

Submission from the Committee on the Administration of Justice (CAJ) to the United Nations Committee Against Torture 66th Session on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland on compliance with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

March 2019

1. 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.
2. CAJ files this submission to the Committee Against Torture on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland in compliance with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
3. CAJ notes the Concluding Observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013) and wishes to address in particular a number of areas of particular concern, referenced in the Committee's List of Issues (LoI):

A: The fate of the Human Rights Act 1998 and failure to implement the Bill of Rights for Northern Ireland (Article 2, LoI, para 3.)

B: High use of Closed Material Procedures in Northern Ireland legacy cases - (Articles 2, 12, 13, 14, 15, 16, LoI, para 8.)

C: Investigations into deaths, ill treatment and torture during the Northern Ireland Conflict (Articles 2, 12, 13, 14 and 16, and LoI, para 35)

A: The fate of the Human Rights Act 1998 and failure to implement the Bill of Rights for Northern Ireland (Article 2, Lol, para 3.)

4. The Committee's Lol seeks information on the proposed repeal of the Human Rights Act (HRA) 1998, which incorporated the European Convention on Human Rights (ECHR) into UK domestic law (including the prohibition under Article 3 ECHR of torture and inhuman and degrading treatment). The Committee also seeks clarification on progress on the adoption of the Bill of Rights for Northern Ireland, provided for under the 1998 UK-Ireland Belfast or Good Friday Agreement (GFA).¹
5. In the most recent UK Parliamentary Election in 2017 the UK Conservative Party, who formed a minority Government, placed a commitment in their Manifesto not to repeal or replace the Human Rights Act (HRA) until the Brexit process was completed, at which point the matter would be reconsidered. The Manifesto also committed to the UK remaining signatories to the ECHR, but only for the duration of the current UK Parliament.²
6. The draft Political Declaration on the future relationship between the European Union and the United Kingdom is limited in its wording to the UK agreeing to 'respect the framework' of the ECHR.³ More recently, Ministers have given assurances there are no plans to repeal the HRA.⁴ However, the situation has been at best changeable, inconsistent and unpredictable.
7. In addition to the requirements of the Convention, incorporation of the ECHR into Northern Ireland law is a cornerstone of the constitutional framework introduced as a result of the peace settlement. The 1998 GFA, in addition to being approved by referendum, was incorporated as a treaty between the UK and Ireland and lodged with the UN.⁵ Article 2 of the treaty binds the UK to implement provisions of the annexed Multi-Party Agreement which correspond to its competency. Paragraph 2 of the Rights, Safeguards and Equality of Opportunity Section of this Agreement states:

The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule [Northern Ireland] Assembly legislation on grounds of inconsistency.
8. This commitment was given legislative effect through the HRA 1998. The Agreement also commits to safeguards to ensure that the Northern Ireland Assembly or public authorities cannot infringe the ECHR. In relation to other provisions of the peace settlement, the HRA 1998 is, for example, also key to the framework for the human rights compliance of policing in Northern Ireland. One of the important functions of

¹ CAT/C/GBR/QPR/6 (List of Issues for UK, 7 June 2016), paragraph 3.

² The Conservative and Unionist Party Manifesto 2017, page 37.

³ UK-EU Political Declaration, 22 November 2018, paragraph 7.

⁴ The Parliamentary Under-Secretary of State for Justice HC Deb, 12 March 2019, c167

⁵ UK Treaty Series no. 50 Cm 4705.

the Northern Ireland Policing Board, as set out in s3(3)(b)(ii) of the Policing (Northern Ireland) Act 1998, is to monitor compliance with the Human Rights Act 1998. The Police Service of Northern Ireland (PSNI) Code of Ethics, provided for under s52 of the same Act is also designed around the framework of the ECHR as provided for by the HRA 1998. In short the HRA 1998 is fundamental to the peace settlement and its repeal (unless its provisions were simultaneously re-introduced for this jurisdiction) would constitute a flagrant breach of the 1998 Belfast/Good Friday Agreement. The Government of Ireland have intervened to insist that the UK continue to comply with its obligations under the treaty.⁶ In relation to the Bill of Rights, it is now 21 years since the GFA mandated a Bill of Rights containing rights supplementary to the ECHR to reflect the “particular circumstances of Northern Ireland”.

9. The UK has failed to date to implement the Bill of Rights for Northern Ireland despite the concluding observations of this Committee, as well as the Human Rights Committee;⁷ Committee on Economic, Social and Cultural Rights;⁸ and the Committee on the Rights of the Child.⁹ The UK has introduced a precondition, not contained in the GFA, of cross-party consensus in Northern Ireland to take forward the Bill of Rights. This conflicts with the GFA which, in recognition that there would not be such consensus, vested the power to advise on the content of a Bill of Rights in the NHRI (itself established as a result of the GFA).
10. Given the pending withdrawal of the UK from the European Union and the partly associated crisis of our devolved institutions, CAJ submits that the need for a Bill of Rights takes on new importance and could have a vital role in re-stabilising the peace settlement.

