reflect negatively on the major strides taken in the accountability of policing here and the many sided attempts the PSNI has made to put human rights standards at the heart of its practice.

## The ECHR Standard

The *Jordan* case is generally understood to have laid down the essential characteristics of an investigation into potentially unlawful killing.<sup>1</sup> In respect of the concept of independence, paragraph 106 of the judgement of the European Court reads:

“For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see e.g. the *Güleç v. Turkey* judgment of 27 July 1998, Reports 1998-IV, §§ 81-82; *Öğür v. Turkey*, [GC] no. [21954/93](#), ECHR 1999-III, §§ 91-92). This means not only a lack of hierarchical or institutional connection but also a practical independence (see for example the *Ergi v. Turkey* judgment of 28 July 1998, Reports 1998-IV, §§ 83-84, where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident).”

There are a number of points about this paragraph that may sometimes be lost in the usual summaries made of it. First, it refers to “the persons responsible for and carrying out the investigation.” This means that both those managing, commanding or in some other way being “responsible” for the investigation and those actually, physically carrying it out must be “independent from those implicated in the events.” Presumably, if either of these levels is in some way compromised, then so is the investigation itself. Moreover, this sentence refers to “persons,” which presumably, in this context, means individual human beings, rather than institutions. So the standard is not capable of being satisfied at an institutional level but must go down to the level of individual people.

---

<sup>1</sup> *Jordan v UK* [2001] [24746/94](#)

Second, the next element of the standard is “a lack of hierarchical or institutional connection.” “Hierarchical” connection can clearly refer to the relevant individuals being either in command of, or commanded by those implicated in the events being investigated. It might very well also mean being answerable to the same commander – separate and distinct branches but part of the same hierarchical tree. It would presumably have an impact on an investigation if the investigators have to report to a commander or command team which is also accountable for the actions of the people under investigation. “Institutional” connection is perhaps less clear – what is an institution? If people share a uniform, emblems, operating procedures, constitution or management structure, they are presumably part of the same institution. There may be difficulties in definition in concrete circumstances where there are differential roles within an organisation or when more than one organised grouping answers to the same management structure. There may be even more difficulties when an “institution” has changed over time – what is the element of continuity and what of discontinuity? It will be more complicated again if the famous Northern Ireland peace process tool of “creative ambiguity” has been deployed. Perhaps the safest way to approach this element of the standard is by looking at legal responsibility – does the head (whether individual or corporate) of one grouping of people have legal responsibility both for them and the comparator group (distinguished, for example, by function, geography or time)? If so, it seems fair comment that there is an institutional connection.

Third, the investigating persons must demonstrate “a practical independence.” This is not further defined but the example given is significant. If we assume that the public prosecutor had theoretical hierarchical or institutional independence, his *practical* lack of independence was demonstrated by his actual behaviour: “his heavy reliance on the information provided by the gendarmes implicated in the incident.” So, if we had a hypothetical investigator, who was as organisationally distinct and independent from any group allegedly involved in the incident as could be, but who accepted their view of events uncritically, or “relied on their local knowledge,” or failed to pursue evidential lines of enquiry that might implicate them, it is pretty clear that his or her investigation would fail the *Jordan* independence test.

## **Independent from whom?**

### **The RUC**

For the purposes of this discussion and up to a point, the question of whether the PSNI is independent from the RUC is academic. Domestic law in the form of The Police Act (NI) 1998 Part VII does not permit the police in Northern Ireland to investigate complaints made by members of the public about police officers, or any case in which the conduct of a police officer may have resulted in the death of some other person. These must be referred to the Police Ombudsman for Northern Ireland (PONI) for independent investigation. So, even if the PSNI were independent of the RUC in the Article 2 sense, ECHR law is, as the European Court never tires of

pointing out, only a minimum standard and domestic law would be seen as presenting a higher bar. In any event, the PSNI cannot investigate a case where a police officer's actions might have resulted in a death and that is that. Amongst other consequences, this is why HET "refers any matter arising from its work which raises a concern of possible police criminality to the PONI."<sup>2</sup> It is also worth noting that, where the PONI finds evidence of police criminality, it is obligated by law to pass the evidence file to the Director of the Public Prosecution Service<sup>3</sup> with no further input or role for the PSNI.

