

Submission from the Committee on the Administration of Justice (CAJ) to the United Nations Human Rights Committee in response to the Concluding Observations on the 7th Periodic Report of the UK under the International Covenant on Civil and Political Rights (ICCPR) (S465)

June 2017

Follow up Procedure: “accountability for conflict-related violations in Northern Ireland” (CCPR/C/GBR/CO/7, paragraph 8).

The Committee on the Administration of Justice (CAJ) is an independent human rights NGO with cross community membership in Northern Ireland and beyond. It was established in 1981 and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its international human rights obligations.

This submission will address Concluding Observation 8 (“*accountability for conflict-related violations in Northern Ireland*”) which the Committee sought action on as a matter of urgency and which was consequently selected for the Committee’s follow up procedure. A summary of our views in relation to the five sub-areas identified by the Committee is followed by each of these areas being examined in further detail.

The UK issued a response in August 2016 a year on from the recommendation. This submission is cognisant of this response and developments since. This includes the November 2016 report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Grieff, on his mission to the UK which focused specifically on the legacy of the Northern Ireland conflict.¹

The 2017 Universal Periodic Review of the UK by the Human Rights Council also engaged the subject matter of the Committee’s concerns, and led to the following recommendations:

¹ UN DOC A/HRC/34/62/Add.1, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland, 17 November 2016.

6.156. Increase the necessary resources to the service of the Coroner to allow him to carry out impartial, swift and effective investigations on all the deaths linked to the conflict in Northern Ireland (Switzerland);

6.157. Continue negotiations on transitional justice issues and implement transitional justice elements of the Stormont House Agreement (Australia);²

The Committee's Concluding Observation 8 in full:

Accountability for conflict-related violations in Northern Ireland

8. While welcoming the adoption of the Stormont House Agreement, the Committee remains concerned (see CCPR/C/GBR/CO/6, para. 9) about the quality and pace of the process of promoting accountability in relation to “the Troubles” in Northern Ireland and about the absence of a comprehensive framework for dealing with conflict-related serious human rights violations. The Committee also notes with concern (a) the multiple independence and effectiveness shortcomings alleged in relation to the Police Ombudsman’s ability to investigate historical cases of police misconduct; (b) that the Legacy Investigation Branch established within the Police Service of Northern Ireland to carry out the work of the closed Historical Enquiries Team may lack sufficient independence and adequate resources; (c) delays in the functioning of the Coroner’s inquest system in legacy cases; (d) the retention in the Inquiries Act 2005 of a broad mandate for government ministers to suppress the publication of inquiry reports and the lack of safeguards against abuse of those executive powers; and (e) that the review relating to the murder of Patrick Finucane (i.e. the de Silva Review) does not appear to satisfy the effective investigation standards under the Covenant. The Committee, while welcoming the proposed establishment of an Historical Investigations Unit to deal with outstanding cases related to the conflict in Northern Ireland, is concerned that the quality of investigations to be conducted may be affected by the passage of time, given that the unit would become fully operational only in 2017 (arts. 2 and 6).

² UN Doc A/HRC/WG.6/27/L.7, 8 May 2017 (Draft report of UPR Working Group on UK)

The State party should:

(a) Ensure, as a matter of particular urgency, that independent, impartial, prompt and effective investigations, including those proposed under the Stormont House Agreement, are conducted to ensure a full, transparent and credible account of the circumstances surrounding events in Northern Ireland with a view to identifying, prosecuting and punishing perpetrators of human rights violations, in particular the right to life, and providing appropriate remedies for victims;

(b) Ensure, given the passage of time, the establishment and full operation of the Historical Investigations Unit as soon as possible; guarantee its independence, by statute; secure adequate and sufficient funding to enable the effective investigation of all outstanding cases; and ensure its access to all documentation and material relevant to its investigations;

(c) Ensure that the Legacy Investigation Branch and the Coroner's Court in Northern Ireland are adequately resourced and are well positioned to review outstanding legacy cases effectively;

(d) Reconsider its position on the broad mandate of the executive to suppress the publication of inquiry reports under the Inquiries Act 2005;

(e) Consider launching an official inquiry into the murder of Patrick Finucane.

In summary, in relation to the five sub-areas identified by the Committee:

A: Urgently ensure effective investigations into conflict-related human rights violations- including through the Stormont House Agreement (SHA) mechanisms;

- The UK has not progressed implementation of the 2014 SHA legacy mechanisms;
- Under *ad hoc* mechanisms the first ever decisions to prosecute members of the security forces in relation to conflict-era legacy killings were recently taken, with three soldiers now charged;
- There was a significant backlash from prominent sections of the UK media, military and political establishment, including from UK Ministers, with misleading

- propaganda alleging disproportionate bias in legacy inquiries and political attacks on lawyers, law officers and NGOs;
- The Defence Select Committee at the UK Parliament subsequently recommended a 'statute of limitations' amnesty for the security forces for Northern Ireland conflict-related actions;

B: Establish the SHA Historical Investigations Unit and ensure disclosure of material;

- The UK has not progressed the establishment of the Historical Investigations Unit (HIU);
- The UK has convened crisis talks with the Northern Ireland political parties but there is no sign of movement by the UK on the key stumbling block of its proposed Ministerial 'national security veto' over the contents of investigation reports, which derailed the original legislative process;
- The 'national security veto' would prevent disclosure in family reports of any material relating to the actions of intelligence services or intelligence branches of the police and military. This would allow the concealment of practices of informant-based collusion with paramilitary organisations;
- The UK has regularly committed to public consultation on SHA legislation, but this is yet to occur. The negotiations have currently been suspended until the conclusion of the UK General Election;

C: Ensure Legacy Inquests Unit of Coroners Court adequately resourced

- The Legacy Inquests Unit blueprint from the Northern Ireland Lord Chief Justice for outstanding Inquests into legacy deaths has been positively appraised by the Council of Europe Human Rights Commissioner Nils Muižnieks and UN Special Rapporteur Pablo de Grieff;
- Despite requests from successive Northern Ireland Justice Ministers the UK Government has consistently withheld the (relatively modest) resources required for the Unit to take forward its caseload. Initially the UK introduced a pre-condition of consensus between the main Northern Ireland political parties before resources were released. Subsequently the UK Government then took a position that no resources would be released until there is an overall agreement on the full range of mechanisms to deal with the past. Some families have waited over 40 years for inquests into the deaths of their loved ones, many are now elderly and passing away;

D: Reconsider the powers of Ministers to suppress publication of Inquiries Act reports

- The UK has retained these powers and declined to reconsider them;

E: Official inquiry into the murder of human rights lawyer Pat Finucane

- The UK made an unequivocal commitment to a public inquiry into the murder of Pat Finucane in a bilateral international agreement (UK-Ireland) in 2001 (The 'Weston Park Agreement'). This commitment remains unimplemented;

Substantive commentary on the Committee's concluding observations:

(a) Ensure, as a matter of particular urgency, that independent, impartial, prompt and effective investigations, including those proposed under the Stormont House Agreement, are conducted to ensure a full, transparent and credible account of the circumstances surrounding events in Northern Ireland with a view to identifying, prosecuting and punishing perpetrators of human rights violations, in particular the right to life, and providing appropriate remedies for victims;

Unfortunately the UK has not progressed the implementation of the Stormont House Agreement legacy mechanisms, a matter covered in detail in the next section of this submission. The independent mechanisms of the Police Ombudsman and Coroners Courts have continued to deal with a small number of cases but their work has been limited by budget cuts and the withholding of specific resources.³

There have also been a number of Police Service for Northern Ireland (PSNI) investigations into legacy deaths including those resulting from referrals from the Attorney General for Northern Ireland to the Director of Public Prosecutions and consequent decisions as to whether to prosecute suspects.

As a result of these investigations there have now been the first decisions to prosecute members of the security forces in relation to a conflict related deaths since the 1998 Belfast/Good Friday Agreement. There have been two cases, the first related to the killing by a military patrol in 1974 of a young civilian adult with

³ For Further information and figures regarding the Police Ombudsman see S459 CAJ Rule 9 Submission to the Committee of Ministers on the McKerr group of cases (October 2016) <http://www.caj.org.uk/contents/1456>

learning disabilities; for which one soldier has been charged. The second relates to the killing of a republican leader in 1972, for which two soldiers have now been charged.