The Committee may wish to seek assurances the UK will not disincorporate the ECHR and hence weaken protections under the Convention, and urge the UK to legislate for the Bill of Rights for Northern Ireland, inclusive of provisions in the Convention.

⁶ See for example Scrapping Human Rights Act 'would breach Good Friday agreement' The Guardian 12 May 2015; and Government concern about UK plan to scrap Human Rights Act Irish Times 14 May 2015; <https://www.irishtimes.com/news/ireland/irish-news/british-government-cannot-change-the-belfast-agreement-coveney-says-1.3648915>

⁷ Concluding observations (2015) CCPR/C/GBR/CO/7

⁸ Concluding observations (2016) E/C.12/GBR/CO/6

⁹ Concluding observations (2016) CRC/C/GBR/CO/5

B: High use of Closed Material Procedures in Northern Ireland legacy cases - (Articles 2, 12, 13, 14, 15, 16, Lol, para 8.)

11. CAJ welcomed the Committee's recommendation in 2013 that 'all measures used to restrict or limit fair trial guarantees based on national security grounds be fully compliant with the Convention'.¹⁰ The Committee's Lol seeks further information on the steps taken to ensure that all measures used to limit fair trial guarantees on national security grounds – including closed material procedures (CMPs) - are compatible with the Convention.¹¹
12. Under Section 6 of the Justice and Security Act 2013 the Secretary of State must produce a report on the use of CMPs. These annual reports reveal a continued trend of disproportionate use of CMPs in relation to cases concerning the legacy of the Northern Ireland conflict, despite the region constituting only 2% of the UK population. Such cases generally concern the actions of informants or agents of the state within paramilitary groups. The statistics for the previous three years are:

Applications / Year	Northern Ireland legacy	All other applications
June 2017- June 2018 ¹²	4	9
June 2016- June 2017 ¹³	4	9
June 2015- June 2016 ¹⁴	5	6

13. It is also notable that it appears only to be in Northern Ireland legacy cases where the applications are often made by the Chief Constable of the Police Service, which appears not to be the case anywhere else in the UK. The use of CMPs in investigations into conflict related human rights violations forms part of a pattern of the use of the 'national security' doctrine in Northern Ireland legacy cases.
14. Since the GFA, the UK has extended 'national security' exemptions to a range of accountability bodies with a role in Northern Ireland which has resulted in the restriction of disclosure of official records. When most justice powers were transferred from the UK Government to the Northern Ireland administration in 2010 the implementation statute contained 45 references to national security, providing for a raft of exemptions, on national security grounds, to justice powers.¹⁵ One official policy document has in fact sought to designate the whole of 'the past' in

¹⁰ Committee Against Torture Concluding Observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013), Paragraph 12(c).

¹¹ CAT/C/GBR/QPR/6 (List of Issues for UK, 7 June 2016), paragraph 38.

¹² Ministry of Justice, Report on use of closed material procedures (from 25 June 2017 to 24 June 2018)

¹³ Ministry of Justice, Report on use of closed material procedures (from 25 June 2016 to 24 June 2017), p 11.

¹⁴ Ministry of Justice, Report on use of closed material procedures (from 25 June 2016 to 24 June 2017), p 11.

¹⁵ Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010.

Northern Ireland as a national security matter with the purpose or effect of preventing access to documents.¹⁶ There is no statutory definition of 'national security'. As the MI5 website clarifies, "It has been the policy of successive Governments and the practice of Parliament not to define the term, in order to retain the flexibility necessary to ensure that the use of the term can adapt to changing circumstances."¹⁷

15. Through the Justice and Security Act 2013, the UK has extended the use of closed material procedures to civil proceedings involving sensitive material (including claims for damages) and to historical conflict-related cases in Northern Ireland. This is despite inadequate safeguards remaining in place, in particular, the heavily criticised special advocate system. This affects cases where agents of the state may have been involved in human rights violations and has already impacted on conflict related cases whereby victims' relatives have taken civil claims against the state.
16. We note the concerns raised in August 2015 by the Human Rights Committee in its concluding observations on the seventh periodic report of the United Kingdom on the International Covenant on Civil and Political Rights (ICCPR) and its recommendation that:

The State party should: (a) Ensure that any restrictions or limitations on fair trial guarantees that are based on national security grounds, including the use of closed material procedures, are fully compliant with its obligations under the Covenant, and particularly that the use of closed material procedures in cases involving serious human rights violations does not create obstacles to the establishing of State responsibility and accountability or compromise the right of victims to a fair trial and an effective remedy.¹⁸