### **"Mixed" or collusion cases**

There are, unfortunately, many cases where possible police criminality is only part of an investigation. We may describe these as "mixed" cases or as cases in which police collusion in criminality has been alleged. The HET is not an appropriate agency for investigating police officers but is permitted to investigate agents (informants) who were operating for the police and other state agencies. In historic cases, this has resulted in a "parallel" process where aspects of the same case have been dealt with by both PONI and HET. As recorded in the CM Interim Resolution CM/ResDH(2007)73 the HETs "view" was that cases "that allegedly involve the actions of police officers exclusively" would be dealt with by PONI alone and that a "parallel investigation" would take place by both HET and PONI when both "police and external collusion was alleged." CAJ has sought further information as regards the referral mechanism from HET to PONI under freedom of information legislation. Whilst the number of cases to August 2013 the HET has referred to the Ombudsman under their exclusive remit, was said by the PSNI to be 44 cases (53 victims) they have declined to provide statistics on both the number of cases referred for parallel investigation and the overall number of cases which have involved informants.<sup>4</sup> So the PSNI does not wish us to know even how many "parallel" investigations are being carried out. Furthermore, the PSNI have declined (on grounds of both "national security" in general and the involvement of the Security Service specifically) to confirm or deny whether they hold any further information on the matter.

The numbers game here is very confusing. Back in 2008 the UK Government said: "Currently the OPONI has a total of 63 cases which have been referred to them by the HET."<sup>5</sup> Recently, an official of PONI told CAJ that the number was 59, though perhaps that meant active cases. In any event, if 44 were "exclusive" cases, that means that at least 15 collusion cases have been referred to PONI for parallel investigation, although that does seem a small figure. It may be that the PSNI will be prepared to give further information on these matters to the Policing Board.

---

<sup>2</sup> HMIC Report into HET p.37

<sup>3</sup> Police (NI) Act 1998 S.58 Sub-section (2) "If the Ombudsman determines that the report indicates that a criminal offence may have been committed by a member of the police force, he shall send a copy of the report to the Director together with such recommendations as appear to the Ombudsman to be appropriate."

<sup>4</sup> PSNI FOI reference F-2013-03386.

<sup>5</sup> CM/Inf/DH(2008)2 revised, 18 November 2008 §38

However, the most quoted case on the issue of PSNI independence from the RUC is such a “mixed” or collusion case – that of *Brecknell v. UK*.<sup>6</sup>

### ***Brecknell***

This case originated in a murderous attack on a bar in County Armagh in December 1975, apparently by Loyalist gunmen. However, after many complicated events and investigations, in January 1999, John Weir, an ex-RUC officer, who had been convicted of another murder and had served 13 or more years in prison, made further allegations about security force involvement in the 1975 attack. The case was brought by Mrs Brecknell, whose husband Trevor was killed in the original attack, and alleged that the UK had failed to provide an effective official investigation into the circumstances of her husband’s death after allegations were made in 1999 by John Weir as to RUC involvement, invoking Article 2 of the Convention.

There were various elements involved in the post 1999 investigation, first the RUC, then the PSNI (from November 2001), then the Serious Crime Review Team (SCRT) (established in March 2004) then the HET (established in March 2005). The Government’s case also contained the assertion that PONI was “in a position to investigate and monitor the HET investigation,” though it is not clear from the Court papers whether they actually had any involvement and we are unaware of any general practice whereby the PONI “monitors” an HET investigation. In any event, the Court found that there had been a breach of Article 2 on the grounds that the RUC “cannot be regarded as disclosing the requisite independence,” and “for a considerable period the case lay under the responsibility and control of the RUC.”<sup>7</sup> However, the court also commented that it was “satisfied that the PSNI was institutionally distinct from its predecessor even if, necessarily, it inherited officers and resources.”

