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Cases concerning the action of security forces in Northern Ireland

Revised Memorandum prepared by the Secretariat
incorporating information received up to 20 September 2004

6 cases concerning the action of security forces in Northern Ireland

Jordan v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001
Kelly and others v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001
McKerr v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001
Shanaghan v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001
McShane v the United Kingdom, judgment of 28 May 2002, final on 28 August 2002
Finucane v the United Kingdom, judgment of 1 July 2003, final on 1 October 2003

SUMMARY

The Secretariat considers that the information provided on measures adopted so far indicates that significant improvements in existing procedures and additional safeguards have been introduced. Several questions nonetheless remain outstanding and further information/clarifications are requested on a number of points with a view to enabling the Committee of Minister to assess the compliance with the judgments in these cases (see the Secretariat assessments for each item).

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INTRODUCTION

1. At the 819th meeting (DH) (3-4 December 2002), the Deputies requested the Secretariat to prepare a Memorandum summarising the information received from the United Kingdom authorities in response to the violations found by the European Court of Human Rights (ECHR) in the present cases[1] and certain comments received from applicants' lawyers[2], the Irish authorities (written statement provided at the 834th meeting (DH) (9-10 April 2003), the Committee for the Administration of Justice[3], and from the Northern Ireland Human Rights Commission (NIHRC)[4]. It is recalled that the supporting documents sent by the United Kingdom authorities together with the package of measures are available at the Secretariat as indicated in the Annotated Agenda for the 819th meeting (DH).

2. The Secretariat was also asked to indicate those areas for which additional information or clarifications might still be needed with a view to compliance with the ECHR's judgments in the above-mentioned cases.

3. At the 834th meeting (DH) (9-10 April 2003) several delegations took the floor to request information in respect of the questions raised in the Memorandum. However, it was also agreed that it was important to wait for the outcome of the proceedings in pending litigation, notably in the *Middleton* case that was then pending before the House of Lords, before discussing further some of the issues covered in the Memorandum.

4. On 19 May 2003, the Secretariat received further information/comments from the United Kingdom authorities. The information was appended to the Notes on the Agenda at the 841st meeting (DH) (3-4 June 2003). The Deputies decided to postpone the examination of the cases to its 854th meeting (DH) (7-8 October 2003) to enable the Secretariat to update the Memorandum and, as appropriate, to include in it any further information on pending litigation, notably in the *Middleton* case.

5. Further information received just prior to the 854th meeting (DH) was incorporated in the Memorandum presented at the 879th meeting (DH) (5-6 April 2004). Information concerning the judgments of the House of Lords delivered on 11 March 2004 in the *Middleton* and *McKerr* cases, as well as the further information/comments submitted by the United Kingdom authorities on 14 June 2004, is included in the present revised Memorandum.

6. In addition, a bilateral meeting was held on 20 September 2004 between relevant government officials from the United Kingdom and the Secretariat. The information provided at that meeting is also incorporated in the present revised Memorandum. Also, some information that is now clearly outdated, concerning pending judicial proceedings in particular, or that has been superseded because new measures have been taken, has been replaced with current information.

7. It is recalled that, in order to facilitate its examination, this Memorandum follows essentially the same structure as that of the information package submitted by the United Kingdom authorities for the 819th meeting (DH). Questions concerning the armed forces are dealt with in part II.K. Questions related specifically to individual measures are dealt with separately, in part III. The areas where additional information or clarifications would be needed are indicated under the heading "*Secretariat assessment*".

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[1] For a summary, see 827th Annotated Agenda and Order of Business, section 4.2.
[2] Madden & Finucane Solicitors, representing the applicants in the cases Jordan and McKerr
[3] Non Governmental Human Rights Organisation based in Belfast (Northern Ireland), representing the applicants in the cases Kelly and Shanaghan.
[4] The Northern Ireland Human Rights Commission is a statutory body established on 1 March 1999 as a result of the Belfast Agreement of 10 April 1998. The activities of the Commission include, inter alia, reviewing the adequacy and effectiveness in Northern Ireland of law and practice relating to human rights, advising on the compatibility of legislation and policy with human rights and promoting understanding and awareness of human rights.

I. GENERAL INFORMATION

8. The United Kingdom authorities have indicated that, since the events in question in these six judgments, the United Kingdom has enacted the Human Rights Act 1998. The Act provides for the Convention to be relied upon in the courts of the United Kingdom. In particular, under section 6(1) of that Act, it is unlawful for a public authority to act in a way which is incompatible with a right set out in the Convention. The Director of Public Prosecutions, the Chief Constable, all coroners, as well as Ministers of the Crown, are "public authorities" within the meaning of the Act and are thus bound to act compatibly with Convention rights. A copy of the judgments in these cases has been sent to the Director of Public Prosecutions, the Chief Constable and all coroners in Northern Ireland. They are thus aware of the Court's judgments on the requirements of Article 2.

II. INFORMATION CONCERNING GENERAL MEASURES TAKEN WITH RESPECT TO EACH VIOLATION FOUND

A. Lack of independence of the police officers investigating the incident from those implicated in the incident

1. Investigations into deaths allegedly caused by the police

(i) Police Ombudsman

9. As regards investigations into deaths allegedly caused by the police, the United Kingdom Government has indicated that, since November 2000, there has been an independent Police Ombudsman in Northern Ireland with the power to investigate all complaints against the police, to supervise the investigation of complaints by the Chief Constable and to investigate other matters of her own motion. The Ombudsman is completely independent in deciding what is a complaint and how it should be handled. She has a staff of over one hundred including a team of independent investigators. She can recommend criminal or disciplinary proceedings against police officers and may direct that disciplinary proceedings be brought where the Chief Constable refuses to do so. The Ombudsman does not adjudicate on guilt or punishment.

10. A copy of the legal texts setting out the manner of appointment and powers of the Ombudsman, together with a paper giving further details, have been forwarded to the Secretariat. It is to be noted in particular:

a) where there is a "serious complaint" (defined in section 50(1) of the Police (NI) Act 1998 as including any case where the complaint relates to the death or serious injury of any person), the Ombudsman is obliged by section 54(2) to investigate it in accordance with section 56, i.e. by appointing one of her officers to investigate it;

b) the Ombudsman is required by section 58(1) of the Act to consider the report of the investigation and determine whether it indicates that a criminal offence may have been committed by a police officer. Where this is the case, the Ombudsman is required by section 58(2) of the Act to send a report to the Director of Public Prosecutions together with any appropriate recommendations;

c) where it appears that the conduct of a member of the police service may have resulted in the death of a person the Chief Constable is required, under section 55(2) of the Act, to refer the matter to the Police Ombudsman;

d) under a protocol with the Ombudsman, the Chief Constable automatically refers serious matters such as the use of baton rounds or firearms by the police; and

e) the Policing Board or the Secretary of State may in certain circumstances also refer matters to the Police Ombudsman under section 55(1) of the Act.

(ii) Initiation of prosecutions by the Director of Public Prosecutions

11. The United Kingdom authorities have emphasised that under the above legislation, the Police Ombudsman is required to make a report to the Director of Public Prosecutions, who carefully considers the evidence, information and recommendations of the Ombudsman. That said, it is entirely a matter for the DPP (whose independence was expressly recognised in the judgments in question) to decide if a prosecution should be commenced; the decision to prosecute is based upon the application of the test for prosecution, namely whether there is sufficient, admissible evidence to afford a reasonable prospect of conviction and, if there is, whether prosecution is in the public interest.

12. In practice, internal management statistics show that the DPP has differed from a recommendation of the Ombudsman in only a small number of cases. In all cases, the DPP informs the Ombudsman by letter of the decision taken and the reasons for it. The principles governing the giving of reasons for decisions not to prosecute, described below at C.1, apply.

13. As regards the scope of the prosecutor's duty to initiate criminal proceedings against members of the police force if there has been evidence of serious crime or unlawful death, the criteria of public interest for and against prosecution are not exhaustive, and the factors that apply will depend on the facts in each case.