17. Also of particular significance are the Preliminary Observations and Recommendations of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his visit to the UK in November 2015 when assessing the various initiatives undertaken to deal with the legacies of the violations and abuses during the period that is widely referred to as 'the Troubles' in Northern Ireland:

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. This ends up obscuring practices which retrospectively, it is often recognized (unfortunately, mostly privately), were not especially efficient means of furthering security. In particular, national security, in accordance with both national and international

¹⁶ CAJ 'The Apparatus of Impunity?' January 2015, pages 38-39

http://www.caj.org.uk/files/2015/01/30/No._66_The_Apparatus_of_Impunity_Human_rights_violations_and_the_Northern_Ireland_conflict_Jan_2015_1.pdf

¹⁷ CAJ, 'The Apparatus of Impunity? Human rights violations and the Northern Ireland conflict: a narrative of official limitations on post-Agreements investigative mechanisms' 2015, 30

¹⁸ CCPR/C/GBR/CO/7, 17 August 2015

obligations, can only be served within the limits of the law, and allowing for adequate means of comprehensive redress in cases of breaches of obligations.¹⁹

18. In 2018, UK Supreme Court proceedings dealt with allegations of UK complicity in the ill treatment of detainees by USA authorities as part of the 'war on terror'. The Appellants sought a judicial review of a decision not to prosecute a former senior MI6 officer and these proceedings addressed whether the closed material procedure could be used to allow material to be received during judicial review proceedings. In finding that CMP amounted to an infringement of the Appellants' rights this Supreme Court decision will deprive the UK from availing of such a mechanism to defend similar judicial review proceedings and undermines the basis of the Justice and Security Act.²⁰ Of particular note are the comments of the Divisional Court which highlighted the tension between transparency and justice created by national security concerns and the CMP process:

... The effect of the extension of the JSA 2013 to proceedings such as these is that the executive, in the form of the prosecuting authorities, can be held to account by judicial process. What is described by the Claimants as an encroachment on their fundamental rights in fact enfranchises informed and detailed scrutiny by the Courts, which would otherwise be impossible.²¹

The Committee may wish to raise with the UK the growing use of Closed Material Procedures in Northern Ireland legacy cases and the detrimental impact this will have on fair trial guarantees and in investigating 'legacy matters' in Northern Ireland.

¹⁹ 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

<http://www.ohchr.org/CH/NewsEvents/Pages/DisplayNews.aspx?NewsID=16778&LangID=E>

²⁰ *Belhaj and another v Director of Public Prosecutions and another* [2018] UKSC 33.

²¹ <http://www.bailii.org/ew/cases/EWHC/Admin/2017/3056.html>

C: Investigations into deaths, ill treatment and torture during the Northern Ireland Conflict (Articles 2, 12, 13, 14 and 16, and Lol, para 35)

19. The Committee's previous concluding observations on the fifth periodic report on the UK in 2013 recommended that the UK:
- Develop a comprehensive framework for transitional justice in Northern Ireland and ensure that prompt, thorough and independent investigations are conducted to establish the truth and identify, prosecute and punish perpetrators.²²
20. In 2016, the Committee's Lol, in light of this, sought further information on progress in Northern Ireland conflict ("troubles") legacy cases, including in particular:
- Measures to remedy the causes of excessive delays into the functioning of the Coroner's inquest system in legacy cases;
 - Commentary on the closure of the Police Historical Enquiries Team (HET);
 - The successor Legacy Investigations Branch (LIB) of the police;
 - The legacy remit of the Police Ombudsman;
 - The investigation into the murder of human rights lawyer Pat Finucane;
 - The *Ireland v UK* five techniques torture case.
21. The Committee also sought information on measures to develop a comprehensive framework for transitional justice and for prompt, thorough independent investigations. Specifically, information was requested on the *"measures the State party has put in place to ensure the full investigation of all other crimes, including acts of torture and ill-treatment, that occurred during 'the Troubles' and did not result in death."*²³
22. Since the Lol, despite a number of lengthy processes and political agreements, to date no transitional justice mechanism has been established to deal with the legacy of the Northern Ireland conflict. There is, however, potential that a series of mechanisms agreed under the 2014 Stormont House Agreement may be extended beyond deaths to also deal with torture cases. This is in particular through a proposed independent Historical Investigations Unit (HIU). Further detail is provided below on many of the matters above.