That one sentence was not elaborated on by the court and may be regarded as *obiter* in that the finding was not necessary, on the facts of the case, for the Court’s conclusion. It has, however, been widely quoted to endorse the view that the PSNI is independent of the RUC and indeed that *Brecknell* means that the PSNI is inherently Article 2 compliant when investigating historic collusion cases. In a letter of March 2012 to CAJ from the Command Secretariat of the PSNI it is stated:

“Where any review, being undertaken by HET, identifies new evidential leads the investigation is then passed on to the PSNI Crime Operations Department who will undertake a fully compliant Article 2 ECHR investigation. The independence of the PSNI to undertake such an investigation has been tested in court. In *Brecknell v. United Kingdom* (27 November 2007), the European Court of Human Rights stated explicitly that the PSNI (including the HET) is institutionally distinct from the RUC.”

---

<sup>6</sup> *Brecknell v UK*, 27 November 2007

<sup>7</sup> Op. Cit. §76

We should also note that the Secretariat of the Committee of Ministers has quoted the same sentence from *Brecknell*.<sup>8</sup>

CAJ does not believe that this one sentence can bear that heavy burden and we wish to marshal some countervailing arguments. First, as we noted above, the standard refers to “persons,” not institutions, so the PSNI as an institution cannot be inherently Article 2 compliant. Second, the *Brecknell* statement refers only to “institutional” distinctness, and it is not clear if that is supposed to include “hierarchical” distinctness or, indeed, what it actually means and whether it is correct. Third, it makes no reference to “practical independence” and we believe that elements of the contemporary structure, personnel and behaviour of the PSNI vitiate the idea of “practical independence” from the RUC.

### ***Individual independence***

The first argument need not detain us long. At one level, whether individual investigators or investigation managers are independent must be decided upon on a case by case basis by reference to individual biographies or perhaps individual opinions or behaviours. If, however, individuals who demonstrably lack independence are in posts or positions which have some ongoing engagement with investigations, then that questions institutional “practical independence” and we will come to it later.

### ***Institutional distinctness***

The second point is that the concept of “institutional” distinctness lacks clarity and we want to give some contradictory evidence. The first evidence is from the legislation establishing the PSNI. Section 1) subsection (1) of the Police (Northern Ireland) Act 2000 states:

“(1)The body of constables known as the Royal Ulster Constabulary shall continue in being as the Police Service of Northern Ireland (incorporating the Royal Ulster Constabulary).”

On the face of it, that implies a strong institutional continuity. Indeed, explaining it, the then Secretary of State Peter Mandelson said:

“On 17 May, in the House, in reply to a question from my hon. Friend the Member for North-East Derbyshire (Mr. Barnes), I said that I believed that the sensible way forward was to provide in the Bill a legal description that incorporates the Royal Ulster Constabulary--effectively the title deeds, as I put it, of the new service--making it clear that disbandment is

---

<sup>8</sup> CM/Inf/DH(2008)2 revised, 18 November 2008 §52

not taking place, while at the same time introducing a new name, the Police Service of Northern Ireland, which will be used for all working and operational purposes.”<sup>9</sup>

That statement also seems to reflect a good deal of institutional continuity. However, we all know that this was an example of “creative ambiguity” at work – Unionists could take it that the RUC was continuing in all but name and Nationalists could take it that a new police service had been established. We would argue that that ambiguity, creative or not, means that there is a very uncertain foundation for the assertion that the PSNI is “institutionally independent” for the purposes of investigating crimes, much less murders, in which police officers of its predecessor force may have been involved.

Another body of rather compelling evidence is contained in the HMIC Report into HET. A significant proportion of the report is spent wrestling with the extent to which and in what ways, HET can be regarded as being independent of the PSNI. The HMIC was asked specifically whether the HET was Article 2 compliant. On page 90 of the Report, the Inspectors set out a summary version of the independence test:

“In order for an investigation to be Article 2 compliant, the persons responsible for and carrying out the investigation must be independent, both structurally and practically, from those implicated in the events.”

The Report goes on to say that:

“The Director of the HET stated that cases of state involvement are assigned to the red and white teams, which are in principle staffed by people not previously associated with the RUC or the PSNI.”

The inescapable implication is that independence in these cases would be undermined if some of those involved *were* people previously associated with the RUC or the PSNI. If the PSNI were itself independent, why would this matter? The next few sentences of the Report are slightly confusing in that they seem to present pros and cons as to how close the structural connection is between the PSNI and HET without coming to any clear conclusion.