14. The policy of the Director of Public Prosecutions in Northern Ireland is that broadly there is a presumption that the public interest requires prosecution where there has been a contravention of the criminal law. This is the starting point for consideration of each individual case. In some circumstances the serious nature of the case will make the presumption a very strong one, though there may still be instances where, although the evidence is sufficient to provide a reasonable prospect of a conviction, prosecution is still not required in the public interest. Examples of such instances are where details may be made public that could harm sources of information, or where the defendant is elderly or is suffering from significant physical or mental ill-health. Nevertheless it will be highly unlikely for the DPP to decide that it will be against the public interest to prosecute in a murder case, or in the case of any other serious offence, whatever the passage of time. See also the further information provided below, at C.1.

(iii) "Calling-in" arrangements

15. The authorities have referred to the fact that another safeguard of the efficiency of the police investigation is the possibility of entrusting it to another police force. Under the Police Act 1996, where one police service may provide aid to another, the Chief Constable may request that an incident be investigated by officers from a police service from Great Britain. As responsibility for criminal investigations in Northern Ireland is a matter for the Chief Constable of the Police Service of Northern Ireland (PSNI), he is best placed to make a professional judgment to decide if the assistance of another police service is required in an investigation, taking account of local knowledge, interpretation of any intelligence, or any specialised skills that may be required. It is therefore important that such a decision is based on the professional assessment of the Chief Constable and, when such assistance is required, that an appropriate police service is identified in discussion with Her Majesty's Inspector of Constabulary.

2. <u>Investigations into deaths allegedly caused by members of the armed forces</u>

16. With regard to investigations of deaths caused by members of the armed forces, they are carried out by the police, who are separate from the armed forces and who are subject to scrutiny by the Police Ombudsman. This point is treated in more detail below, at K.

3. Allegations of collusion involving members of the armed forces and the police

17. Where there is an allegation of collusion involving members of the armed forces and the police, the Chief Constable of the PSNI may use his above-mentioned powers to bring in an outside police force to investigate (practice of the Chief Constable). For example, in a recent case where it was alleged that the security forces were implicated in a murder, the Chief Constable requested that the incident be investigated by a police force from England. The United Kingdom authorities have indicated that, in the light of the judgments of the European Court, the Chief Constable will be mindful of the need to make use of this power in appropriate cases. Furthermore, where the Police Ombudsman is not satisfied that the police are conducting an independent investigation at any time, she can authorise a separate investigation into the conduct of the police.

Comments received relating to points 1, 2 and 3 above

18. NIHRC is of the opinion that the above-mentioned practice of the Chief Constable should be enshrined as a statutory duty, thereby reflecting the need to ensure that, in line with the European Convention's standards and the European Court's case law, human rights are protected in a manner "prescribed by law".

19. This statutory duty would be particularly important in incidents where the death has been caused by a member of the army in a situation where the army and police have been conducting a joint security operation (as in the cases of Kelly and others and McShane). While the army does not act under the direction and control of the police in Northern Ireland, it often acts alongside and in conjunction with the police (i.e. "in support of the police"). In the Commission's view it is imperative that, in such situations, the police of Northern Ireland should not be involved in the investigation of any alleged malpractice by the army.

20. The Irish authorities would also welcome a codification of the Chief Constable's statutory duty. They have also requested that, in relation to the investigation of offences alleged to have been committed by security forces, particularly where such offences are alleged to have been committed in the course of joint operations between the security forces and the police, it would also welcome information on codification of the practice of having investigations into such matters carried out by outside police forces. In particular, the Irish authorities note the statement made at paragraph 5 of the United Kingdom's package of measures of 8 October 2002 that "in relation to cases not covered by the Police Ombudsman's jurisdiction, the Chief Constable of Police Service of Northern Ireland is very conscious of the need to ensure that, in appropriate cases, an incident involving the security forces is investigated by persons who are independent of those implicated in the incident". The Irish authorities would welcome clarification of what is meant by "appropriate cases".

Supplementary information received from the United Kingdom Delegation in reply to the above comments

21. As regards the question of codifying the practice of having investigations carried out by outside police forces, the Government continues to believe that a professional assessment by the Chief Constable is the right approach to deciding when and how to seek assistance from another police force. In addition to calling in outside police forces to carry out investigations, the Chief Constable can also consider appointing a PSNI investigation team with an external police adviser. These are operational decisions properly within the discretion of the Chief Constable.

22. Cases identified by the Chief Constable as potentially requiring the appointment of an external service are monitored and discussed with the Policing Board. Moreover, the Chief Constable, as a public authority within the meaning of the Human Rights Act, would, under section 6(1) of the HRA, be acting unlawfully if he acted in a manner incompatible with a Convention right. His decision whether or not to call in an outside force may be subject to review. In this respect, the United Kingdom authorities have referred to

the *Kelly* application currently pending before the High Court in Northern Ireland, in which the Chief Constable's decision *not* to call in an outside force has been challenged. While this application may fail as a matter of fact or of law, it is at least clear that a challenge can be brought even where no "calling-in" decision is made, and that Article 2 of the Convention could be directly relied on for facts occurring after the HRA came into force.

23. The question of which cases are "appropriate" for an investigation led by members of outside police forces depends very much on the individual circumstances of the case. Examples of cases where the Chief Constable has exercised his power to call in officers from outside forces include the Stevens series of investigations (which involved allegations of collusion between the security forces and loyalist paramilitaries); the Stalker/Simpson investigation (which involved fatal shootings by police officers) and the investigation into allegations by David Adams that he had been assaulted by police officers. The arrangements used by the PSNI have worked and continue to work well.

4. Interface between criminal investigations and coroners' work

24. As regards the interface between criminal investigations and coroners' work and the impact this may have on the efficiency of proceedings, the United Kingdom authorities have indicated that, as a rule, where police investigations are necessary, these are carried out and a decision made whether or not to prosecute before an inquest is held. Coroners are obliged to adjourn an inquest if so requested by the police because a person may be charged with certain offences (Rule 12 of the Coroners (Practice and Procedure) Rules (NI) 1963) or has been so charged (Rule 13).

25. After the conclusion of criminal proceedings, coroners may resume an inquest if they consider that there is sufficient cause to do so. If evidence comes to light at the inquest that appears to disclose that a criminal offence may have been committed, coroners are required under section 6(2) of the Prosecution of Offences (Northern Ireland) Order 1972, as noted by the Court (§ 71 of the *McKerr* judgment) to report this to the Director of Public Prosecutions in writing. Conversely, under section 11(1) of the Coroners (Northern Ireland) Act 1959, the coroner receives the evidence of investigations conducted by a police constable. The Police Ombudsman has likewise made a working arrangement to pass to coroners any information obtained by her investigators.

5. Specific expertise in the field of human rights

26. Following a recommendation of the Patten Report on policing for Northern Ireland, a lawyer with specific expertise in the field of human rights was appointed to the staff of the Police Service of Northern Ireland in October 2001. The Police Service and the Police Ombudsman are both aware of the need to respect human rights and the Convention in particular, and to provide appropriate training for their staff.

Secretariat assessment:

27. The investigation powers of the Police Ombudsman vis-à-vis the police would appear satisfactory.

28. The possibility of having investigations of allegations of abuses by the police, and of collusion between police and army, carried out by outside police forces, at least in cases of allegation of serious crime, appears to be established, although it is not envisaged to codify this practice to make it compulsory. It may also be observed that the holding of the Stalker/Sampson investigation in the McKerr case and of the three Stevens investigations in the Finucane case was not in itself a sufficient safeguard to prevent the Court finding violations of the procedural obligations arising under Article 2 in those cases.

29. The clarifications received regarding the scrutiny to which the Chief Constable's decisions may be subject appear encouraging. Information would be welcome as to the outcome of the Kelly application currently pending before the High Court.

30. The information provided as regards the scope of the prosecutors' duty to engage criminal proceedings against members of the police if there has been evidence of serious crime and, a fortiori, unlawful deaths, as well as the criterion of "public interest" referred to by the authorities, appear to clarify matters, particularly bearing in mind the further information provided on the giving of reasons for decisions not to prosecute (see C below).

31. The arrangements allowing the scrutiny of evidence by the coroner and the appointment of a lawyer with specific human rights expertise within the Northern Ireland Police Service appear useful.