Police Service (Historical Enquiries Team and Legacy Investigations Branch)

23. The Historical Enquiries Team was disbanded in 2014 following an Inspection report which found that it did not conform to proper policing standards and did not comply

²² Paragraph 23, Committee Against Torture Concluding Observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013)

²³ CAT/C/GBR/QPR/6 (List of Issues for UK, 7 June 2016), paragraph 35.

with Article 2 ECHR (right to life) when dealing with deaths involving state actors. The remit of the HET was restricted to dealing with unresolved conflict related deaths and did not extend to acts of torture. Following the disbandment of the HET the Police Service of Northern Ireland put forward a Legacy Investigations Branch (LIB) as its successor tasked to investigate unresolved legacy cases. However, the ability of the LIB, as part of the police service, to conduct independent investigations into conflict related incidents involving State Actors has been successfully challenged in the courts. Most recently, in a 2019 case challenging the independence of the LIB to investigate an unresolved death the Court of Appeal has held that the LIB is not practically independent and as such does not have the capacity to carry out an Article 2 ECHR investigation into the death.²⁴

The 2014 Stormont House Agreement

24. In December 2014, the British Government published the Stormont House Agreement (SHA) which were the result of talks involving the parties in the Northern Ireland Executive and the British and Irish Governments. The SHA provided for a new set of institutions to deal with the legacy of the Northern Ireland conflict, namely:
 - A Historical Investigations Unit (HIU) “an independent body to take forward investigations into outstanding Troubles-related deaths” to take over the work of the HET and Police Ombudsman;
 - An Independent Commission on Information Retrieval (ICIR) “to enable victims and survivors to seek and privately receive information about the deaths of their next of kin”;
 - An Oral History Archive “to provide a central place ...to share experiences and narratives related to the Troubles”;
 - An Implementation and Reconciliation Group “to oversee themes, archives, and information recovery”.
25. There have been a series of events, which have led to a delay in the implementation of the SHA legacy provisions. A central issue which originally delayed the legislation for the HIU was the proposed insertion by the UK of a ministerial power to redact the contents of independent investigation reports by the HIU on undefined ‘national security’ grounds. This power is explicitly defined as relating to the onward disclosure of material from the intelligence branches of the police, military and security services and, as such, appears designed to have the purpose or effect of permitting the concealment of human rights violations conducted by state agents.

²⁴ <https://judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20judgment%20-%20In%20re%20Margaret%20McQuillan%20-%202019.3.19.pdf>

26. In late July 2015, the UN issued its Concluding Observations on the UK's compliance with the ICCPR stating that the UK should:
- Ensure, given the passage of time, the establishment and full operation of the Historical Inquiries Unit as soon as possible; guarantee its independence in a 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 for its investigations.²⁵
27. Following a visit to Northern Ireland in January 2016, Nils Muižnieks the Council of Europe Commissioner for Human Rights noted the fact that the ECHR has a particular resonance in Northern Ireland, where it is part of the Good Friday Agreement and where the Human Rights Act underpins key policing institutions:
- I urge the UK government and other parties concerned to return to negotiations on mechanisms for dealing with the past in the Stormont House Agreement, including setting up the Historical Investigations Unit, as soon as possible. Disagreements over the national security veto concerning disclosure of information need to be resolved.²⁶
28. In the summer of 2018, the UK finally launched a public consultation exercise, inclusive of draft legislation to implement the SHA.²⁷ However the legislation is yet to be introduced in the UK Parliament, nor is there a timetable for this to happen. In March 2019 the Committee of Ministers urged the UK to legislate for the Stormont House Agreement having expressed its serious concerns:
- ... about the delay in the establishment of the Historical Investigations Unit and other legacy institutions and underlined that, notwithstanding the complexity of the broader political picture, it is imperative that a way forward be found to enable effective investigations to be conducted, 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.²⁸
29. One of the limitations is that the remit of the HIU is currently restricted to the investigation of unresolved conflict-related deaths and does not extend to investigating allegations of torture and ill treatment. We endorse the recommendation of the UN Special Rapporteur on truth, justice, reparation and

²⁵ Human Rights Committee Concluding Observations

CCPR/C/GBR/CO/7 https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GBR/CO/7&Lang=En

²⁶ 'UK: Forthcoming reforms to human rights law must not weaken protection'

<http://www.coe.int/en/web/commissioner/-/uk-forthcoming-reforms-to-human-rights-law-must-not-weaken-protection>

²⁷ See the submission from CAJ and academic colleagues to this consultation at: <https://s3-eu-west-1.amazonaws.com/caj.org.uk/2018/08/30135633/qub-uu-caj-response-to-nio-consultation-aug-18.pdf>

²⁸ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016809375a1

guarantees of non-recurrence following his visit to NI in 2016 when he noted that the cases involving severe bodily injuries and torture deserve urgent attention and redress:

Truth, justice and reparation initiatives should expand their focus beyond cases leading to death to address violations and abuses largely excluded from their ambit, including torture, sexual harm, disappearance and illegal detention.²⁹

30. In partnership with academics, CAJ developed a shadow Model Bill designed to implement the SHA in an ECHR compliant manner³⁰. In this Bill we addressed the obligation on the UK to carry out independent and effective investigations under Article 3 ECHR by providing for an extension to the remit of the HIU to ensure it could discharge its duties to investigate legacy torture cases. We understand that the UK may be open to such an extension.