There has been a considerable backlash from sectors of the security force, media and political establishments both to the uncovering of human rights violations in Police Ombudsman reports and to soldier prosecutions. This includes allegations from members of the UK Executive that the justice system is 'biased' against soldiers and a campaign arguing that such charges constitute a 'witch hunt' against the military.

Proportionality in relation to investigations into conflict related deaths

Given the official contestation over 'bias' in the justice system we feel it is important to set out first some statistical evidence. This is not as straight forward as it may seem. Pablo De Grieff, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, was invited by the UK Government as part of his mandate to assess the Northern Ireland situation and undertook official visits in 2015 and 2016. His November 2016 report documents that despite "*requests to various relevant parties, surprisingly no entity could provide the Special Rapporteur with comprehensive data on the prosecution of State or non-State actors relating to the conflict.*"⁴

The 1998 Belfast/Good Friday Agreement provided for an early release scheme for prisoners with conflict related convictions who were subsequently released after serving two further years. This also applies to future convictions for pre-1998 conflict related offences (although a technicality currently precludes application to pre-1973 offences).

Officially cited estimates of the number of (Irish) republican and (pro state) loyalist paramilitary prisoners during the conflict range from around 20,000–40,000.⁵ These figures will relate to a range of offences. Convictions of state actors are more quantifiable given small numbers. In relation to fatal shootings, the British Army's

⁴ UN DOC A/HRC/34/62/Add.1, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland, 17 November 2016, paragraph 49.

⁵ OFMDFM 'Report of the Review Panel, Employers' Guidance on Recruiting People with Conflict-Related Convictions', March 2012, page 14.

official report of its operations in Northern Ireland (known as *Operation Banner*) cites that there were only four convictions of soldiers during the whole of the conflict, (one of which was subsequently overturned on retrial).⁶ In other cases the soldiers served only a small part of their sentences before being released under an Executive Order and returned to the army.⁷

It is estimated that state actors were *directly* responsible for around 360 conflict deaths, around 10% of the total. This figure does not include however deaths attributable to security force collusion with paramilitary organisations. One NGO representing victims of the state estimates that when factoring in collusion state culpability would rise to around a third of deaths.⁸ It has not been possible to determine an accurate figure in the absence of effective investigations into the past.

In relation to the total number of deaths directly attributable to state actors in the conflict academic research has found that 63% of victims were undisputedly unarmed, with only 12% confirmed as having been in possession of a weapon.⁹ There is evidence of significant deficiencies in investigations into state killings, and of interference in the prosecutorial process, which led to very few prosecutions of state actors. Between 1970 and 1973 (the most violent period of the conflict)- investigations into the soldiers' actions were not conducted by the regular police but by the Royal Military Police (RMP) in a process characterised by procedural anomalies. There is clear authority from the domestic courts that RMP investigations, when judged by the standards of 1971-72 did not meet legal requirements under Article 2 ECHR.¹⁰ Between 1969 and 1974 there were no criminal prosecutions against state actors in relation to deaths. In this period 189 people were killed by state actors, 170 by the military.¹¹ There is archival evidence of

⁶ "Operation banner in Northern Ireland an analysis of military operations, prepared under the direction of the Chief of the General Staff Army Code 71842", July 2006 (Operation Banner Official Report [subsequently withdrawn]), paragraph 427. The cases were namely R v Thain (1984) R v Clegg (1993) (acquitted on retrial in 1999) and R v Fisher and Wright (1995).

⁷ http://www.patfinucanecentre.org/q-there-witch-hunt-against-ex-british-soldiers#_ftn3

⁸ CAJ Apparatus of Impunity? Human rights violations and the Northern Ireland conflict (January 2015), p3.

⁹ Prof Kieran McEvoy, evidence to Defence Select Committee of UK Parliament, 7 March 2017 (<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-committee/investigations-into-fatalities-in-northern-ireland-involving-british-military-personnel/written/48436.html>) citing research by Professor Fionnuala Ní Aoláin (Ulster University and Minnesota Law School) .

¹⁰ *In the Matter of an Application by Mary Louise Thompson for Judicial Review [2003] NIQB 80*

¹¹ Prof Kieran McEvoy, citing research by Professor Fionnuala Ní Aoláin (as above).

political intervention in the prosecutorial process and other irregularities.¹² There is also similar evidence of digression from the standard prosecutorial process in relation to aspects of security policy.¹³

In examining the process the Special Rapporteur concludes that in addition to the exclusive focus on deaths in legacy cases “*The impunity gap in Northern Ireland does not come so much from early release as from apparent selectivity in the deployment of prosecutorial resources.*” The report also concludes that the figures on the prosecution of state actors do not coincide even with the figure of 10% of deaths directly attributed to the state and warns “*Manifest unevenness in the distribution of investigatory and prosecutorial initiatives undermines confidence in rule of law institutions.*”¹⁴

Legacy investigations into conflict related deaths

Many of the patterns during the conflict subsequently re-emerged in legacy investigations following the 1998 Agreement. To date there has not been a single conviction of a member of the security forces as a result of a legacy investigation.

The PSNI Historical Enquiries Team (HET) was established in 2004 with a remit of re-examining conflict related deaths between 1969 and 1998. A two stage process of ‘review’ and full ‘investigation’ was subsequently adopted. Not one of the cases referred for full investigation by the HET was a state involvement case. In relation to disaggregation of protagonists responsible for the 2000 deaths reviewed by the HET – the PSNI has set out the following statistics:

¹² CAJ Apparatus of Impunity? Human rights violations and the Northern Ireland conflict (January 2015), chapter 8.

¹³ The De Silva review into the death of Pat Finucane declassifies records that highlight a policy of running informants within the middle ranks of proscribed organisations which it states “meant they would have to become involved in terrorist activity and operate with a degree of immunity from prosecution.” This was part of a system of holding back information from the judicial process, which the record concedes was ‘technically’ in breach of guidelines Declassified Records of a high level RUC–NIO meeting in March 1987, in the The Report of the Patrick Finucane Review Volume 1 [de Silva Review], paragraph 4.36.

¹⁴ UNSR report, paragraphs 54 and 59.

The HET completed reviews of 1,625 cases, which related to 2,051 deaths; of these 1,038 were attributed to republicans, 536 to loyalists, 32 to the army, and 9 cases where it is not known.¹⁵

Ultimately the HET was stood down following a highly critical inspection by the official HM Inspector of Constabulary which found that the HET had given such preferential treatment to military cases it had not acted in a manner compliant with ECHR Article 2. The PSNI Chief Constable consequently directed that all 238 military cases that had been in the remit of the HET be the subject of a fresh investigation and established a new PSNI Legacy Investigations Branch (LIB). The LIB caseload reportedly involves 530 killings carried out by republicans, 271 by loyalists, 354 by the security forces, and 33 other killings (a total of 1,188). The higher number of security force cases reflects the deficiencies in previous investigations. The LIB is not actively considering all of these cases at once and into 2017 was operating four investigations teams with the majority of the cases relating to the actions of republicans.¹⁶ Whilst some military cases have been dealt with by the LIB the courts, at first instance, have however held that the LIB, as part of the police, does not meet ECHR Article 2 independence requirements for such cases.¹⁷ This position had already been taken by the Human Rights Committee of the UK Parliament.¹⁸

In relation to contemporary prosecutions since the current Director of Public Prosecutions came to post in 2011 his office states there have been 17 prosecutorial decisions in legacy cases since this time, which break down as follows:

¹⁵ Troubles legacy cases bias disputed by figures BBC News Online 2 February 2017, <http://www.bbc.co.uk/news/uk-northern-ireland-38844453>

¹⁶ Team A examining 238 republican 'on the runs' cases; Team B: two republican cases and activities of a covert military unit (MRF, Military Action Force) following revelations from former members in a BBC documentary; Team 3 is examining the Bloody Sunday and Kingsmill massacres by the British Army and republicans respectively. Team D is dealing with seven republican attributed deaths. See Prof Kieran McEvoy, evidence to Defence Select Committee of UK Parliament, 7 March 2017

¹⁷ Re Margaret McQuillan in Matter of Review by the HET into the Circumstances of the Death of Mrs Jean Smyth and Other Suspected British Army Military Reaction Force Killings. 3rd March 2017. REF 15/57619/01.