B. Defects in the police investigations

32. The United Kingdom authorities have indicated that, on 28 March 2003, the Chief Constable of the PSNI established the Serious Crimes Review Team (SRCT), whose remit is "to review a number of unsolved major crimes, including murder and rape, where it is thought that new evidential leads may be developed". If, as a result of this review, it appears that new evidence might come to light, reinvestigation of any of the present cases might follow. The present state of proceedings with respect to each case is examined further in part III of this memorandum.

33. As regards any suggestion that the passage of time might serve as a pretext for not reinvestigating cases, the United Kingdom authorities have indicated that to adopt a policy that the passage of time was a debarring factor for reinvestigation would in fact be contrary to the whole ethos of the PSNI in establishing the SCRT. Time remains an influencing factor in that it can inevitably affect the availability of witnesses, exhibits and documentation, but cannot be used in itself as a bar. The PSNI has adopted a three-stage approach to "historical" cases. First, a preliminary case assessment is carried out to ascertain if any potential evidential opportunities exist to move the investigation forward. Second, where these are identified then a full deferred case review will be commissioned by the Assistant Chief Constable. Subsequently, as the third stage of the process, the case may be referred to a murder investigation team for further investigation subject to the accepted recommendations of the Review.

34. The draft PSNI rationale document in respect of conclusions reached by the SCRT has yet to be ratified by the Chief Constable's Top Team. When this has happened the matter will be dealt with in greater detail. For the time being, however, 22 cases are ongoing. Seven have been identified for a full deferred case review and two cases have been reopened. While fresh information is not available in each unsolved case, the aim is to conduct a systematic reivew of each case in order to see what scope exists for moving forward with its investigation.

35. The Government has also emphasised that the Chief Constable remains generally mindful of the need to ensure that all allegations of crime, but particularly of serious crime such as unlawful killings, are investigated expeditiously and thoroughly.

36. The Government further indicated in June 2004 that it is also looking at ways of dealing with Northern Ireland's past in a way that recognises the pain and anger associated with the Troubles but which also allows the community as a whole to move forward, better prepared to build a better future for the next generation. At this stage, Ministers are taking initial soundings from experts in the field, with a view to wider consultation with the community in Northern Ireland, in particular victims and survivors, in due course. This remains a deeply sensitive subject and so this is not likely to be a quick process. The Government is clear that any solution must command widespread respect across all sections of the community in Northern Ireland.

Secretariat assessment:

37. The information received regarding the approach of the SCRT to "historical" cases and the passage of time is welcome. Information concerning any further conclusions reached by the SCRT would be helpful.

38. The efficiency of police investigations will in particular be tested in the handling of the requests for new investigations. It would thus appear appropriate to await further information, in the light of the work of the SCRT and following the McKerr judgment, before reaching a conclusion on the adequacy of the present situation for the purposes of the ECHR.

39. The information provided concerning the long-term policy on dealing with the past would appear constructive. Further information in this respect would be welcome, notably inasmuch as it may also assist in providing further, concrete solutions concerning individual measures in the present cases.

C. Lack of public scrutiny and information to the victims' families of the reasons for the decision of the Director of Public Prosecutions not to bring any prosecution

1. Policy of the Director of Public Prosecutions on giving reasons

40. The United Kingdom Government has previously pointed out that the Director of Public Prosecutions has recognised the need to adjust his policy on giving reasons to take account of the judgments of the ECHR. Accordingly, he has issued a statement setting out his policy. In addition, as the Director already has instructions in place that require him to be notified of any cases of particular difficulty or sensitivity, it would in practice be inconceivable for any case arising from a death allegedly caused by an agent of the state not to be drawn to his attention.

41. The United Kingdom authorities have further indicated that the decision whether or not to give reasons for non-prosecution in any given case involves the balancing of different factors which are mainly public-interest considerations. The balancing of public-interest considerations is set out at length in the Court of Appeal decision *In the matter of Adams*[5]. It is possible, for example, that in giving reasons for a decision not to prosecute, information would be made public which could cause a serious risk to an individual's safety and may thus raise Article 2 issues itself.

42. In the view of the United Kingdom authorities, it is important, therefore, that the Director continues to take a case-by-case approach to giving reasons. They consider that this emphasis on the particular circumstances of each case accords entirely with the case law of the European Court, exemplified in the Jordan judgment itself. They consider that a blanket requirement that DPP gives reasons in all cases could give rise to unfairness. The statement explaining his change of policy, therefore, is specifically worded to ensure that the Director retains the right to consider the circumstances of each case individually and reach decisions on a case-by-case basis, having weighed all material considerations.

43. The United Kingdom authorities recall that the DPP is a public authority within the meaning of the Human Rights Act 1998 and must act accordingly. His obligations as a public authority are guided and shaped by the case law of the European Court, including the judgments in Jordan and the related cases. The DPP indeed acknowledges this, while observing that he must retain the discretion necessary to permit a fully informed case-by-case approach to be taken. The decisions of the DPP may be subjected to judicial scrutiny through judicial review proceedings at the suit of a dissatisfied interested party.

44. In this respect, the United Kingdom authorities have confirmed that the decision of the High Court in Jordan, referred to in part III below (Individual measures – Comments received), represents the law in Northern Ireland (not in England) and must be followed unless superseded or overturned by a higher court.

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[5] In the matter of Adams [2001] NICA 2: Appeal against the decision of the DPP not to prosecute police officers in respect of matters which occurred at and following the arrest of Mr Adams on 10 February 1994 and not to provide detailed reasons for those decisions. In paragraph 5 of the DPP affidavit sworn on 10 December 1999, Mr White set out the criteria which the DPP applies to the initiation of prosecutions. The DPP's grounds for declining to provide reasons in the case were set out in paragraphs 41 and 42 of Mr White's affidavit.
The final decision in the Adams case was that the DPP did not apply his policy in a manner which was unfair to the appellant. In reaching the decision, reference was made to the case-law of the European Court of Human Rights.

45. They have also indicated that, given that it appeared that the appeal to the House of Lords in the *McKerr* case could have repercussions for the outcome of other judicial review applications and for the approach of the DPP in other fatal shooting cases with regard to the giving of reasons for no prosecution, the DPP intended to defer writing further on such cases until the determination of the appeal to the House of Lords in the *McKerr* case. This approach has been approved by the Northern Ireland courts, which have found that the appropriate course in a number of ongoing judicial reviews on the issue of giving reasons for no prosecution was to await the outcome of the *McKerr* case.

Comments received

46. The NIHRC has asked whether the DPP's policy statement could be given the force of law.

Supplementary information received from the United Kingdom Delegation up to 20 September 2004

47. As regards the regulation by statute of the giving of reasons for decisions not to prosecute, this idea was debated during the passage of the Justice (Northern Ireland) Act 2002, at which time the Government took the view that this would be an inappropriate step, since decisions on giving reasons would need to be taken on a case by case basis, taking into account the balance that needs to be struck between the proper interest of victims, witnesses and other concerns. This argument was accepted at the time by Parliament. Also, the Criminal Justice Review did not recommend that legislative provision be made.

48. A draft Code for Prosecutors in Northern Ireland was, however, published for consultation in March 2004, with the consultation period ending on 30 June 2004; the draft is available to interested delegations from the Secretariat. Section 4.11 of the Code sets out the DPP's policy on the giving of reasons, which notes that in many cases the reason for non-prosecution is a technical one, lists the main interests at stake in striking a balance between the proper interest of victims, witnesses and other concerns, and reiterates almost verbatim the statement of the Attorney General tabled in the House of Lords on 1 March 2002 (Lords Hansard, Columns WA259-260), which recognised that

> there may be cases arising in the future, which the Director [of Public Prosecutions] would expect to be exceptional in nature, where an expectation will arise that a reasonable explanation will be given for not prosecuting where death is, or may have been, occasioned by the conduct of agents of the State. Subject to compelling grounds for not giving reasons, including his duties under the Human Rights Act 1998, the Director accepts that in such cases it will be in the public interest to reassure a concerned public, including the families of victims, that the rule of law has been respected by the provision of a reasonable explanation. The Director will reach a decision as to the provision of reasons, and their extent, having weighed the applicability of public interest considerations material to the particular facts and circumstances of each individual case.