The Committee may wish to urge the UK to ensure that the SHA mechanisms, including the HIU will have their remits extended to cover cases of torture.

Proposed Statute of Limitations for the UK military

31. During the Northern Ireland conflict the rule of law was rarely applied to the UK military. The significant work, not least from families, NGOs, lawyers, international bodies, and the reformed justice system has recently led to the first decisions to prosecute a small number of soldiers in relation to conflict related deaths.
32. The response from sectors of the UK military, political and media establishment has been to seek a unilateral amnesty for soldiers usually in the form of a proposed statute of limitations for offences over 10 years old (which would by definition include all NI Conflict related offences.) The Defence Committee of the UK Parliament in April 2017 recommended such a 'statute of limitations' for members of the armed forces in the SHA consultation. More recently a further proposal was said to be under consideration by the UK Attorney General to reinstate a de facto power to veto prosecutions of soldiers by virtue of relevant offences requiring the Attorney General's consent. Should this be taken forward it would represent a significant reversal of the reforms of the NI Peace settlement.
33. There has been a lengthy narrative, including from members of the UK Executive, of misinformation in relation to such statistics, generally grounded in allegations of

²⁹ 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, A/HRC/34/62/Add.1 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/257/49/PDF/G1625749.pdf?OpenElement>, paragraph 126.

³⁰ <https://www.ulster.ac.uk/research/institutes/transitional-justice-institute/research/current-projects/implementing-the-stormont-house-agreement>

disproportionate focus on the security forces.³¹ This includes twice in 2018 the UK Prime Minister telling the UK Parliament that police legacy investigations were only focusing on the security forces, despite this being flatly contradicted by police figures.³²

34. There have been further examples of this in the reporting period, including, as well as misinformation, assertions that indicate a significant misunderstanding of the nature of procedural obligations to investigate and the separation of powers in a democratic society. In November 2018, the Secretary of State for Northern Ireland, Karen Bradley MP, when questioned in relation to the Statute of Limitations before a Committee at the UK Parliament, referred to due process in legacy inquests as “much of the problem” and judicial processes involving the military as “harassment in the courts”, as well as implying that all investigations, interviews and charges of soldiers should be stopped.³³ In early 2019, in advance of the announcement of the prosecutorial decision in relation to soldiers involved in the Bloody Sunday massacre in which 13 civilians on a civil rights demonstration were killed by British soldiers in 1972, Ms Bradley stated that killings by British military and police during the troubles were “not crimes”.³⁴
35. After the announcement of the decision to prosecute one soldier involved in Bloody Sunday the Secretary of State for Home Defence for Gavin Williamson, questioned the decision and failed to acknowledge the victims of this atrocity stating:

The Ministry of Defence is working across government to drive through a new package of safeguards to ensure our armed forces are not unfairly treated. And the Government will urgently reform the system for dealing with legacy issues. Our serving and former personnel cannot live in constant fear of prosecution³⁵.

The Committee may wish to seek assurances from the UK no amnesty will be introduced for the military or other state actors in relation to conduct prohibited under the Convention.

³¹ 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) June 2017 Follow up Procedure: “accountability for conflict-related violations in Northern Ireland” (CCPR/C/GBR/CO/7, paragraph 8). <http://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/06/30110335/S465-CAJ-Submission-to-UNHRC-ICCPR2c-June-2017.pdf>

³² This first occurred in May 2018 and again in June 2018 see ‘PM: Northern Ireland system investigating past ‘unfair’ BBC News 9 May 2018 <https://www.bbc.co.uk/news/uk-northern-ireland-44054424>; and ‘Theresa May repeats claim paramilitaries are not being investigated for Troubles killings’ *Irish News* 6 June 2018.

³³ See <https://twitter.com/CAJNi/status/1065262694687756290> and <https://www.parliamentlive.tv/Event/Index/226f5010-7320-43d2-9497-f3a798b68a45>

³⁴ <https://www.irishtimes.com/news/politics/killings-by-british-soldiers-during-troubles-were-not-crimes-karen-bradley-1.3816483>

³⁵ <https://www.independent.co.uk/news/uk/politics/bloody-sunday-prosecution-gavin-williamson-soldierf-derry-relatives-condemn-john-kelly-a8823196.html>

The Ireland v UK case – the ‘Hooded Men’