¹⁸ Joint Committee on Human Rights (JCHR) Human Rights Judgments Seventh Report of Session 2014–15, HL Paper 130HC 1088, 11 March 2015, paragraph 3.7: '*...the Legacy Investigations Branch cannot itself satisfy the requirements of Article 2 ECHR because of its lack of independence from the police service.*'

- 8 cases relate to alleged offences attributed to republicans, in 7 of the cases decisions were taken to prosecute;
- 3 cases relate to loyalists and have resulted in prosecutions;
- 3 cases relate to soldiers, two of these have resulted in decisions to prosecute and one a decision not to prosecute.
- 3 cases relate to police officers, in two decisions were taken not to prosecute.¹⁹

We have considered it necessary to set out these figures to contextualise the commentary that has followed, including from members of the UK Executive, alleging bias in the criminal justice system against the military. In relation to soldier prosecutions there has also been considerable criticism of lawyers and law officers, most notably the Director of Public Prosecutions, who recently announced his resignation. Such discourse has included a fundamental misunderstanding of the role of lawyers, through associating them with their current or past clients and clients' causes.

'Pernicious Counter Narrative' Speech by Northern Ireland Secretary of State, 2016

In June 2016 the Police Ombudsman issued a report into the 1994 Loughinisland massacre, in which the Ombudsman found security force collusion was a 'significant feature' in the massacre of civilians in a pub by the Loyalist UVF paramilitary group. This included the involvement of police informants "at the most senior levels within Loyalist paramilitary organisations" in the importation of large amounts of weapons from Apartheid South Africa in the mid to late 1980s which were then used, according to police figures, in at least 70 murders and attempted murders.²⁰

A speech given by Secretary of State for Northern Ireland Theresa Villiers MP in February 2016 on the way forward for dealing with the past in Northern Ireland, which had essentially denied state involvement in Loughinisland, came back into focus following the publication of the Ombudsman Report. The Secretary of State however stood by her remarks.²¹ CAJ and three other human rights NGOs wrote to the Secretary of State in relation to concerns at implied allegations in her speech

¹⁹ Troubles legacy cases bias disputed by figures BBC News Online 2 February 2017, <http://www.bbc.co.uk/news/uk-northern-ireland-38844453>

²⁰ [Police Ombudsman The murders at the Heights Bar in Loughinisland: Police Ombudsman report, Press Statement](#)

²¹ [Villiers: A way forward for legacy of the past in Northern Ireland](#), Speech by Secretary of State, 11 February 2016.

that either victims' families or human rights defenders in raising issues of human rights violations were responsible for a 'pernicious counter narrative' with the purpose or effect of either diverting attention from armed groups or even justifying the actions of paramilitary groups. The four NGOs wrote:

In your [the Secretary of State] speech you make reference to bravery awards to the security forces and then raise concerns that, in contrast "*....today we face a pernicious counter narrative...It is a version of the Troubles that seeks to displace responsibility from the people who perpetrated acts of terrorism and place the State at the heart of nearly every atrocity and murder that took place - be it through allegations of collusion, misuse of agents and informers or other forms of unlawful activity.*" This statement not only implies that allegations of such human rights violations are vexatious but also that they are being made, not in furtherance of human rights goals like realising victims rights, the right to truth and non-recurrence, but with the intention of displacing responsibility from paramilitary organisations.

In your speech you also state rejection of "*equivalence between the security forces and those who carried out acts of terrorism*" and then appear to link this to a "*real risk that those who seek to justify the terrorist violence of the past risk giving a spurious legitimacy to the terrorist violence of the present.*" This implies that uncovering and commenting on security force involvement in actions as serious as extra-judicial killings and torture – which were also carried out by non-state actors - is undertaken to justify 'terrorist violence' past and present.²²

In our correspondence we drew attention to international standards regarding the non-stigmatisation of human rights defenders. The Secretary of State responded to our correspondence, did not indicate to whom she was attributing the allegation of a 'pernicious counter narrative', but did state that she considered any narrative which suggested that misconduct in the security forces was rife or endemic was "a deliberate distortion and not justified by the facts."²³ We include this information in this submission as growing evidence of the contention that the UK government is alarmed at the prospect of reputational damage from fully independent legacy investigations. This is particularly the case in relation to patterns of human rights

²² CAJ correspondence 20 June 2016, also on behalf of Relatives for Justice, the Pat Finucane Centre and Rights Watch UK, to Secretary of State, Theresa Villiers MP.

²³ Secretary of State correspondence, response to CAJ and others, 14 July 2016.

violations linked to police and security force informants. It is this which appears central to the state party's current lack of progress on implementing the Stormont House Agreement, which is covered in the next section.

The Secretary of States' remarks were subsequently quoted in a comment piece in one of the main Belfast newspapers – *the Newsletter*- on the 21 November 2016. This article by an academic states that rather than a line being drawn on the past "*Instead [the republican political party] Sinn Féin, umbilically linked to the [Irish Republican Army] IRA's campaign of violence, and a range of sympathetic NGOs and lawyers, has waged a discursive war to justify the IRA's campaign*". The author then makes reference to 'resistance' to this narrative from the former Secretary of State through her aforementioned concept of the 'pernicious counter-narrative.'

Speech by UK Prime Minister, October 2016

In her first speech to her annual party conference as the UK Prime Minister, Theresa May MP, stated her commitment to the 'finest Armed Forces known to man' and followed this by stating:

But we will never again – in any future conflict – let those activist, left-wing human rights lawyers harangue and harass the bravest of the brave – the men and women of Britain's Armed Forces.²⁴

Whilst this assertion has been taken to be linked to claims against the UK military in Iraq, the phrase has, predictably, subsequently been linked to Northern Ireland cases.

The Sun Thursday 8 December 2016

The *Sun* is the widest circulation newspaper in the UK in its print format. On the 8 December 2016, *The Sun* ran a front page headline "Bloody Outrage", with the subheadings – in relation to Northern Ireland – "New Probe into all 302 Army killings" and "Tank Chase Lawyers agony for 1,000 squaddies (soldiers)".²⁵ The *Sun* article claimed that all killings by British Troops in Northern Ireland would be freshly investigated in a 'legal inquiry' costing taxpayers 'tens of millions of pounds' citing a 'decision' it stated has come just weeks after the UK Prime Minister Theresa May

²⁴ <http://press.conservatives.com/post/151378268295/prime-minister-the-good-that-government-can-do>

²⁵ <https://www.thesun.co.uk/news/2353150/decision-to-investigate-brave-british-troops-over-killings-in-northern-irelands-30-years-of-the-troubles-branded-witch-hunt/>

‘finally acted to limit lawyer-driven claims on Iraqi veterans’. The paper quotes a Conservative MP Johnny Mercer who it describes as a ‘former army officer’ who has ‘battled against tank-chasing lawyers’ describing the investigations as a ‘brand new witch-hunt’. The paper then ‘reveals’ that 328 deaths are being reinvestigated by the Police Service of Northern Ireland (PSNI) Legacy Investigations Branch (LIB) which it describes as ‘newly created’.

This article was released at the time Council of Europe Committee of Ministers were deliberating on the UK cases. As alluded to earlier PSNI LIB was not ‘newly created’ but had been established almost two years earlier in January 2015 following the standing down of the HET. The article continued stating that in addition to these criminal probes a number of inquests into 57 killings by the British Army had been reopened. It states that ‘Republican-linked law firms’ had helped ‘force’ the opening of inquests. A spokesperson for the Secretary of State for Northern Ireland is quoted in the article as stating that the UK government believes in the rule of law, but then qualifies this belief with a ‘concern’ regarding investigations focusing on police officers and soldiers.