“Also, the only connection between the two has been the reporting line between the Director of the HET and the Chief Constable. However, a number of NGOs state that the line of accountability was, in fact, between the ACC – Crime Operations and the Director of the HET. Furthermore, the HET is a unit of the PSNI and is located in police premises. In our view

---

<sup>9</sup> <http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo000606/debtext/00606-12.htm>



the NGOs found and produced credible evidence that the line of accountability is with ACC crime operations.”<sup>10</sup>

Whatever the actual balance of opinion on the issue, the whole discussion is about the extent of structural independence of HET from the PSNI. Again, we have to ask why any of this would matter if the PSNI was itself independent to the Article 2 standard? It is clear from the amount of effort the Inspectors expend exploring this issue that, although they indirectly quote *Brecknell*, they do not regard the PSNI as Article 2 compliant in terms of independence from the RUC.

There is another aspect of institutional continuity between the RUC and the PSNI and that is the aspect of the latter taking responsibility for the former’s actions. This was clearly seen in the Chief Constable’s controversial response to the PONI report on the McGurk’s Bar bombing.<sup>11</sup> In this the Chief Constable seemed not to accept the criticisms of the RUC commenting that “other reports had reached different conclusions.”

In another sense, the Chief Constable is regularly held legally responsible for the past actions of the RUC. In civil proceedings for damages for the wrong actions of the RUC, for example, he is cited as the defendant and briefs lawyers to defend the cases.<sup>12</sup> It may be argued that this is a purely technical matter and it is really the state itself maintaining continuity of legal responsibility. However, if the Chief Executive of a current organisation is held legally responsible for the actions of those under the command of a Chief Executive of a predecessor organisation, that would normally be excellent evidence of institutional continuity. It is not clear why or indeed whether, the RUC-PSNI relationship is any different.

### ***Practical independence***

Our third argument noted above was that we believe that elements of the contemporary structure, personnel and behaviour of the PSNI vitiate the idea of “practical independence” from the RUC. The first tranche of evidence we wish to present to back up this argument refers to what is sometimes known as the “rehiring scandal” and was referred to in the following terms in our joint submission to the Committee of Ministers with the Pat Finucane Centre:

---

<sup>10</sup> This was in a Joint submission (no. 376) by the Committee on the Administration of Justice and the Pat Finucane Centre in relation to the supervision of cases concerning the action of the security forces in Northern Ireland, February 2012, page 4. The evidence was a published organisational chart showing the accountability link direct to the ACC. We ought to note that, although the Report here seems to accept that accountability is to the ACC, on page 49 it refers to the latest PSNI Organisational Chart and asserts that it is actually to the Chief Constable.

<sup>11</sup> <http://www.bbc.co.uk/news/uk-northern-ireland-12534056>

<sup>12</sup> For example: *McClurg v Chief Constable* [2009] NICA 37 An appeal on a class action by some 5,500 former and serving members of the Royal Ulster Constabulary and Police Service of Northern Ireland who had claimed to have sustained a psychological/psychiatric disorder following exposure to trauma experienced during the course of the terrorist campaign in Northern Ireland. The defendant was the Chief Constable of the PSNI.

“The concerns over the independence of HET (and other PSNI staff who may have a role in the HET investigative chain) from those potentially implicated in the incidents under examination has been recently compounded. This is due to the recent uncovering of a PSNI practice of re-contracting former RUC officers as ‘civilian staff’, apparently carrying out key police roles. This relates to former RUC police officers who had ‘retired’ as a direct result of the reforms to policing contained in the peace settlement now being re-contracted outside standard police recruitment processes as ‘civilian’ staff within the PSNI. Whilst the PSNI would not disclose details to us under freedom of information legislation some details were eventually given to the oversight body, the Policing Board, which were then published by the BBC. This indicates a significant number of rehired officers are involved in the present PSNI Crime Operations Department including C2 and C3. There are therefore potentially such rehired officers, who may have held senior positions within the RUC Special Branch, within the parts of the PSNI dealing with historic investigations, as well as potentially the HET itself. Further serious questions arise about the general accountability and oversight of these staff (as their ‘civilian’ status puts them beyond the scrutiny of the Police Ombudsman), we have raised with the PSNI our specific concerns about the role former police officers have in the process of historic investigations into the actions of their former units. In particular we have concerns about the extent to which former Special Branch officers are involved in gatekeeping access and/or providing the intelligence data on which many HET legacy investigations are reliant, particularly when the very investigations themselves engage the activities of police agents. We have also sought, but not yet obtained, clarity from PSNI as to the precise roles rehired ‘civilian’ staff are playing in historic investigations in relation to their former role in the RUC/PSNI.”<sup>13</sup>