36. Since the last examination by the Committee, there have been significant developments into the torture cases known as the ‘hooded men’ in which CAJ represents one of the next of kin³⁶. As the Committee will recall, in 1978 the European Court of Human Rights, in *Ireland v UK*,³⁷ found that detainees in Northern Ireland in 1971 who had been subjected to ‘in-depth interrogation’ techniques³⁸ suffered inhuman and degrading treatment, but not torture. This has been interpreted by many Governments, incorrectly, to justify actions that might otherwise be considered to come within the definition of ‘torture’ in international law including in Iraq, Afghanistan and around the world.
37. In December 2014, the Irish Government lodged an application before the European Court of Human Rights seeking a revision of this judgment. This was based on new evidence which emerged from the British National Archives which showed that the effects of the ill-treatment had been long-term and severe. An RTÉ Investigations Unit documentary aired in June 2014 revealed evidence that the UK Government at the highest levels authorised ‘deep interrogation’ tactics of Northern Ireland prisoners in the 1970s³⁹. It was submitted that the UK Government deliberately misled the Court when the case was first heard by it and which could have led to the Court finding that the treatment being considered in fact constituted torture.⁴⁰ In September 2018 the ECtHR Grand Chamber rejected this request on a technicality.⁴¹
38. A number of the ‘hooded men’ and next of kin initiated judicial review proceedings before the domestic courts claiming a violation of Article 2 ECHR (right to life) and Article 3 ECHR (right to be free from torture) given that there has been no effective investigation into the treatment of these men following the discovery of the new material at the British National Archives. In 2017, the High Court of Northern Ireland declared that the decision by the PSNI in October 2014 to not take further steps to investigate the question of identifying and, if appropriate, prosecuting those responsible for criminal acts should be quashed. This decision⁴² was appealed by the PSNI and was heard by the Court of Appeal in April 2018 and judgment is pending.

³⁶ <http://www.irishtimes.com/news/crime-and-law/the-torture-centre-northern-ireland-s-hooded-men-1.2296152>

³⁷ *Ireland v UK* app no. 5310/71 (18/01/1978)

³⁸ Which included ‘five techniques’ of wall standing, hooding, being subjected to ‘white Noise’, starvation and sleep deprivation.

³⁹ <https://www.rte.ie/news/player/prime-time/2014/0604/>

⁴⁰ ‘Ireland to clash with UK at human rights court over hooded men judgment’, the guardian, 2 December 2014

⁴¹ <https://hudoc.echr.coe.int/eng?press#%7B%22sort%22%3A%22kdate%20Descending%22%2C%22itemid%22%3A%22003-61858848022502%22%7D>

⁴² <https://judiciaryni.uk/sites/judiciary/files/decisions/McKenna%20%28Mary%27s%29%20Application.pdf>

Waterboarding and other forms of torture

39. As well as failing to properly investigate the use of ‘interrogation in depth’ techniques on the ‘hooded men’ the State party is also in dereliction of its duty to investigate the further allegations of the use of torture by the Parachute Regiment of the British Army and the former police service - the Royal Ulster Constabulary (RUC) in Northern Ireland.
40. Declassified official British documents⁴³ established that ‘water boarding’ and other torture techniques were used against a number of individuals in Northern Ireland and were alleged to be known by the then UK Prime Minister Edward Heath. Some of the most serious allegations include detainees being subjected to water boarding; anal rape of male detainees; electric shock on genitals; detainees being encased in a coffin underground; and being suspended upside down by the feet over a lift shaft in a RUC station. It is alleged that medical notes from military doctors detailing the injuries suffered by detainees were also forged. Some of these serious allegations were the subject of a media report.⁴⁴ Following this the allegations were raised by the Irish Government with the UK Government and were the subject of a written question in parliament by the Shadow Secretary of State for Northern Ireland in 2017.⁴⁵
41. There have been a number of media⁴⁶ and human rights reports⁴⁷ on these cases which called for an investigation into these allegations and this matter has been reported to the UN Special Rapporteur on Torture.⁴⁸

The Committee may wish to ask the UK how it intends to discharge its investigative obligations in relation to acts of torture, inhuman and degrading treatment arising from the conflict in Northern Ireland.

Challenges to the Police Ombudsman and Police arrest of journalists

42. In June 2016, the Police Ombudsman in exercising statutory powers issued a report into the 1994 Loughinisland massacre finding that collusion had been a significant feature in the sectarian murders of six civilians in a machine gun attack on the Heights Bar.⁴⁹ In 2017, an award winning documentary - ‘No Stone Unturned’ - in

⁴³ <https://www.patfinucanecentre.org/index.php/state-violence/evidence-waterboarding-belfast>

⁴⁴ <https://www.channel4.com/news/waterboarding-claims-in-northern-ireland>

⁴⁵ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-02-27/65783/>

⁴⁶ <https://www.irishtimes.com/news/crime-and-law/papers-alleging-british-army-waterboarding-in-ni-uncovered-1.3133074>