Daily Mail 9 December 2016

The *Daily Mail* is the newspaper with the largest combined print and online UK readership.²⁶ The day after the Sun’s headline Friday 9 September the *Daily Mail* ran with a front page headline “*So why are our soldiers facing a new witch hunt?*” which was directly juxtaposed with the quote from the Prime Minister that “*We will never again let human rights lawyers harass the bravest of the brave*”. The article also focused on ‘fresh’ PSNI LIB investigations and presented them as a new development.²⁷

The Sun 10 December 2016

The following day on the 10 December 2016, *The Sun*, on pages 12-13 published a further article entitled the “*Our Lions the Rich and the War Probe*” (a play on words of a CS Lewis children’s novel). This article specifically focused on criticising lawyers with carriage of conflict related cases and on this occasion named three Belfast law firms with clients in state-involvement cases. The article:

²⁶ According to the Press Gazette in 2015, the Mails and online readership has a total of 23.5 million readers a month.

²⁷ <http://www.dailymail.co.uk/news/article-4015524/Why-Army-facing-new-witch-hunt-IRA-killers.html>

- Was sub-headlined “Firms’ profit from Heroes”; “Lawyers scored 12m in legal aid” and “Veterans: end witch-hunt now.”
- Names three Belfast law firms and publishes names and photos of two of their partners with the general location and reported value of their family homes;
- An adjacent picture box is entitled “Solicitors’ IRA clients” and pictures nine persons who have been, or whose families have been, represented by the named law firms.

The Sun facilitated an online comments section which included a comment stating lawyers ‘were standing up for terrorists’ and also the following:

“Soldiers should have immunity from this kind of thing. These parasite lawyers need shooting along with the scum they’re representing.”

On the 12 December 2016 CAJ wrote to the UN Special Rapporteurs on the independence of lawyers and judges and human rights defenders to raise concerns for the safety of human rights lawyers working on Northern Ireland conflict cases in light of newspaper coverage.

The media articles were followed by statements in the UK Parliament (which are protected from claims for defamation) from senior politicians, including members of the government, alleging that the criminal justice system was biased.

On the 13 December 2016 in a debate on legacy cases in Northern Ireland former Foreign Office Minister and Conservative MP, Sir Henry Bellingham, in the course of a Westminster Hall debate, in addition to suggesting that investigations into human rights violations would ‘imperil’ the whole peace process, and speaking about a live case currently before the courts, was also critical of the Director of Public Prosecutions (DPP), Barra McGrory QC. Mr Bellingham alleged the DPP was making political rather than evidence based decisions. The reasoning proffered to support this contention was the DPP being a former defence solicitor who had previously represented (among many others) republicans:

What has changed? There is no new evidence, but what has changed is that the DPP in Northern Ireland is now Barra McGrory, QC—the same person who represented [republican leader] Martin McGuinness in the Saville

[Bloody Sunday] inquiry. This is the person who is prepared to move away from credible evidence to political decision making, which I find very worrying. It has to be stopped.²⁸

The Minister of State Kris Hopkins MP responding in the debate, rather than defending the integrity of law officers instead made his own allegations of bias against the justice system complaining that “*the almost exclusive focus on the actions of the state is disproportionate and must be challenged and redressed if we are to deal with the past in a way that is fair and balanced and allows victims and survivors to see better outcomes than the current piecemeal approach.*”²⁹ These allegations against the DPP were made precisely at a time when the second decision to prosecute two soldiers for murder, was under active consideration. In a further debate in the UK Parliament on the 17 January 2017, which related to new elections in Northern Ireland, a former Defence Minister Conservative MP Gerald Howarth stated:

...may I make a fervent plea that he should protect the interests of former British soldiers currently being charged by the Sinn Féin-supporting Director of Public Prosecutions for Northern Ireland with murder for events that took place more than 40 years ago?³⁰

This intervention was permitted by the Speaker, despite not relating to the subject of debate. The Secretary of State James Brokenshire MP responded, by praising the work of the armed forces, and raising his own concerns about “imbalance within the [justice] system” and not defending the DPP. The Secretary of State subsequently wrote to the UK *Telegraph* newspaper stating legacy investigations were reportedly “not working” because they were “targeting soldiers not terrorists” and arguing there was an ‘imbalance’ and disproportionate focus on the military.³¹ A former Northern Ireland Justice Minister, David Ford MLA, raised concerns around the Secretary of State’s comments stating:

²⁸ Hansard, 13 December 2016, Volume 618, Legacy Issues: Northern Ireland
<https://hansard.parliament.uk/commons/2016-12-13/debates/359B1D65-1837-4701-BBE1-78FE2D9A6CE9/LegacyIssuesNorthernIreland>

²⁹ As above.

³⁰ <https://hansard.parliament.uk/commons/2017-01-17/debates/58D7C09F-47A1-49C7-A347-A38703C7C6FF/NorthernIrelandAssemblyElection>

³¹ British soldiers are being failed by Troubles inquiry, Northern Ireland Secretary concedes *The Telegraph* 28 January 2017.

Politicians have a duty to support the impartial operation of the institutions of the Justice system. The comments from James Brokenshire on prosecutions come perilously close to interfering in the rule of law.³²

On the 22 February 2017 the UK Prime Minister, Theresa May, stated in the UK Parliament that she found it “*absolutely appalling when people try to make a business out of dragging our brave troops through the courts*” and reiterated the allegation that the present system was disproportionately focused against the security forces.³³

In April 2017 the Defence Committee of the UK Parliament published an inquiry report calling for an amnesty (framed as a ‘statute of limitations’) covering all conflict-related incidents until 1998 involving members of the armed forces. The Committee also sought a truth-recovery mechanism. It also urged government to consider extending such an amnesty to the police and other security personnel and, in implicit recognition that this may be discriminatory, stated that it would be a matter for a future government to determine whether such an amnesty should cover all conflict-related incidents.³⁴

In May 2017 the Director of Public Prosecutions for Northern Ireland announced he would step down from the role.³⁵

In June 2017 US-based Human Rights *First* issued a report documenting and raising their concerns regarding the vilification of human rights lawyers in Northern Ireland. This includes material from interviews with directly affected practitioners. The report – alluding to the contribution of the Clinton Administration to the Good Friday Agreement and peace process - concludes:

Now an element of that success is in danger of unravelling. Renewed hostility toward human rights lawyers—those representing the families of people

³² <https://allianceparty.org/article/2017/0010948/ford-criticises-brokenshire-comments-on-prosecutions>

³³ Official Report (Hansard) PMQ 22 February 2017 <https://hansard.parliament.uk/commons/2017-02-22/debates/A31B6DEF-BB99-46F6-A49F-37FFF90D70C5/FormerMilitaryPersonnelNorthernIreland>
On the 23 February 2017 a further debate took place in the UK Parliament the following day.

³⁴ House of Commons Select Committee ‘Investigations into fatalities in Northern Ireland involving British military personnel’ HC1064 April 2017.

³⁵ <http://www.bbc.co.uk/news/uk-northern-ireland-39940849>

allegedly killed by the British military—recalls the Troubles and augurs new danger.

History tells us that rhetorical attacks against lawyers by the press and public officials can lead to violence, which, in turn, inhibits the pursuit of justice and undermines the rule of law. The hostility toward human rights lawyers strikes at the heart of the Good Friday Agreement, which embedded respect for human rights into the politics of Northern Ireland. It's especially alarming given the United Kingdom's broader backsliding on its human rights commitments.³⁶

The report calls the UK to publicly reaffirm the UN Basic Principles on the Role of Lawyers, to urgently calm the rhetoric around the work of lawyers working on legacy cases in Northern Ireland, and outline how it will otherwise protect the lawyers from vilification and violence. It also calls on members of the UK Legislature to refrain from inflammatory rhetoric against Northern Ireland lawyers and the Director of Public Prosecutions.³⁷

In summary the experiences since the dialogue with the state party of seeking the application of the law to the security forces in legacy cases have caused considerable concern regarding their compliance with duties under the Covenant. The attacks on law officers, lawyers and NGOs in the context of the law being applied for the military have also caused considerable concern.