49. A new draft Code will now be drawn up bearing in mind the responses received during the consultation period, and, in view of the fact that there is no precedent for such a code in Northern Ireland, a second round of consultations will then be conducted, with the aim of producing a final text by spring 2005. The final Code, like the drafts, will be public. However, as regards the giving of reasons for not prosecuting where death is, or may have been, caused by state agents, this text clearly reflects the policy announced by the Attorney General in 2002 and is not subject to change.

50. Regarding the binding nature of the Code and the possibility of judicial review of decisions not to prosecute, the United Kingdom authorities have indicated that the Code itself will not be binding but that it will give rise to obligations that can be enforced in law. Judicial review will be possible under two heads:

- first, a freestanding challenge to a failure to give detailed reasons for a decision not to prosecute would be possible under the Human Rights Act, based on the failure to conduct an Article 2-compliant investigation. This amounts to a claim of unlawfulness and already exists, independently of any Code for Prosecutors;

- second, in accordance with a well developed doctrine in domestic law in the United Kingdom,[6] if a public body states that it will follow a given policy, this creates a legitimate expectation that the body will follow that policy unless there exist compelling reasons not to do so. Judicial review is possible on the basis of this legitimate expectation and would therefore be possible on the basis of legitimate expectations arising out of the Code.

These two heads of judicial review correspond to the first two points listed in the *R v DPP ex parte* C (1995) 1 CAR judgment, quoted at § 88 of the European Court's judgment in the *McKerr* case. It should be noted that the two heads of judicial review outlined above are new developments; the judgments in both the *Adams* case and the *ex parte C* case were delivered before the Human Rights Act had come into force and in the absence of any public policy of the Director of Public Prosecutions (whether in the form of a statement to Parliament or a Code for Prosecutors) that could have created any legitimate expectation at the relevant time.

2. Family liaison officers

51. The United Kingdom authorities have indicated that it is also to be noted that both the Police Service of Northern Ireland and the Police Ombudsman now have family liaison officers, whose duty is to keep in contact with a victim's family during the course of an investigation.

Secretariat assessment:

52. The policy adopted by the DPP with respect to the giving of reasons in cases where a death is or may have been caused by the conduct of agents of the State, and the possibility of judicial review of refusals by the DPP to provide reasons for decisions not to prosecute in such cases, would appear to be an important safeguard, in view of the direct effect of the ECHR and the Court's judgments, to ensure adequate information and scrutiny of the reasons behind such decisions.

53. Indeed, in the context of the Jordan application for judicial review, the High Court appears to accept that the DPP already has a duty to explain the reasons for deciding not to prosecute if that will reassure the concerned public that the rule of law has been respected. This appears to have been accepted also by the Court of Appeal in Northern Ireland on 12 December 2003, in its judgment on appeal on that application.

54. That said, the High Court noted that the decisions of the DPP that were challenged in the Jordan case "had been taken before the Convention had been incorporated into domestic law by the Human Rights Act and could not be transformed into decisions subject to the Convention simply because the DPP had been asked to review those earlier decisions after incorporation. To now require the DPP to give reasons for his decisions in 1993 and 1995 would inevitably involve giving retrospective effect to the Human Rights Act and that was simply not possible". Again, this evaluation was accepted by the Court of Appeal in Northern Ireland on 12 December 2003, in its judgment on appeal on that application.

55. Notwithstanding these developments, the introduction of a presumption that reasons shall be given in serious cases such as those at issue appears consonant with the Court's judgments. In this context, confirmation would be useful that this presumption will apply to any new decision now taken by the DPP with respect to Article 2 cases, irrespective of the date of the facts at issue in any given case. A copy of the response given to the request submitted for reasons to be given for the decision not to prosecute in the McKerr case would also be useful.

[6] See, as one striking example, the judgment of the Court of Appeal of 6 November 2002 in the case of Abbasi and Another [2002] EWCA Civ 1598.

D. The inquest procedure did not allow any verdict or findings which might play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed.

56. The United Kingdom Government has recalled that the inquest provides a public forum for the investigation of a death. The inquest is heard in a courtroom open to the public. It is the practice of coroners to sit with a jury in inquests into the deaths of persons alleged to have been killed by the security forces (although this is not a statutory obligation). It is a statutory requirement under the Coroners Act (Northern Ireland) 1959 that the inquest determine who the deceased was and how, when and where he or she came to his or her death.

57. The family of the deceased are fully involved participants in the inquest. The family are provided with disclosure of all statements sent to the coroner where death resulted from actions of a police officer acting in the course of his duty. A scheme to provide for legal representation at exceptional inquests is in place.

58. The Government has further recalled that the coroner is required, as a public authority for the purposes of section 6(1) of the Human Rights Act 1998, to ensure that the scope of the inquest is appropriately wide. A person suspected of involvement in the death can be compelled to attend the inquest. The family may cross-examine any witness, although a witness is not obliged to answer a question tending to incriminate him.

59. Under Article 6 of the Prosecution of Offences (Northern Ireland) Order 1972, the coroner is, as the Court noted (§ 71 of the *McKerr* judgment), required to send to the Director of Public Prosecutions a written report where the circumstances of any death appear to disclose that a criminal offence may have been committed. The report will include all the evidence before the coroner together with a full record of the proceedings. Upon receipt of such a report, the Director of Public Prosecutions for Northern Ireland considers the evidence then available to him to determine whether to prosecute. Such a report will either result in a prosecution or in the Director applying the new policy on the giving of reasons.

60. According to the United Kingdom Government, the result is that the judgments of the Court, as applied through the Human Rights Act, will allow inquest procedures to play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed. Consequently, provision for allowing verdicts of unlawful killing in inquests is not presently considered necessary (see further below, supplementary information). Such verdicts may also be problematic in an inquest held with a jury because the risk of intimidation of jurors remains very significant.

61. A copy of the Coroners Act (Northern Ireland) 1959 and of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 has been forwarded to the Secretariat.

Comments received

62. According to the applicants' representatives in the Jordan and McKerr cases, the information submitted by the United Kingdom authorities will not avoid the present impossibility for an inquest to determine the lawfulness or unlawfulness of the force used. In their view, a simple change in the Coroner's Rule could rectify this difficulty and avoid the need to pursue the matter through the Courts.

63. The representatives also referred in January 2003 to the uncertainty of the current situation pending the outcome of the Middleton case, in which the Court of Appeal held in March 2002 ([2002] EWCA Civ 390]) that a coroner could permit a jury at an inquest to make a finding of neglect if that would serve to identify a failure in the system which could reduce the risk of repetition of the circumstances giving rise to that death. In the same judgment the Court of Appeal, however, also held that public scrutiny and family participation are not necessarily requirements which have to be distinctly and separately fulfilled in every case.

64. The Irish authorities have stated that many issues raised by victims and NGOs as to the system of inquests in Northern Ireland have been addressed by the Review of Death Certification and Investigation in England, Wales and Northern Ireland, headed by Mr Tom Luce. They have welcomed this as a comprehensive review and stated that the implementation of its recommendations without delay would represent a major step forward in the inquest system in Northern Ireland. They particularly welcomed the recommendation that inquests should be the default mechanism for handling Article 2 cases.

Supplementary information received from the United Kingdom Delegation in June 2004

65. The House of Lords delivered judgment in the *Middleton* case (*R v. Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) ex parte Middleton (FC) (Respondent)* [2004] UKHL 10, on appeal from [2002] EWCA Civ 390) on 11 March 2004. This case is helpful in that it decided that in order to provide an Article 2-compliant investigation, an inquest is now required, when examining "how" the deceased came by their death, to determine "by what means *and in what circumstances*" the deceased came by their death. This interpretation of "how" means that inquests are now required to examine broader circumstances surrounding the death than was previously the case.