<https://www.irishtimes.com/news/ireland/irish-news/british-army-used-waterboarding-in-north-papers-claim-1.2959826>

⁴⁷ <https://www.amnesty.org.uk/press-releases/amnesty-international-urges-investigation-new-torture-allegations-northern-ireland>

⁴⁸ Complaint lodged by Amnesty International, CAJ and the Pat Finucane Centre, March 2017

⁴⁹ <https://www.policeombudsman.org/Media-Releases/2016/The-murders-at-the-Heights-Bar-in-Loughinisland-Po>

part relying on leaked official documents, further revealed details of human rights violations through paramilitary collusion in relation to the massacre.⁵⁰

43. Despite the evidence uncovered by the Ombudsman and the documentary no one has been charged with the massacre. In August 2018, however, two journalists, Barry McCaffrey and Trevor Birney who had worked on the documentary were arrested. This related to the use of allegedly leaked documents with the PSNI sustaining that the Ombudsman had reported a 'theft' of such documents from the Ombudsman's office and the Ombudsman sustaining that he had not. Judicial review proceedings have been taken as regards the legality of the search and seizure of journalistic material and the two journalists have been released on bail. The arrests have prompted significant concern from human rights and press freedom and representative bodies as well as international attention. Further details are found on a Council of Europe alert and Media Freedom report.⁵¹
44. In 2017, former members of the RUC, including a former head of Special Branch, took forward a judicial review arguing that the Ombudsman had exceeded his statutory powers by making findings in his public statement on the Loughisland massacre. Judgment delivered on 29 November 2018 dismissed the application and found that the Ombudsman had acted appropriately in discharging his Article 2 ECHR investigative obligation.⁵² The powers of the Police Ombudsman's office to issue public statements have therefore been maintained. An appeal has been reportedly lodged by the applicants against the ruling.
45. The Court's ruling on the Police Ombudsman's powers provided the way for the release of much delayed reports, also investigating collusion from the Ombudsman's office. This was expected to happen in early 2019 however on 14 February 2019 the Police Ombudsman for Northern Ireland (PONI) Dr Michael Maguire issued a press statement advising that:

His investigators have identified significant, sensitive information, some of which relates to covert policing, which is held by police but was not made available to his staff investigating events during 'the Troubles'.⁵³

⁵⁰ <http://film.britishcouncil.org/no-stone-unturned>

⁵¹ <https://mappingmediafreedom.usahidi.io/posts/22627>

https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesoportlet&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_sojdashboard_WAR_coesoportlet_alertId=39053000

⁵² <https://judiciaryni.uk/judicial-decisions/summary-judgment-court-delivers-judgment-loughinisland-report>

⁵³ <https://www.policeombudsman.org/Media-Releases/Police-did-not-disclose-sensitive%E2%80%98troubles%E2%80%99-relat>

This discovery has undermined confidence in the capacity of the PSNI to properly disclose all archive material to the Police Ombudsman to enable it to carry out independent and effective investigations into troubles related matters.

46. There is also a concern among victims and survivors who are waiting for reports into the deaths of their next of kin that the Office is not being properly funded to enable it to carry out investigations into legacy matters in a prompt manner. The failure to properly resource the Office of the Police Ombudsman to enable it to discharge its investigative obligation has been criticised by the High Court in Northern Ireland.⁵⁴
47. The Police Ombudsman noted the reduction in the Office's budget of 10.2% between 2012-2017⁵⁵. In his latest report, he highlighted that one of the key strategic risks facing the Office was an insufficient budget and that:
- any further reduction would undermine the capability and capacity of the Office to undertake its statutory functions.⁵⁶

The Committee may wish to ask the UK what steps it is taking to ensure the Police Ombudsman is properly resourced and capable of carrying out independent effective investigations, including into legacy cases.

Public Inquiry into the death of Patrick Finucane

48. Despite the Committee's recommendation, the UK has also failed to date to conduct a public inquiry into the murder of human rights lawyer Pat Finucane in 1989. This is despite the commitment to do so in the Weston Park Agreement and the admission by former UK Prime Minister David Cameron in 2012 that there were "shocking levels of collusion" in this murder in which no one has ever been held to account.
49. On 27 February 2019, the UK Supreme Court delivered a seminal judgment in which it declared that the UK has failed to discharge its obligations under Article 2 of the European Convention on Human Rights (right to life). It held that none of the inquiries into this murder, including the De Silva review, have been fully effective investigations. The Court reached its decision as none of the inquiries were granted powers to compel the attendance of witnesses and, as a result of this, no individual has been identified as being responsible for the collusion which the UK Government has admitted to.⁵⁷

⁵⁴ <https://www.bbc.co.uk/news/uk-northern-ireland-39381983>

⁵⁵ <https://www.policeombudsman.org/PONI/files/59/59a07a61-6d31-4190-b639-6d4333ca7dd0.pdf>