(b) Ensure, given the passage of time, the establishment and full operation of the Historical Investigations Unit as soon as possible; guarantee its independence, by statute; secure adequate and sufficient funding to enable the effective investigation of all outstanding cases; and ensure its access to all documentation and material relevant to its investigations;

The legislation to establish the HIU and other legacy bodies from the 2014 Stormont House Agreement (SHA) has not been introduced into the UK Parliament. The

³⁶ A Troubling Turn: The Vilification of Human Rights Lawyers in Northern Ireland (Human Rights *First*, June 2017) available at: <http://www.humanrightsfirst.org/sites/default/files/A-Troubling-Turn.pdf>

³⁷ As above page 12.

following section provides some further detail regarding developments since the Committee made its above recommendation in July 2015.

UK Policy Paper and leaked legislation (September 2015)

On 23 September 2015, the UK Government published a policy paper detailing elements of a draft Bill to establish the Historical Investigations Unit and other bodies contained in the Stormont House Agreement. According to the policy paper the HIU would:

- be an independent body with both a criminal and non-criminal misconduct investigative function to take forward outstanding Troubles-related deaths which occurred between 1966 and 10 April 1998;
- have dedicated family support staff to involve the next-of-kin from the beginning and provide them with support and other assistance throughout the process;
- have policing powers and specific powers to obtain full disclosure of all information from the United Kingdom Government and all relevant bodies;
- be overseen by the independent Northern Ireland Policing Board (as provided for in the SHA) but introduced an exception in national security matters where the HIU would be overseen by the Secretary of State;
- be empowered to recruit such employees as appear to it be appropriate without a prohibition from recruiting persons who have previously served in policing or security roles in Northern Ireland; and
- be required to refer decisions on the disclosure of any information which might prejudice national security to the United Kingdom Government, which may prevent disclosure if necessary.³⁸

This latter provision, which is outside the terms of the Stormont House Agreement, essentially stalled the process. Draft legislation was widely leaked to the media and contained detailed national security exemptions never before seen in UK legislation. The draft bill provided for this category of ‘sensitive’ material to include any

³⁸ [McKerr v UK \(Lead\) status of execution.](#)

information which hypothetically could prejudice UK 'national security' interests, but also extends to *any information* which was supplied by the security and intelligence services, or *any intelligence* information from the police or military. The draft bill contained a mandatory duty on any 'Relevant Authority' (government, military, police, ombudsman, ministers, and security/intelligence agencies) to pre-classify any information they have as 'sensitive information'. A 'relevant authority' may also identify information held by another relevant authority as 'sensitive information'. So even if the police decided some information they held was not to be treated as 'sensitive' a minister or the security services could overrule them. There is also a mandatory duty on the HIU to identify any information it holds falling within the category of 'sensitive' information. Once materials have been classified as within a class of being of 'sensitive' national security information the HIU would not be permitted to disclose the information. The only two exemptions to this would be firstly when the information is supplied to the Secretary of State, or under certain circumstances criminal justice bodies. The second exemption would be when the Secretary of State gives permission for the disclosure. There was no right to appeal.

Essentially therefore the decision maker as to what 'sensitive' information is disclosed to families in relation to findings of investigations would be a government minister. Should a member of the HIU, past or present, disclose sensitive information to a family without the permission of the Secretary of State, they commit a criminal offence for which they could face up to two years in prison. By contrast, unusually, there is no offence created if public authorities fail to disclose requested documents to the HIU.

The UK committed to consulting on draft legislation in June 2015 and introducing the bill into the UK Parliament in the autumn session in October 2015. This did not happen. There were further talks with the British and Irish governments and Northern Ireland political parties on this and a range of (non-legacy) SHA implementation issues leading to a fresh implementation agreement in November 2015.

The 'Fresh Start' SHA implementation agreement (November 2015)

In November 2015 a new agreement to address implementation of the Stormont House Agreement entitled "*A Fresh Start*" was published by the UK. This addressed other elements of the SHA but did not include any agreement on the SHA legacy institutions. There is wide consensus that the stumbling block was the ministerial national security veto. Northern Ireland's then First Minister, Peter Robinson MLA,

stated that the national security caveat on disclosure was the only issue on which consensus had not been achieved in the negotiations on changes to the draft bill. The Minister for Foreign Affairs for the Republic of Ireland, Charlie Flannigan TD stated:

The issue that remains unresolved is the issue of disclosure and national security and I don't believe it's acceptable that the smothering blanket of national security should on all occasions be used in the manner you've seen in Northern Ireland over a number of years.³⁹

The Report of the UN Special Rapporteur (November 2015)

On 18 November 2015 the Special Rapporteur Pablo de Grieff issued preliminary observations and recommendations at the conclusion of his 10 day visit to the UK. He spent several days in Northern Ireland as the aim of his visit was to offer an objective assessment of the various initiatives undertaken to address the legacy of the violations and abuses during the 'troubles' in Northern Ireland. In his concluding remarks he noted that 'the legacies of the past have not been successfully or comprehensively addressed on any of these four dimensions (truth, justice, reparations and guarantees of non-recurrence).' He also recommended that:

Any future arrangements for truth-disclosure and for justice will need to take on board the fact that none of the stakeholders can assume the position of neutral arbiters of 'the troubles' and therefore will have to incorporate procedures to guarantee both the reality and the appearance of independence and impartiality.⁴⁰

On the matter of national security he noted:

Although everyone must acknowledge the significance of national security concerns, it must also be acknowledged that particularly in the days we are living in, it is easy to use 'national security' as a blanket term. ...In particular, national security, in accordance with both national and international obligations, can only be served within the limits of the law, and allowing for

³⁹ [Charlie Flanagan critical of national security 'smothering blanket'](#) *Irish News* 27 November 2015.

⁴⁰ [Preliminary observations and recommendations by the Special Rapporteur on his visit to the United Kingdom of Great Britain and Northern Ireland](#), London, 18 November 2015.

adequate means of comprehensive redress in cases of breaches of obligations.⁴¹

The UK response to the Committee of Ministers (November 2015)

The UK reply (20 November 2015) to a previous CAJ submission to the Committee of Ministers of the Council of Europe makes the following statement, in relation to the HIU, which misinterprets the positive duties under Article 6 ICCPR/Article 2 ECHR (right to life):

The UK Government, like other member states, is subject to a positive duty under Article 2 of the Convention to take appropriate steps to safeguard the lives of those within its jurisdiction. *To permit the disclosure of information which would prejudice national security would be incompatible with this duty (emphasis added).*⁴²

The UK has also sought to portray the impasse over Stormont House Agreement implementation as one created by disagreements between the unionist and nationalist parties in Northern Ireland:

The most difficult outstanding issue in those political talks was onward disclosure of sensitive information by the Historical Investigations Unit (HIU). As a result of the lack of agreement among participants to the talks, legislation was not taken forward last autumn....[the UK emphasises that]...these matters are extremely sensitive for many people in Northern Ireland, and their elected representatives. Whilst some real progress was made in the cross-party talks which have taken place over the last three years, there are groups from both sides of the community in Northern Ireland for whom making further progress on these matters will involve difficult compromises.⁴³

The suggestion by the UK that it is the unionist and nationalist parties holding up the process over disagreements over the national security veto over disclosure was

⁴¹ As above.

⁴² [Communication from a NGO \(Committee on the Administration of Justice \(CAJ\)\) \(24/11/2015\) in the McKerr group of cases against the United Kingdom and reply from the authorities \(30/11/2015\)](#) (Application No. 28883/95), p16.

⁴³ DH-DD(2016)528: [Communication from a NGO \(Committee on the Administration of Justice \(CAJ\)\) \(19/04/2016\) in the McKerr group of cases against the United Kingdom \(Application No. 28883/95\) and reply from the authorities \(26/04/2016\)](#)

contradicted by Northern Ireland’s former First Minister of the Democratic Unionist Party (DUP), Arlene Foster MLA. Ms Foster has consistently maintained that the impasse on this matter is one between the UK government and the nationalist parties.