66. In England and Wales the findings or verdict of an inquest are recorded in a statutory form which provides for a conclusion as to the death. The note to the form lists the words that might be used; for example, "died from natural causes"; "as a result of accident/misadventure"; "was killed unlawfully". This is referred to as a short form verdict .In Northern Ireland the form in which the inquest verdict is recorded does not include provision for a short form verdict, although an inquest still records how, when and where the deceased came to his death.

67. Whether the *Middleton* judgment requires inquests in Northern Ireland to return such a "short form verdict" was a specific issue before the Court of Appeal in Northern Ireland in the case of Jordan. That case was heard at the end of April and the judgment was delivered on 10 September 2004 ([2004] NICA 29 and [2004] NICA 30). In that case, the Court of Appeal confirmed that the Coroners' Rules for Northern Ireland as they currently stand preclude the delivery of a short form verdict, since, under Rule 16, "Neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability…". However, Rule 16 could and must be read in such a manner as to allow the inquest to set out its findings regarding the contested relevant facts that must be determined to establish the circumstances of the death. This could be achieved either in the form of a narrative verdict or of a verdict giving answers to a list of specific questions asked by the coroner.

68. By way of example of the application of these principles in practice, the United Kingdom authorities provided a copy of a verdict on inquest delivered in the County Court Division of Greater Belfast on 24 August 2004, in which the jury made detailed findings of fact in response to a list of specific questions asked by the coroner.

Secretariat assessment:

69. The House of Lords' decision in the Middleton case provides some important guidance as to the powers of inquests (cf. also point E) and the rights of families and relatives to be informed (cf. also point C). In that judgment the House of Lords found, unanimously, that in the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that the inquest is the means by which the state will discharge its procedural investigative obligation under Article 2. It therefore defined a new, broader approach to be adopted in interpreting the requirement that juries in inquests set out their findings as to how the deceased came by his or her death. Specifically, the word "how" is now to be interpreted as meaning "by what means* **and in what circumstances".***

70. This finding appears to go some way towards increasing the scope for juries to express their conclusions on the central facts explored before them. Moreover, the Secretariat would note that the judgment was applied by the Court of Appeal for Northern Ireland in its decision of 10 September 2004 in the Jordan application for judicial review, which found that, although a short-form "unlawful killing" verdict was not open to a coroner's jury in Northern Ireland, juries must be able to make findings of fact on the central issues involved in the death they are examining.

71. The example provided of a verdict on inquest including detailed answers to a list of specific questions asked by the coroner would appear encouraging. Further examples of such verdicts would be welcome.

E. The scope of examination of the inquest was too restricted

1. Determination of the scope of the inquest by the coroner

72. The United Kingdom Government have pointed out that it is the duty of the coroner to decide on the scope of the inquest. The coroner is a "public authority" for the purposes of section 6(1) of the Human Rights Act 1998, and it is thus unlawful for him to act in a manner incompatible with the Convention rights. Accordingly, if an issue were raised at the inquest which, under Article 2 of the Convention, ought to be the subject of investigation (such as an allegation of collusion by the security forces, as in paragraph 122 of the Shanaghan judgment), it is the duty of the coroner to act in a manner compatible with Article 2 and in particular to ensure that the scope of the inquest is appropriately wide. In the Government's view, the result is that the judgments of the Court, as applied through the Human Rights Act, will allow inquest procedures which can play a role in securing a prosecution for any criminal offences which may have been revealed.

2. Dissemination of judgments to coroners and other training measures taken

73. Copies of four of the judgments have been circulated to all coroners in Northern Ireland. Moreover, the Judicial Studies Board for Northern Ireland held a training seminar on 28 January 2003 to which all coroners and deputy coroners together with the judges of the High Court were invited. Mr Tom Luce, Chair of the Review of the Death Certification and the Coroners Services in England and Wales and Northern Ireland and Mr Justice Kerr, Judge of the High Court with particular responsibility for judicial reviews, addressed the session.[7] A general discussion took place at the end of the formal training event, but no conclusions were reached on possible further improvements.

74. Following the session, Coroners were invited to provide the Judicial Studies Board with suggestions for further training. In November 2003, the Judicial Studies Board organised further training for coroners. According to the information provided in October 2003, the content of the course was to include Article 2 of the Convention and public interest immunity training. A number of coroners from Northern Ireland have also attended training provided by the Home Office in London.

75. As of June 2004, there were no immediate plans for a further event tailored specifically to coroners, although training needs are kept under review. All coroners have, however, been provided with copies of the *Middleton* judgment.

Secretariat assessment:

76. In the light of the information provided on this point and at D. above, this point now appears settled.

F. The persons who shot the deceased could not be required to attend the inquest as witnesses

77. The United Kingdom Government has indicated that the Lord Chancellor has brought forward an amendment to the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 so that, in future, a witness suspected of involvement in a death can be compelled to attend the inquest. A copy of the 1963 Rules and the amending Rules have been forwarded to the Secretariat.

[7] A copy of the intervention of Mr Justice Kerr is available, in English, from the Secretariat.

Comments received

78. NIHRC is of the opinion that the proposed change may not sufficiently address the need for public scrutiny and for information to be made available to victims' families. The Commission was, and remains, concerned that those called to give evidence at inquests may refuse to answer questions on the circumstances surrounding the death. In those circumstances the Article 6 rights will, in practice, override the Article 2 rights of the next-of-kin of the deceased. The amended rule is likely to raise further arguments about incompatibility with Article 2 and lead to continuing delay as well as uncertainty about the law.

Supplementary information/comments received from the United Kingdom Delegation

79. The Government had considered whether to replace the protection against self-incrimination under the amendment to the Coroners Rules with a rule which required a witness to provide incriminatory answers but which prevented those answers from being adduced in evidence at the criminal trial. However, as the principal objective of the procedural requirements of Article 2 is to ensure that criminal conduct is identified with a view to prosecution, it seems that compelling the giving of self-incriminating answers which could not themselves assist in the bringing of any prosecution would go beyond the purposes of the Article 2 investigation. Moreover, if such answers were required to be given under compulsion in the public inquest proceedings, that would itself be likely to jeopardise the possibility of there being a fair trial of the state agents themselves – and so would actually have the effect of undermining the effectiveness of the Article 2 procedures in holding state agents to account for their conduct.

Secretariat assessment:

80. The changes introduced in new Rule 9 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 compelling witnesses to attend the inquest but not obliging them to answer any question tending to incriminate themselves or spouses would appear, in the light of the additional explanations provided, capable of avoiding the repetition of the violation found by the Court.

G. Non-disclosure of witness statements prior to the appearance of a witness at the inquest prejudiced the ability of the families to prepare for and to participate in the inquest and contributed to long adjournments in the proceedings

81. The United Kingdom Government has indicated that a Home Office Circular in April 1999 dealing with deaths in police custody has been implemented by the Chief Constable of the Royal Ulster Constabulary (now the Police Service of Northern Ireland) by Force Order.

82. The Force Order was issued and made under the Chief Constable's statutory authority to direct and control the Police Force under Section 33 of the Police Act (NI) 2000. While the Home Office Guidelines, on which the Force Order is based, are restricted (1) to deaths in custody; and (2) to deaths at the hands of the police, the Chief Constable has chosen to interpret (2) flexibly (for example in McShane, where the army vehicle was ordered towards the barricade by a police Inspector).

83. As a result of the implementation of this circular, the Chief Constable normally will disclose to interested persons, including the family of the deceased, the statements sent to the coroner where death occurred in police custody or where it resulted in the actions of a police officer acting in the course of his duty.

84. The United Kingdom authorities have stated, with regard to the new practice of disclosure of witness statements prior to inquest, that the Chief Constable has followed this practice in all current cases relating to deaths caused by the security forces and that application of the practice is enforceable by judicial review.

85. The Chief Constable considers that he is obliged to provide to the coroner all statements concerning the death obtained by him in the course of an investigation, whether from police, security forces or civilian sources. Where he is also obliged to disclose the next of kin or family, then the same situation pertains.

86. The United Kingdom authorities have further indicated that, in the cases of McClory and Thompson[8] the courts in Northern Ireland have enforced the Chief Constable's duty of disclosure.