⁵⁶ <https://www.policeombudsman.org/PONI/files/0a/0a274df0-07a3-4cee-b131-b13847a566d9.pdf>

⁵⁷ <https://www.supremecourt.uk/cases/docs/uksc-2017-0058-judgment.pdf>

50. It is now incumbent on the UK Government to initiate a fully independent public inquiry into this death as a matter of urgency. This request by the family is supported widely including by the Irish Taoiseach (Prime Minister) Leo Varadkar.⁵⁸
51. In March 2019, the Committee of Ministers of the Council of Europe invited the UK to provide its response to the judgment by June 2019, given that this case was before the European Court of Human Rights in 2003 and still has not been fully implemented⁵⁹.

The Committee may wish to ask the UK how it intends to comply with its obligations to hold a public inquiry into the murder of Patrick Finucane without further delay.

Legacy Inquests

52. CAJ continues to express concern at the protracted delays and current limitations within the inquest system undermining its ability to provide prompt and effective investigations into conflict related deaths. There are currently 52 legacy inquests involving 93 deaths pending before the Coroners' Courts which have been opened but not completed, primarily due to a lack of resources and delays in the state disclosing information.
53. There have been both domestic and European Court of Human Rights (ECtHR) decisions which have found the UK to be in breach of its human rights obligations in relation to legacy inquests.⁶⁰ CAJ is concerned at the detrimental impact of these protracted delays on the next of kin, many of whom now suffer ill health or advancing old age. In 2016 as part of reform proposals the Lord Chief Justice of Northern Ireland set out a five-year plan for dealing with outstanding legacy cases before the Coroner's Court through the establishment of a dedicated Inquest Legacy Unit.
54. In March 2017, the UK announced that no resources would be released for the establishment of a dedicated Legacy Inquest Unit until there was overall agreement on the full range of mechanisms to deal with the past.⁶¹ The collapse of the Executive in January 2017 related to issues concerning, *inter alia*, the establishment of such mechanisms. The introduction of a requirement by the State Party for cross-party consensus on this issue prior to the release of resources has delayed the establishment of a Legacy Inquest Unit. It should be noted that there are no legal

⁵⁸ <https://www.independent.ie/irish-news/courts/varadkar-calls-on-uk-to-hold-inquiry-into-1989-murder-of-pat-finucane-37863751.html>

⁵⁹ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016809375a1

⁶⁰ Concurring Opinion of Judge Kalaydjieva in *McCaughey & Others v the UK and Hemsworth v the UK*, 16 July 2013

⁶¹ 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/>

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 in this instance.⁶²

55. In March 2018, families waiting on inquests successfully judicially reviewed the actions of the former First Minister over preventing a request from the Justice Minister for the release of funding for legacy inquests. This included a ruling that the Ministers actions had been unlawful by virtue of failure to take into account the duties to comply with ECHR Article 2 and erroneously subjecting the release of monies for legacy inquests to an ‘overall package’ to deal with legacy issues.⁶³
56. In January 2019, the Court of Appeal allowed an appeal taken by another next of kin against a case management decision not to remove a stay on the hearing of his application for judicial review against the PSNI, Department of Justice and Coroner Service. He sought a declaration that the delay into an inquest into his son’s death violated Article 2 ECHR.⁶⁴ Citing the Court of Appeal decision in *Hugh Jordan’s Application*,⁶⁵ the Court noted that the fresh inquest should take place within a reasonable timeframe and any failure to do would constitute a fresh breach of the Convention which could result in a remedy of damages.
57. In March 2019, the UK Supreme Court upheld a further challenge taken by the next of kin in relation to the delay suffered in holding inquest proceedings. It was held that the PSNI and Coroner’s Court had breached the family’s right to prompt investigation in this legacy inquest.⁶⁶
58. In February 2019, the UK Government indicated that while a business case made by the Northern Ireland Department of Justice to the Department of Finance had been approved in October 2018⁶⁷. However, at that time no monies had been released. Into March 2019, during discussions on the incoming budget, an announcement was made that monies had been secured for the financial year. It is unclear, however, what the long-term funding arrangements are.

⁶² 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

⁶³Hughes (Brigid) Application [2018] NIQB 30 <https://judiciaryni.uk/judicial-decisions/2018-niqb-30>

⁶⁴ <https://judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20Judgment%20-%20In%20re%20Raymond%20McCord%2018.01.19.pdf>

⁶⁵ [2015] NICA 66

⁶⁶ <http://www.bailii.org/uk/cases/UKSC/2019/9.html>

⁶⁷<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680931251>

The Committee may wish to ask the UK what steps it is taking to discharge its obligations to establish without further delay outstanding legacy inquests.