The UK government has subsequently stated that during the talks it had “*proposed a dedicated appeals mechanism that would allow families or the HIU Director to appeal the Secretary of State’s decision directly to a High Court judge.*”⁴⁴ No further details of this mechanism, its thresholds, powers or costs, were however set out. Implicit in the proposal was that the Secretary of State, and not the head of the HIU, would still be the primary decision-maker regarding disclosure of investigations reports. Implicit also was that the UK intended to still maintain the undefined blanket concept of ‘national security’ as the criterion for non-disclosure of information to families. In CAJ’s view any resolution of the impasse would involve both specifying any criteria for non-disclosure to families, and decision making by a competent independent body for doing so at all levels.⁴⁵

Change in Secretary of State following BREXIT referendum (summer 2016)

In the summer of 2016 the Secretary of State was replaced in a cabinet reshuffle with the incumbent James Brokenshire MP. On the 9 September 2016 Mr Brokenshire gave a speech in Oxford, to the British-Irish Association conference. In this speech the Secretary of State outlined that he had been meeting groups of victims and survivors of the conflict, reaffirmed commitment to delivering the Stormont House Agreement legacy mechanisms, and in relation to disclosure stated “*I am determined to strike the right balance between the obligation to the families to provide comprehensive disclosure, and my fundamental obligation as Secretary of State to protect lives and keep people safe and secure.*” The Secretary of State indicated discussions with political parties had been ongoing, and that there would now be public consultation on taking the proposals forward. However, in the speech the Secretary of State revealed that he was still ‘*reflecting*’ on what format the consultation would take.⁴⁶ This consultation is yet to occur.

⁴⁴ As above, page 18.

⁴⁵ CAJ and academic colleagues have published both a Model Bill which would implement the Stormont House Agreement in a human rights compliant manner (<http://www.caj.org.uk/contents/1413>), along with an alternative model on how to deal with information redaction from the HIU – this is available at: <https://amnesties-prosecution-public-interest.co.uk/themainevent/wp-content/uploads/2017/04/Independent-Mechanism-to-Oversee-Redactions-for-Dealing-with-the-Past-Final-3rd-April-2017.pdf>

⁴⁶ [Secretary of State’s speech to 2016 British Irish Association Conference](#), 9 September 2016.

Committee of Ministers Pronouncement (December 2016)

The Council of Europe Ministers' Deputies most pronounced on the Northern Ireland legacy cases at their 1273rd meeting – 6-8 December 2016. In summary they:

- Expressed concern that the HIU and other Stormont House Agreement institutions had still not been legislated for;
- *“called upon the authorities to take all necessary measures to ensure the HIU can be established and start its work without any further delay, particularly in light of the length of time that has already passed since these judgments became final, and the failure of previous initiatives to achieve effective, expeditious investigations;”*
- Called on the authorities to ensure that a proposed public consultation on the SHA legislation was launched and legislation introduced into Parliament to establish the HIU without further delay;
- Regretted the necessary resources had not been provided for the Legacy Inquest Unit and strongly urged the authorities as a matter of urgency to implement the Lord Chief Justices plan and to ensure timely disclosure to inquests.

At the time of the publication of the Council of Europe decision the Secretary of State for Northern Ireland announced a further and potentially indefinite delay to the establishment of the HIU. The Secretary of State introduced a pre-condition of ‘political consensus’ between Northern Ireland parties for any further progress, essentially providing for a veto for those opposed to independent investigations.⁴⁷

The Northern Ireland Executive collapsed in January 2017 and fresh elections took place on the 2 March 2017. Whilst a scandal regarding the allocation of public resources and potential corruption was the headline issue for the collapse of the power-sharing institutions, the failure to implement the SHA legislation and other previous agreements was also cited.

The British and Irish Governments and the Northern Irish political parties then entered into further negotiations on a range of issues including the implementation of the Stormont House Agreement. Deadlines for agreement were extended several times but no agreement was reached through these negotiations to allow the restoration of the Northern Ireland Executive. The talks were subsequently

⁴⁷ <http://www.bbc.co.uk/news/uk-northern-ireland-38147206>

suspended in light of the decision to call a UK General Election which will take place on 8 June 2017. Further negotiations were planned following the election but the outgoing government, as we understand has indicated that there will be a public consultation on SHA legislation over the summer of 2017.

(c) Ensure that the Legacy Investigation Branch and the Coroner’s Court in Northern Ireland are adequately resourced and are well positioned to review outstanding legacy cases effectively;

Paragraph 31 of the December 2014 Stormont House Agreement affirms:

Legacy inquests will continue as a separate process to the HIU. Recent domestic and European judgments have demonstrated that the legacy inquest process is not providing access to a sufficiently effective investigation within an acceptable timeframe. In light of this, the [Northern Ireland] Executive will take appropriate steps to improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements.⁴⁸

The background to this commitment was the pattern of endemic delays to inquests dealing with deaths during the Northern Ireland conflict (known as ‘Legacy Inquests’). Some families have been waiting over 40 years for an Article 6 ICCPR/ Article 2 ECHR compliant inquest. The delays are largely attributed to the withholding of necessary resources from the coronial system along with delays in disclosure and over redaction of official security force records. This has led to a series of Strasbourg and domestic judgements finding the UK in breach of its ECHR obligations. A concurring opinion by Judge Kalaydjieva in *Hemsworth v. UK* which was echoed in *McCaughey & Ors v. UK* concluded:

...the period of demonstrated, if not deliberate, systematic refusals and failures to undertake timely and adequate investigation and to take all necessary steps to investigate arguable allegations under Article 2 and 3 seem as a matter of principle to make it possible for at least some agents of the state to benefit from virtual impunity as a result of the passage of time. (*Hemsworth v. UK*, p25).

⁴⁸ [Stormont House Agreement](#), paragraph 31.

In May 2014 the High Court in Belfast found that the delays in six inquest cases had been so protracted they were unlawful as a breach of convention rights.⁴⁹ In September 2015 the Lord Chief Justice for Northern Ireland (LCJ) noted that only nine cases had been disposed of in the previous five years, and only 13 in the past decade.⁵⁰ In a judgment in the previous year the LCJ commented that “If the existing legacy inquests are to be brought to a conclusion under the present system someone could easily be hearing some of these cases in 2040.”⁵¹ At the time there were approximately 55 outstanding legacy cases (relating to around 95 deaths). The Attorney General for Northern Ireland has a power to direct the opening of further inquests, including legacy inquests, where advisable to do so.

In 2014 legislation was passed through the Northern Ireland Assembly to make the Lord Chief Justice (LCJ) for Northern Ireland, Sir Declan Morgan, President of the Coroners Court.⁵² Following his appointment the LCJ instigated a review of all outstanding legacy cases by a senior judge, Lord Justice Weir, which took place in January 2016. The LCJ also engaged with the Council of Europe and UN human rights machinery, through the Human Rights Commissioner, Nils Muižnieks, and UN Special Rapporteur Pablo de Greiff, who advised on the principles that should underpin an Article 2 ECHR (right to life) compliant model for legacy inquests. During the course of the review Lord Justice Weir was highly critical of the UK Ministry of Defence (MoD) who had cited ‘resource pressures’ as a rationale for repeatedly missing deadlines for disclosing documents to inquests examining the actions of soldiers. Lord Justice Weir stated:

The MoD is not short of money. It’s busy all over the world fighting wars and it’s about to buy some new submarines with nuclear warheads - so it’s not short of money.... [The disclosure of official records to legacy inquests] is obviously very low on their list of priorities.⁵³

Lord Justice Weir continued that such disclosure “...is not an option - this is an international obligation on the State” and took the view that the argument of ‘resource pressure’ raised questions over the commitment to obligations under international human rights laws stating that the practice “...doesn’t suggest any

⁴⁹ *Jordan’s and five other Applications [2014] NIQB 71.*

⁵⁰ ‘[Judges to preside over Troubles killings inquests](#)’, *BBC News Online* 22 October 2015

⁵¹ *Re Jordan’s applications for judicial review [2014] NICA 76.*

⁵² Legal Aid and Coroners’ Courts Act (Northern Ireland) 2014.