Comments received

87. The NIHRC considers that the disclosure of information to families at inquests should be a matter of statutory duty.

88. According to the applicants' representatives in the Jordan and McKerr cases, the Chief Constable has no statutory power to compel disclosure from the Ministry of Defence and to date the Ministry of Defence has not conceded that they are obliged to provide disclosure to the Chief Constable, let alone the next of kin.

Supplementary information/comments received from the United Kingdom Delegation

89. It is the policy and practice of the Ministry of Defence to co-operate fully with all police inquiries. There are no circumstances in which the armed forces or the Ministry of Defence can avoid disclosure to the Chief Constable in the course of a criminal investigation. All relevant information and persons are made available to the police in the execution of their investigation. However, the Secretary of State for Defence, like other Government departments and agencies, reserves the right to seek public interest immunity when disclosable information may be made available to other persons, the disclosure of which would cause harm to the public interest. This might take the form of damage to national security or the lives of individuals being threatened.

90. As witnesses, members of the armed forces are no different from any other government agent. The Ministry of Defence, on behalf of the armed forces, exercises its public interest duties in exactly the same manner as any other government department, including the Northern Ireland Office on behalf of the PSNI. The assessment of the public interest in allowing the disclosure of witness statements by members of the armed forces is no different from that for any other witness.

91. As regards documents, before deciding whether to claim public interest immunity in respect of a document which is otherwise disclosable, the Secretary of State will have to balance the public interest in the administration of justice against the public interest in maintaining the confidentiality of the document of which the disclosure would be damaging to the public interest. Having conducted this exercise, he may come down in favour of asserting public interest immunity where he considers that disclosure would cause real damage or harm to the public interest. Where a claim for public interest immunity has been made in an inquest and the claim is challenged it is for a court to decide where the balance lies between the interests of justice and, for example, the interests of national security. The Minister is never the final arbiter in relation to a claim for public interest immunity.

Secretariat assessment:

92. The measures advanced, bearing in mind also the further information on public interest immunity certificates provided below, at I, would appear to have solved most problems raised in the Court's judgments as regards this issue. In the light of the new duties on public authorities to disclose information to the coroner before seeking public interest immunity certificates, however (see below, at I), confirmation would be helpful that families are informed of information that the coroner has found to be relevant and for which no public interest immunity certificate has been granted as soon as the relevance of the information and the absence of such a certificate have been established.

8 In the matter of an application by Anne McClory for Judicial review: In this case, the Queen's Bench Division of the High Court on 8 January 2001 ordered the quashing of the decision made by the Government authorities (and notified to the applicant on 3rd November 1999) whereby the applicant was refused pre-inquest disclosure in relation to the inquest into the death of James McClory.

H. The absence of legal aid for the representation of the victim's family

93. The United Kingdom Government has provided information with regard to a scheme established by the Lord Chancellor to provide for legal representation at certain exceptional inquests in Northern Ireland. This legal aid scheme applies where the applicant has a sufficiently close relationship to the deceased to warrant the funding of representation. In deciding whether to grant legal aid under this Scheme, the Lord Chancellor will be obliged, by virtue of the Human Rights Act, to act in a manner compatible with the Convention. A copy of the Scheme has been forwarded to the Secretariat.

Comments received

94. The NIHRC notes the following points regarding the Scheme:

(a) it is not a statutory scheme: apparently the relevant section of the Justice (Northern Ireland) Act 2002 – which would allow for a statutory scheme – has not yet been brought into force;
(b) it is run by the Northern Ireland Court Service, not by the Legal Aid Department of the Law Society, yet it purports to be constructed around factors taken into account by the Legal Aid Department (such as financial eligibility);
(c) one of the criteria used by the Northern Ireland Court Service in applying the Scheme is "whether there is significant wider public interest in representation being provided", but it is nowhere made clear what is meant by this;
(d) another criterion is that there must be no source of alternative funding available.

95. According to the applicants' representatives in the cases Jordan and McKerr, the Scheme creates substantial difficulties. The Scheme provides for representation only and does not cover legal representation for necessary preparatory work, which is apparently to be covered by the Green Form Scheme. However, that Scheme has not in fact provided the funding for necessary preparatory work. The entire Scheme is currently the subject matter of at least 3 separate judicial reviews in Northern Ireland. There has been a recent decision of the High Court in relation to the operation of the Scheme in Hemsworth v Lord Chancellor (concluding that "none of grounds of challenge has been made out and the application for judicial review must therefore be dismissed"). Two other cases are pending before the courts.

Supplementary information/comments received from the United Kingdom Delegation

96. The following information has been submitted in response to the questions raised by NIHRC:

(a) The establishment of the scheme was part of the overarching reform programme for legal aid in Northern Ireland and was introduced as an interim measure, in anticipation of securing a power to provide funding in exceptional cases on a statutory basis, similar to an existing power in England and Wales. Such a power has been secured through the Justice (Northern Ireland) Act 2002. The statutory power will be brought into force as soon as practicable; this is expected to be September 2003.

(b) The Statement of General Policy for administering applications for funding under the extra statutory *ex gratia* scheme for representation at exceptional inquests in Northern Ireland sets out the position regarding financial eligibility. Paragraph 5 states that "the applications must satisfy the civil legal aid financial eligibility test".

(c) "Significant wider public interest" is purposely not prescriptively defined so as to allow the Lord Chancellor to properly take account of all the individual circumstances.

(d) This criterion allows the Lord Chancellor to comply with his obligations in relation to stewardship of public funds and obtaining value for money. This is consistent with the approach taken in relation to Legal Aid general under the Access to Justice Order 2002.

97. The extra-statutory *ex gratia* scheme has been the subject of three separate judicial reviews. The judgment in Re *Hemsworth* ([2003] NIQB 5)[9] concerning the decision of the Lord Chancellor in that case found in favour of the scheme; the latter decision should answer some of the criticisms of the extra statutory scheme made in the outstanding judicial reviews (one of which is being held in abeyance pending the outcome of the other).

98. The Government informed the Committee in October 2003 that the judgment in Re *Hemsworth* had been appealed to the Court of Appeal and that no date had yet been fixed for the hearing. The judgment in a second set of proceedings, concerning the judicial review of the decision of the Legal Aid Department with respect to legal aid for preparatory work on the inquest in the Hemsworth case, was also outstanding.

99. The Government further indicated in June 2004 that the scheme governing legal aid for inquests is now on a statutory footing. The relevant legislation came into operation on 2 November 2003. The scheme is supported by ministerial and administrative guidance. The Hemsworth judicial review application in relation to the extra-statutory scheme (which has now been superseded) is likely to be heard in September.

100. Copies of the provisions governing legal aid for inquests were provided at the bilateral meeting held on 20 September 2004 and are available from the Secretariat to interested delegations. The Government also emphasised that the questions raised in the above cases are essentially technical, in that the question at stake is the scheme under which legal aid is available to families for preparatory work for inquests, rather than whether legal aid is available at all.

Secretariat assessment:

101. Although the scheme established by the Lord Chancellor appears to be a positive development, it could be appropriate to await the outcome of the pending judicial review proceedings before concluding this point, at least in so far as the scheme may remain applicable to pending cases. In that context, the Secretariat is currently examining the judgment delivered on 26 April 2004 in Re Hemsworth (No. 2), in the second set of proceedings, concerning the judicial review of the decision of the Legal Aid Department in that case. Further observations in the light of that judgment and of the judgment of the Court of Appeal in the first set of proceedings, once it is delivered, would be welcome.

I. The public interest immunity certificate in McKerr had the effect of preventing the inquest examining matters relevant to the outstanding issues in the case

102. The United Kingdom Government has underlined that the doctrine of public interest immunity operates to protect documents and/or information from disclosure in legal proceedings where such disclosure would be contrary to the public interest. The purpose of such certificates is simply to alert the courts to the existence of information which ought not to be disclosed to persons outside public authorities, for example for national security reasons. PII certificates cannot therefore inhibit the investigation of crime.

103. The Government has recalled that, in Rowe and Davis, the European Court of Human Rights accepted that, in certain circumstances, the use of public interest immunity certificates is justified, even in criminal cases (see paragraph 61 of the judgment).