These concerns were added to by the HMIC Report which provides further evidence to support our argument. While the Inspectors did not specify whether the personnel involved were “rehired” as such they drew attention to the role of those employed both within the Intelligence Unit of HET and C3 intelligence branch in the PSNI. They noted that:

“The HET has a dedicated unit of 17 staff (of whom 15 are former employees of the RUC or the PSNI) which deals with all intelligence received from C3 intelligence branch as well as from other agencies, such as the Ministry of Defence (MOD), the Security Service and forensic service providers.”

The Report goes on to say:

“...the HET’s ability to demonstrate independence in the intelligence process is undermined by the involvement of former RUC and PSNI officers working for the HET in managing the information from the PSNI C3 intelligence branch.”

---

<sup>13</sup> Op. Cit. p.6 Further details are provided in the highly critical Audit Office Report “PSNI: Use of Agency Staff” [http://www.niauditoffice.gov.uk/index/publications/report\\_archive\\_home/2012/psni\\_final\\_report.pdf](http://www.niauditoffice.gov.uk/index/publications/report_archive_home/2012/psni_final_report.pdf)

This is, of course, another indication of the HMIC's concern that HET may not be, or appear not to be, independent of the PSNI but it also reflects a flawed structural element set up and managed by the PSNI. Further on, the Report repeats its comments about HET's Intelligence Unit but also draws attention to the staffing of C3 and its "gate-keeping" role:

"... 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."<sup>14</sup>

In this respect, what goes for HET goes for every other existing or future investigative mechanism. The HMIC 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."<sup>15</sup>

The reality is that the independence of C3 intelligence branch, which is central to all historic cases, perhaps most particularly collusion cases, is fatally flawed by the involvement of former RUC Special Branch officers.

Evidence has also come to light that the PSNI personnel involved in trawling through the Stalker-Sampson archives in order to provide disclosure of material to inquests are former Special Branch officers. The Chief Coroner has questioned the Chief Constable's decision to use four ex-Special Branch Officers and one ex-RUC Intelligence Branch Officer to decide what information is disclosed to the inquests. PSNI lawyers responded negatively: "It is not accepted that the Senior Coroner has power to direct inquiries to the Chief Constable in respect of his staff or the contractors he engages to assist in the discharge of his statutory functions."<sup>16</sup>

These investigations are not into insignificant matters but the alleged "shoot to kill" policies and collusion in the early eighties which resulted in the deaths of six young men. John Stalker is reported as saying: "The Special Branch targeted the suspected terrorists, they briefed the officers, and after the shootings they removed the men, cars and guns for a private de-briefing before CID officers were allowed any access to these crucial matters."<sup>17</sup> Of course, the PSNI is not the investigating organisation here, it is the coronial process that is hoping to get to the bottom of hugely serious

---

<sup>14</sup> Inspection of the Police Service of Northern Ireland Historical Enquiries Team (HMIC Report) P.91

<sup>15</sup> HMIC Report p.92

<sup>16</sup> <http://www.thedetail.tv/issues/146/psni-reject-coroners-request/psni-rebuffs-coroner-over-special-branches-handling-of-stalker-report>

<sup>17</sup> Op. Cit.

allegations, but it is the PSNI which is controlling the flow of information and through a structured process that could not begin to meet the Article 2 standard of independence.

It is submitted that this evidence is sufficient to demonstrate beyond doubt that the PSNI, as presently constituted and staffed, not only lacks the practical independence necessary to investigate “mixed” or collusion cases but, to an extent at least, is knowingly compromising the independence of the inquest process.