⁵³ [MOD is not short of money for work on inquests into historic killings – Judge](#) *Belfast Telegraph* 28 January 2016.

great intent on the part of government to comply with their obligations.” The Judge raised concerns in that the “MoD have been rather inclined to think they can thumb their nose at directions from the coroner and that they were quite free to abandon the promises they made” and told legal representatives of the Ministry that “You want to avoid any suspicions that this approach is designed to prevent the matter being aired in a public arena, that it’s a deliberate attempt to delay and obfuscate.” Lord Justice Weir was also critical of the practice within the Police of delaying disclosure stating that it was ‘disgraceful’ that not a single sheet of paper had been disclosed to the next-of-kin in relation to one inquest.⁵⁴

The review also dealt with the question of the sequencing or prioritisation of cases. CAJ was concerned to learn that during this exercise the legal representatives of the UK government advocated that inquests involving ‘non-sensitive’ materials should be prioritised, essentially as they could be dealt with quicker. CAJ is concerned at this position given the implications that cases examining potential human rights violations, particularly in the areas of covert activity by the security forces, almost always involve ‘sensitive’ materials, and hence would be further delayed and placed at the back of the queue under such an approach.

In an unparalleled move in February 2016 the LCJ and Lord Justice Weir met with all the families awaiting legacy inquests to present the conclusions of the review. The outworking of the review is set out in a UK ‘Action Plan’ to the Committee of Ministers as follows:

The Lord Chief Justice of Northern Ireland (LCJ) became President of the Coroner’s Court on 1 November 2015. The LCJ has appointed a High Court Judge as the Presiding Coroner to oversee the management of cases and consider issues relating to scope and disclosure. The Presiding Coroner in conjunction with the Lord Chief Justice will determine which cases will be listed for hearing and when. Following a review of the state of readiness of the outstanding legacy cases, which was undertaken by Lord Justice Weir in January 2016, and a series of meetings in Strasbourg on 15 January 2016, the LCJ has proposed that, with the support of a properly resourced Legacy Inquest Unit in the Northern Ireland Courts and Tribunals Service and co-operation from the relevant justice bodies including the PSNI and the MoD, operating in conjunction with the other reform measures he has recommended, it should be possible to complete the existing legacy inquest

⁵⁴ As above.

caseload within a period of five years, subject to the required resources being made available.⁵⁵

In a speech given at a conference of the Commission for Victims and Survivors in Belfast in March 2016 the LCJ stated that:

I am satisfied that the plan I have developed represents the best way forward for these cases and satisfies the criteria that need to be met in order to discharge the UK Government's Article 2 obligations.⁵⁶

Resources for the Legacy Inquest Unit

In a February 2016 address to families awaiting legacy inquests the Lord Chief Justice stated:

It is my assessment that provided the necessary resources are put in place and we obtain the full co-operation of the relevant state agencies - principally the Police Service of Northern Ireland and the Ministry of Defence - it should be possible to hear these cases within a reasonable timeframe, which I see as being about five years [emphasis in original].⁵⁷

In his address a month later to the Victims and Survivors Conference the LCJ provided further detail of the timeframes, stating that with the provision of resources the new Legacy Inquests Unit could commence a full work programme in September 2016:

My plan is predicated on the creation of a new Legacy Inquest Unit, since it is evident that the existing Coroners Service is simply not designed to carry the weight of legacy cases. If there is no response before the [5 May 2016 Northern Ireland Assembly] election, we will almost certainly not be able to achieve a September [2016] start date, which would be extremely disappointing. We might at best be able to get one or two cases on before

⁵⁵ ([1259 meeting \(7-9 June 2016\) \(DH\) - Updated action plan \(13/04/2016\) - Communication from the United Kingdom concerning the McKerr group of cases against the United Kingdom \(Application No. 28883/95\) \[Anglais uniquement\]](#))

⁵⁶ Commission for Victims & Survivors Conference, Titanic Belfast, Wednesday 9th March 2016, The Rt Hon Sir Declan Morgan, Lord Chief Justice of Northern Ireland.

⁵⁷ Legacy Engagement Event – Friday 12th February 2016, Opening Address by the Lord Chief Justice, Sir Declan Morgan.

Christmas [2016], but we would be unable to achieve the step change that is required to deal with all of these cases in an Article 2 compliant way.⁵⁸

Essentially the caseload of Legacy Inquests Unit that was to be taken forward in September 2016 was dependent on resources being provided by early May 2016. The UK government however has withheld funding through the introduction of a pre-condition that all political parties in the Northern Ireland power-sharing Executive must first agree to the resources being released.⁵⁹

The ECHR is an international obligation and it ultimately falls to the UK as state party to ensure resources are provided, where necessary. (If a regional Executive can deliver compliance for the state party, international obligations are complied with; if the devolved body does not deliver however the state party does not escape responsibility.) If the UK government takes this position it essentially could hand a veto over legacy inquests to any one of the main parties in the Northern Ireland Executive. It should be noted that there are no legal constraints within the constitutional settlement which we are aware of that would prevent the UK government providing these monies without the approval of all parties to the NI Executive. In addition the Secretary of State has a power to direct Northern Ireland Departments to take any action necessary to comply with international obligations where necessary. This power, under the Northern Ireland Act, has not been exercised.⁶⁰

It is notable that the resources required for inquests and related disclosure are relatively small for the UK, particularly when compared to the estimated £1,200GBP million provided in retirement and compensation packages to the security forces during the Northern Ireland peace process.⁶¹

⁵⁸ Commission for Victims & Survivors Conference, Titanic Belfast, Wednesday 9th March 2016, The Rt Hon Sir Declan Morgan, Lord Chief Justice of Northern Ireland.

⁵⁹ The April 2016 Action Plan alludes to a pre-condition that the Secretary of State will only 'consider' an initial bid for the Legacy Inquest Unit, if it is supported by the entire Northern Ireland Executive.

⁶⁰ s26 [Northern Ireland Act 1998](#). " (1) If the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations, with the interests of defence or national security or with the protection of public safety or public order, he may by order direct that the proposed action shall not be taken. (2) If the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland department is required for the purpose of giving effect to any international obligations, of safeguarding the interests of defence or national security or of protecting public safety or public order, he may by order direct that the action shall be taken

⁶¹ See figures from Relatives for Justice in [CAJ Apparatus of Impunity? \(January 2015\)](#), p28.

There is unfortunately a pattern of the present UK government trying to delegate its international obligations to the power-sharing Northern Ireland Executive which it knows is both under resourced and unlikely to collectively agree. Nils Muižnieks, Commissioner for Human Rights, Council of Europe, speaking in Belfast, 6 November 2014, addressed the issue of ‘delegating responsibility’ and ‘resource constraints’ in the following terms:

It is clear that budgetary cuts should not be used as an excuse to hamper the work of those working for justice. Westminster cannot say ‘well we will let the Northern Irish Assembly deal with this, this is under their jurisdiction’. The UK Government cannot wash its hands of the investigations, including funding of the investigations. These are the most serious human rights violations. Until now there has been virtual impunity for the state actors involved and I think the Government has a responsibility to uphold its obligations under the European Convention to fund investigations and to get the results. The issue of impunity is a very, very serious one and the UK Government has a responsibility to uphold the rule of law. This is not just an issue of dealing with the past, it has to do with upholding the law in general.⁶²

CAJ would wish to emphasise our concerns that the failure to allow the coronial system to function in relation to legacy inquests is causing significant damage to public confidence in the rule of law in general. This is detrimental and regressive to the significant investment made in the context of the peace process in institutional reform of the criminal justice institutions. In a similar vein in his address to families awaiting inquests the Lord Chief Justice stated that “the failure to deal with your cases has cast a long shadow over the entire justice system.”⁶³

In September 2016 and his annual address to mark the opening of the legal year the Lord Chief Justice again raised serious concerns that the funding for legacy inquests had not been provided and called for urgent action to resolve the matter. The official statement issued by the court service stated that coroners within existing resources would only be able to complete two inquests in the current financial year and that at

⁶² Nils Muižnieks, Commissioner for Human Rights, Council of Europe, Speaking in Ulster Hall, Belfast, 6 November 2014 cited in CAJ, The [Apparatus of Impunity?](#) January 2015, page