104. The Government has indicated that, since the domestic proceedings described in the *McKerr* judgment of the European Court, there have been two significant developments in the law and practice in relation to public interest immunity. First, as stated in the paper prepared on behalf of the Attorney General in 1996:

[9] The recent decision in the Hemsworth judicial review has resolved the issue in respect of funding of preparatory work. The Court held that the combined effects of the green form scheme and the extra-statutory scheme should be sufficient to ensure that the applicant is provided with the services of solicitors and counsel of equal calibre to those who will represent other parties and that there is no reason that preparatory work that is properly undertaken will not be adequately remunerated under one or other or both schemes.

"the major change in the law has been the case of R v Chief Constable of West Midlands, ex-parte Wiley in 1994. Lord Woolf made it clear that a minister could discharge his responsibility regarding material which is subject to PII by making his own judgment on whether the overall public interest favoured its disclosure. If he thought that it did, he could make disclosure without asserting PII. If he thought that it did not, or if he was in doubt, he should put the matter to the court."

A copy of the decision of the House of Lords in Wiley has been forwarded to the Secretariat.

105. Second, following the publication of the Report by Lord Justice Scott, the Attorney General carried out a public consultation in relation to the use of public interest immunity certificates and, in December 1996, announced to Parliament changes in the Government's practice in relation to public interest immunity. The major change was that the Government would no longer apply the division of claims into class and contents claims, but would in future focus on the damage caused by disclosure. A copy of the Attorney General's statement and the paper has been forwarded to the Secretariat.

106. Although the paper and the statements confined themselves to England and Wales, the Government has indicated that Ministers in the Northern Ireland Office had already applied the Wiley approach and the new approach in the paper was quickly adopted in Northern Ireland.

107. Subsequently, in May 2003, the United Kingdom authorities indicated that there have been no PII certificates issued in relation to inquests in Northern Ireland since the Jordan inquest.

108. They also provided information on current court practice in relation to PII certificates. Recent judgments of the Northern Ireland Courts were forwarded to the Secretariat on 19 May 2003 and are available to interested delegations.

109. The United Kingdom authorities have referred to five recent cases (Murray, Irwin, Wright, MacFarlane and McCorley) dealt with by courts in Northern Ireland in which the claim of public interest immunity was at issue and in which the fairness of the trial was not found to be at risk. In all cases the plaintiffs had been convicted of serious terrorist offences. The approach taken was first to examine the necessity of the claim of public interest immunity and second to balance the competing interests of open justice and real damage to the public interest if full disclosure were made. In essence, the courts are balancing the interests of the normal trial process, including the openness of the trial and its fairness, against the damage caused by disclosure.

Comments received

110. The Irish authorities have commented that they are aware that the use of PII requires a balance of interests and that the courts must take care to ensure that that balance is correctly struck on a case-by-case basis. The use of such certificates may thus remain a subject of scrutiny for some time.

Supplementary information received from the United Kingdom Delegation in June 2004

111. As regards the discharging of procedural obligations under Article 2 through inquests, the United Kingdom authorities indicated in June 2004 that the position on PII in respect of inquests had changed recently following the judgment of 20 January 2004 of the High Court in the judicial review case of *McCaughey and Grew* (see especially § 25 of the judgment, copies of which are available from the Secretariat). It is now clear that the Police or Ministry of Defence are under a duty to disclose all documents to the coroner, and that it is then for the coroner to assess their relevance. At this stage he will be aware of any public interest concerns that the police or Ministry of Defence have in relation to the disclosure of the documents. If the documents that the coroner decides are relevant contain information which causes concern to the police or Ministry of Defence, it is for them to decide whether to present to the coroner public interest immunity certificates setting out their concerns. If they do so, it will then fall to the coroner to conduct the balance for and against disclosure.

112. Although the decision in McCaughey and Grew has been appealed, the appeal is not on the issue of how a claim for public interest immunity is dealt with. The new procedure has now been applied in the Mallon inquest. In that case, the coroner found that documents disclosed were not relevant to the inquest. Consequently, no further issues arose in respect of public interest immunity certificates in that inquest.

Secretariat assessment:

113. As the Court has stressed in numerous cases, PII are not in themselves prohibited by the ECHR, but their necessity must be assessed by the domestic courts and, if accepted, the courts have to ensure balancing measures to safeguard the right to fair trial. It appears clear that the assessment is now done by the domestic courts, in the context of a trial, and, following the McCaughey and Grew judgment, that, in the context of an inquest, the police have a duty to disclose potentially relevant documents to the Coroner in order to enable him or her to make the necessary assessment. Although that judgment did not refer to any duty of the Ministry of Defence, however, the information provided above at G gives a useful indication as to the scope of the duty incumbent on the Ministry of Defence in this respect.

114. In so far as it is relevant to this point, and in addition to individual measures considerations, dealt with below in part III, further information would be welcome as to the state of progress of the Jordan inquest.

J. The inquest proceedings did not commence promptly and were not pursued with reasonable expedition

115. The United Kingdom Government has stated that, in accordance with the Human Rights Act 1998, coroners are now required to act in a manner compatible with Article 2 of the Convention to ensure that inquest proceedings are commenced promptly and pursued with reasonable expedition.

116. An additional full-time Deputy coroner has been appointed for Belfast to expedite business, so that in Belfast there are now one full-time coroner, one full-time deputy coroner and one part-time deputy coroner. The Northern Ireland Court Service is also providing additional administrative support to part-time coroners. The coroners in Belfast have an administrative support team of five staff and a computer system to facilitate their work. The coroners also have a dedicated legal resource and, in more difficult cases, counsel is instructed. For example in the Jordan inquest, the coroner is assisted by a solicitor, junior and senior counsel.

117. The Northern Ireland Court Service is working in consultation with the coroners with the purpose of improving the availability of statistics and information on outstanding inquests.

118. Separately, officials of the Northern Ireland Court Service are aware of the need to minimise any delay in hearing inquests and, in this regard, they are in contact with individual coroners.

Comments received

119. According to the applicants' representatives in the Jordan and McKerr cases, the coroners regularly complain about their lack of resources and their inability to process cases due to lack of sufficient staff or, outside Belfast, because they are part-time coroners. The provision of one Deputy Coroner in Belfast is not sufficient to address the back-log of inquests which has been building up over many years.

120. According to NIHRC, information received from the office of the coroner for Greater Belfast reveals that there is a long backlog of inquests still to be heard: there are 40 deaths mentioned on that list, all of them occurring prior to the judgments of the European Court of 4 May 2001. The inquest into the death of Pearse Jordan himself has still not been held even though the death occurred in 1992.

121. According to the Irish authorities, given the Court's view that the inquest proceedings did not commence promptly and were not pursued with reasonable expedition, Ireland considers it important that sufficient resources are made available to coroners in Northern Ireland in order that inquests can commence promptly and can be pursued with reasonable expedition.

122. Ireland would welcome further information on the measures taken in this regard. In particular, it looks forward to the publication of the "Fundamental Review of Death Certification and Coroner Services in England, Wales and Northern Ireland", commissioned by the United Kingdom Home Office. The Irish authorities understand that, as part of its consultation on the report, the British Government will take into account and give serious consideration to any representations made about matters relating to inquests in Northern Ireland, before taking decisions on the way forward.

Supplementary information/comments received from the United Kingdom Delegation

123. The 40 deaths referred to by the office of the coroner for Greater Belfast are cases to which Article 2 may apply and consequently had not been listed for hearing because the coroners were awaiting the outcome of the *Middleton* judicial review and not because of lack of judicial resources.

124. Still with regard to this backlog, statistics for the years 2001 and 2002 were supplied with the further information submitted on 14 June 2004 and copies are available from the Secretariat to interested delegations. The United Kingdom authorities further observed that the conduct and listing of inquests are matters for the coroner with jurisdiction in respect of the particular death. Without prejudice to their judicial independence in that regard, it was expected that once the Court of Appeal had given judgment in Jordan, coroners would then take steps to list inquests for hearing. The Northern Ireland Court Service would give whatever support it could to expedite proceedings.