It is important to stress that the issue is not with a proven bias in any given individuals. The recent decision of the English Court of Appeal<sup>18</sup> made the point clear. This case which ruled that the Iraq Historic Allegations Team, set up to investigate allegations of ill-treatment of Iraqi detainees by members of the British armed forces, lacked the requisite independence to fulfil the investigative obligation under Article 3,<sup>19</sup> set out clearly the significance of ensuring that investigative mechanisms are independent:

“...for the appellant to succeed in establishing a lack of independence, it is not necessary for him to prove that some element or person in IHAT actually lacks impartiality. One of the essential functions of independence is to ensure public confidence and, in this context, perception is important. As Lord Steyn said when giving the single opinion of the Appellate Committee in *Lawal v Northern Spirit Ltd* [2003] ICR 856, albeit in a different context (at paragraph 14): ‘Public perception of the possibility of unconscious bias is the key.’”<sup>20</sup>

With key roles staffed by ex-RUC Special Branch officers, it is hard to see how the PSNI can pass this “public perception” test.

## **The Army and other state agencies**

It might be argued that, whatever about the RUC, the PSNI has no institutional connection with the British Army and therefore is competent to carry out investigations into killings in which soldiers may be implicated to Article 2 standards. That appears to be the view of the PSNI in that it is purporting to investigate prosecutorial possibilities in the Bloody Sunday case and has argued that it has an obligation to carry out Article 2 investigations into the 13 “RMP (Army) cases,” in spite of opposition from the families involved.<sup>21</sup>

There are two main objections to that position. First, during the conflict, there was extensive cooperation as well as some rivalry between state security agencies. To some extent at least members of the different security forces saw themselves as allies in a war against terrorism. There is

<sup>18</sup> *Ali Zaki Mousa v Secretary of State for Defence & Anr* [2011] EWCA Civ 133

<sup>19</sup> While these are allegations of torture and the court recognised that this is essentially an Article 3 rather than an Article 2 case, it was common ground that the same basic principles apply.

<sup>20</sup> *Ibid*, Paragraph 35

<sup>21</sup> Press Release 20 September 2013 <http://www.patfinucanecentre.org/>

considerable evidence that RUC Special Branch interacted with, and to an extent was directed by, MI5, the secret Security Service. That agency reports directly to the Home Secretary and has significant influence on Government policy and, in particular, the operations of all those engaged in a conflict against terrorism.<sup>22</sup> Furthermore, in principle the British Army was always deployed “in aid of the civil power” meaning the police. From 1976 “police primacy” was the standard doctrine and there is evidence of RUC Special Branch at least being involved in the planning of operations which were then carried out by the Army. If, as we have shown, the PSNI is not independent from the RUC and ex-RUC Special Branch officers occupy strategic roles within it, it is hard to see how it could claim to be distinct from any of the security forces that cooperated so closely together and under a common direction.

Second, for the past eight years the PSNI has run a unit, the HET, which operated a policy in relation to cases involving the British Army which unlawfully and contrary to Article 2 distinguished between state and other perpetrators. It promulgated a false view of the law of murder as related to the actions of a soldier on duty, even though the law had been decisively settled 10 years before it was established, in versions of its Operating Procedures in 2005 and 2012.<sup>23</sup> HET was established by the PSNI with no other legal authority than its own powers and throughout its existence and to this day, it has been directly answerable to the Chief Constable. Is it possible to have faith in the independence of a police service when it tolerated, and presumably supported, this unlawful policy which appeared to give special consideration to British soldiers? In this respect, in so far as the HMIC Report utterly condemned the policies of the HET they were also condemning the policies of the PSNI, or at least its Chief Constable.

## Conclusion

This paper has sought to bring together law and evidence relating to the independence of the PSNI in Article 2 terms if called upon to investigate killings where state agents may have been involved. Our conclusion is that it does not have the requisite level of independence from any of the state security forces that were engaged in the conflict. The purpose of the exercise was to assess whether an organisation such as HET could ever be Article 2 compliant while it was part of the PSNI – the conclusion must be that it could not. Whatever arrangements might be made to emphasise the independence of HET from the PSNI or any other agency, the lack of a statutory basis means that it could always be interfered with by the PSNI or elements within it.

This conclusion points to the need, already argued by CAJ, for an independent, Article 2 compliant agency to investigate all cases of unresolved deaths arising out of the conflict.

---

<sup>22</sup> “The Policing You Don’t See” CAJ 2012 pp 58, 59

<sup>23</sup> HMIC Report pp. 74-79