⁶³ Legacy Engagement Event – Friday 12th February 2016, Opening Address by the Lord Chief Justice, Sir Declan Morgan see ‘Lord Chief Justice reveals new Troubles inquests plan’ *Irish News* 13 February 2016.

the current rate it would be ‘decades’ before outstanding cases were completed. The LCJ stated:

The coroner’s courts will not be able to satisfy their legal obligation to deliver these inquests within a reasonable timeframe in the absence of the necessary resources. I do not want us to remain in that position since that would be yet another devastating blow to the families. The judiciary will be facing up to its responsibilities but this is not a matter on which the judiciary alone can deliver. I therefore call again on the local Executive and legislature, and on the UK Government, to play their part as a matter of urgency. We cannot move on while we remain under the shadow of the past. Nor should we. But time is not on our side.”⁶⁴

The First Minister’s decision to block legacy inquest funding

The Northern Ireland Department of Justice did seek to submit a financial bid for approval to the last meeting of the then Northern Ireland Executive before the commencement of an election period in April 2016, but was blocked by one of the parties to the Executive in doing so. The then Minister of Justice, David Ford MLA, nevertheless then submitted the bid to the First and deputy First Ministers for Northern Ireland under the Urgent Clearance Procedure to gain approval to submit the bid to the Secretary of State.⁶⁵

It subsequently was widely reported in the media that the First Minister, Arlene Foster MLA blocked the bid. An article in the Belfast Telegraph of the 5 May 2016 entitled “*DUP leader Arlene Foster: Why I blocked plans to speed up Troubles probes*” sets out the First Minister’s reasons for policy decision as relating to the categories of victims covered and not covered by current outstanding legacy inquests. The article is subtitled that ‘inquests are skewed towards killings by the state’. The First Minister is quoted as implying inquests do not deal with ‘innocent victims’, as is her DUP party colleague Nigel Dodds MP. *The Belfast Telegraph* cites remarks made by

⁶⁴ Monday 5 September 2016, Lord Chief Justice Calls for Urgent Progress on Dealing with the Past, Court Service Press Release: https://www.courtsni.gov.uk/en-GB/Publications/Press_and_Media/Documents/Press%20Release%20-%20The%20Lord%20Chief%20Justice%27s%20speech%20marking%20the%20opening%20of%20the%20new%20legal%20year%202016/j_j_Press%20Release%20-%20LCJ%20Address%20-%20Opening%20of%20the%20New%20Legal%20Year%205%20Sep%202016.htm

⁶⁵ CAJ correspondence with the Department of Justice 4 April 2016.

Ms Foster on a BBC election debate in relation to the decision not to approve the funding bid as follows:

Unfortunately a lot of innocent victims feel that their voice has not been heard recently and there has been an imbalance in relation to state killings as opposed to paramilitary killings... I wanted the opportunity to discuss further with the Lord Chief Justice around the issues with innocent victims and how we can deal with their issues and I make no apologies for that. I think the rights of innocent victims are very key in this and I will not allow any process to rewrite the past.⁶⁶

A BBC report also cites a statement from Ms Foster stating that the Legacy Inquest Unit would adversely affect the ability of the Northern Ireland Executive to address the needs of 'innocent victims'.⁶⁷ In September 2016 it was again reported that the bid continued to be blocked by the First Minister.⁶⁸ In relation to specifying the scope of the DUP's definition of innocent victims, the party tabled an amendment to legislation in the UK Parliament in 2013 which would have redefined victim as, *inter alia*, "a person who had suffered harm caused by an act related to the conflict in Northern Ireland, for which they are not wholly or partly responsible, that is in violation of the criminal law."⁶⁹ This latter provision would likely have the effect of excluding almost all victims of the state from the definition of a victim, including for example a child killed by a plastic bullet, as such acts are rarely held to be in violation of the criminal law. Such state involvement cases are however included within the current legacy inquests list.

Into September 2016 a number of families announced their intention to take legal action over the delays to starting legacy inquests.⁷⁰ The issue has led to a series of questions at the Northern Ireland Assembly.⁷¹

⁶⁶ [DUP leader Arlene Foster: Why I blocked plans to speed up Troubles](#) *Belfast Telegraph* 5 May 2016

⁶⁷ [Legacy inquests: Lord chief justice disappointed over funding bid](#) *BBC News Online* 4 May 2016

⁶⁸ see: [Legacy inquests: Judge calls for 'urgent action'](#) *BBC News Online* 5 September 2016 and [Senior judge urges politicians to find funding for legacy inquests](#) *Irish News* 5 September 2016

⁶⁹ Hansard, HC 16 July 2013 [Northern Ireland \(miscellaneous provisions\) bill, amendment by Jeffery Donaldson MP, column 18-19, clause 22](#)

⁷⁰ See [Families take legal action over stalled Troubles inquest funding](#) *Irish News* 22 September 2016

⁷¹ See [AQO 401/16-2, Mr Trevor Lunn, Tabled Date: 22/09/2016](#) Answered On Date: 04/10/2016; [AQO 276/16-21 Mr Trevor Lunn, Tabled Date: 08/09/2016, Answered On Date: 20/09/2016](#); [AQO 275/16-21 Mr Colum Eastwood Tabled Date: 08/09/2016](#) Answered On Date: 20/09/2016 and [\(Oral Answer Mr Eastwood & Mr Kelly: 106/16-21; AQW 808/16-21 Mr David Ford Tabled Date: 08/06/2016](#) Answered On Date: 13/06/2016.

In March 2017 the Secretary of State James Brokenshire MP introduced a further precondition that the UK would not release monies to resource the Legacy Inquests Unit unless and until the Northern Ireland political parties reached a deal on an overall legacy matters.⁷²

(d) Reconsider its position on the broad mandate of the executive to suppress the publication of inquiry reports under the Inquiries Act 2005;

The Inquiries Act 2005 continues to provide powers permitting ministerial interference despite the Human Rights Committee’s concerns. A 2014 House of Lords Select Committee report into the operation of the Inquiries Act 2005 did recommend circumscribing some of the ministerial powers to intervene in the inquiry but not any major overhaul of the Act.⁷³

(e) Consider launching an official inquiry into the murder of Patrick Finucane.

The decision of the UK not hold an independent public inquiry into the murder of human rights lawyer Pat Finucane in 1989 has been the subject of judicial review proceedings taken by the wife of Mr Finucane which were heard in the High Court Northern Ireland.

On 26 June 2015, the High Court in Belfast delivered its ruling on the application for judicial review. In the opening paragraphs of the judgment of Mr Justice Stephens he stated:

“[Geraldine Finucane] ... was convinced from the beginning that servants or agents of the state were involved in the murder of her husband. The government has accepted that there was state involvement and has apologised for it. It is hard to express in forceful enough terms the appropriate response to the murder, the collusion associated with it, the failure to prevent the murder and the obstruction of some of the investigations into it. Individually and collectively they were abominations, which amounted to the most conspicuously bad, glaring and flagrant breach of the obligation of the state to

⁷² James Brokenshire: Deal needed on all legacy issues before inquest cash released *Irish News* 10 March 2017
<http://www.irishnews.com/news/politicalnews/2017/03/10/news/james-brokenshire-deal-needed-on-all-legacy-issues-before-inquest-cash-released-960356/>

⁷³ Select Committee on the Inquiries Act 2005 Report of Session 2013–14 ‘The Inquiries Act 2005: post-legislative scrutiny’ HL Paper 143, chapter six

protect the life of its citizen and to ensure the rule of law. There is and can be no attempt at justification.”

The Court concluded that the decision of the British Government was not unlawful and so it was unable to order an inquiry. This was appealed and on February 14th 2017 the Northern Ireland Court of Appeal delivered its judgment⁷⁴ in which was application was again unsuccessful. While the Court held that the widow of Mr Finucane had received a clear and unambiguous promise that any recommended inquiry would be held they concluded that other issues, including political developments in Northern Ireland and the potential cost of a lengthy process, were enough to frustrate her legitimate expectation. An application is now with the Supreme Court of the UK.

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⁷⁴<http://www.patfinucanecentre.org/sites/default/files/2017-03/Gillen.pdf>