125. The report of the Fundamental Review of Death Certification and Coroner Services in England, Wales and Northern Ireland (Luce Review) was published in June 2003. It made a number of recommendations in relation to the inquest system for England, Wales and Northern Ireland, including: a more professional coronial service which provides a consistent service to families of the deceased; a more informative and accessible outcome to the Coroner's investigation, including more flexibility over the scope of the inquest; a more authoritative handling of exceptionally complex inquests through involvement of senior judiciary; fuller conclusions from an inquest with a strong bias towards narrative and preventative findings; fair and more consistent rules on disclosure of evidence at inquest.

126. The review group considered that this proposed model, in conjunction with other processes, would ensure that an Article 2 investigation responsibility is discharged. However, it was noted that this issue may need to be re-visited in the light of the then outstanding House of Lords judgment in the *Middleton* case.

127. The Northern Ireland Court Service issued this report to relevant interest groups in Northern Ireland, including the political parties, the Human Rights Commission and other reference groups such as the Committee on the Administration of Justice. The report was open for consultation until the end of September 2003.

128. In addition, the Shipman Inquiry, established to investigate allegations of the murder of at least 15 of his patients by a doctor, issued its third report in July 2003, dealing with death certification and the investigation of deaths by coroners in England and Wales. It recommended a new Coroner Service comprising some legally qualified and some medically qualified coroners responsible for all post-death procedures. The Report agreed with many of the views expressed in the Luce Review relating to the outcome, scope and conduct of inquests.

129. As indicated by the United Kingdom authorities in June 2004, following extensive consultation on the Luce Review, the Northern Ireland Court Service (NICtS) published a Consultation Paper outlining its proposals for the administrative redesign of the Coroners Service in Northern Ireland. The paper outlines the steps which might be taken to improve the inquest system in Northern Ireland and which can be implemented without primary legislation. These include the creation of a single jurisdiction in place of the seven that currently exist, to be headed by a senior presiding judge of the High Court, and the appointment of a full-time coroner and two full-time deputy coroners. The Court Service will also provide assistance when the full-time system is in place. The Home Office has also issued a position paper outlining the Government's response to the Luce and Shipman Reports. Both of these papers are available from the Secretariat to interested delegations.

130. In Northern Ireland, an interdepartmental working group has been set up to consider and make recommendations for improving the arrangements for death certification and investigation in Northern Ireland having particular regard to the Luce Report, the Shipman Inquiry Third Report, the NICtS Proposals for Administrative Redesign and the Home Office position paper. The Northern Ireland Court Service, Department of Health and Social Services & Public Safety, General Registrar's Office, PSNI and Northern Ireland Office (State Pathology Branch) are represented on this group. In addition, a sub-group has been formed specifically to consider how the proposals in the Home Office position paper could be implemented in Northern Ireland with particular regard to potential delay and resources.

131. It is expected that the work of the group will be completed by the end of 2004 and will result in a report to ministers on the way forward. The United Kingdom authorities have undertaken to provide further details to the Committee on the timetable for implementing the proposed changes, once it is agreed.

Secretariat assessment:

132. Further information would be useful as to the rate at which the 40 pending cases raising Article 2 issues can be dealt with following the Middleton judgment, particularly as courts in Northern Ireland have already found a breach of Article 2 for failure to conduct prompt or reasonably expeditious investigations (see the McCaughey and Grew judgment, referred to above). It may also be noted that the statistics provided for the years 2001 and 2002 do not show a significant drop in the number of pending cases, since the drop that has occurred is mainly due to a recalculation of the relevant numbers in one district. Clarification would be useful in this respect.

133. The information provided with respect to the follow-up given to the consultation procedure engaged following the Fundamental Review of Death Certification and Coroner Services in England, Wales and Northern Ireland and to the Shipman Inquiry is welcome, as is the information provided with respect to the administrative redesign of the Coroner's Service in Northern Ireland.

134. Further information would be welcome on the concrete follow-up given to these consultation papers, including the impact of the Middleton judgment, if any. Further details of the proposed timetable for change in the Northern Ireland Coroners' Service would also be helpful.

K. Questions raised under the McShane case concerning the application of the package of measures to the armed forces, the fact that the inquest is still pending and the violation of Article 34 of the Convention

1. Application of the package of measures to the army

135. As regards the application of the package of measures to the army, the armed forces are subject to military and civilian law. Members of the armed forces act within guidelines and rules of engagement that are consistent with the law. Alleged criminal acts or complaints against military personnel are investigated either by the armed forces' own Special Investigations Branches (SIB) or the civil police. Where an offence could be investigated and prosecuted under either military or civil law the senior civil and military investigation officers would agree who is best suited to investigate and prosecute the offence. The SIB of another service can conduct an investigation where there is a risk of conflict of interest. The Army Prosecuting Authority (APA), which is independent of the army's chain of command, carries out army prosecutions.

136. The package of safeguards referred to applies principally to the Police Service of Northern Ireland (PSNI) and the investigative process. The PSNI is empowered to investigate criminal acts alleged to have been committed by members of the armed forces. The PSNI is overseen by the Police Ombudsman for Northern Ireland, whereas the armed forces are scrutinised internally and are subject to their separate laws and regulations through the military chain of command, to Defence Ministers who are in turn accountable to Parliament. The armed forces are, in most cases, accountable under the civil law.

137. The United Kingdom authorities have emphasised that, in accordance with the relevant legislation and the Queen's Rules, military law does not apply to certain criminal offences, including treason, murder, manslaughter, treason-felony, rape, genocide, aiding, abetting, counselling or procuring suicide and certain offences related to the use of biological, chemical or nuclear weapons. In Article 2 cases, therefore, as a matter of law, it is not the military but the civil authorities that investigate and prosecute. In other words, there is no concurrent jurisdiction of civil and military authorities in cases of deaths caused by members of the armed forces. These cases are, as stated in point A. above, investigated by the police, subject to the Chief Constable's discretion to ask that the incident be investigated by another police force, and the standards described above under points II.A-J apply equally to such cases.

138. It should be noted that the Police Ombudsman for Northern Ireland is a statutory body tasked with the investigation and monitoring of the police in Northern Ireland and has no statutory power to investigate complaints against the armed forces. However, the Police Ombudsman's competence to investigate complaints concerning police conduct extends to complaints concerning police investigations into deaths caused by members of the armed forces.

139. In Northern Ireland cases falling outside the Ombudsman's jurisdiction, the Chief Constable is very conscious of the need to ensure that, in appropriate cases, an incident involving the security forces is investigated by persons who are independent of those implicated in the incident.

140. As to the conduct of investigations in practice, the civilian police are given access to the armed forces, which are under an obligation to assist the civilian authorities in their investigations. This includes providing witnesses as required, as well as producing evidence such as clothing or weapons used. Where competing Article 2 rights come into play because the disclosure of certain evidence or the identification of sources may pose a risk to life, certain safeguards are in place, such as the possibility of testifying anonymously, screening or the use of public interest immunity certificates. The same tests apply for the use of public interest immunity certificates by the military as for their use by civilian authorities. The civilian authorities remain in control of the investigation at all times.

141. As regards the conduct of joint operations by the police and the armed forces, which were at issue in the Kelly and others and McShane cases, the United Kingdom authorities have indicated that such operations do continue, although their number has been significantly reduced.

2. Violation of Article 34

142. As to the violation of Article 34, the Government's firm policy is to ensure that its obligations under this Article are respected. In particular the Chief Constable has confirmed that he would never wish to do anything which would hinder any applicant from exercising his or her individual right of petition.

143. Furthermore, the Government has drawn the terms of the McShane judgment to the attention of all responsible for litigation in Northern Ireland on behalf of the Security Forces. In a recent case, where an undertaking was sought not to use documents disclosed by the Royal Ulster Constabulary, the undertaking was modified to ensure that disclosure to the European Court of Human Rights would not constitute a breach of that undertaking, and thus the solicitor from whom the undertaking was sought would not commit a disciplinary offence if the documents were to be disclosed to that Court.

Secretariat assessment:

144. The information provided above, and the more detailed information provided with respect to police investigations as well as to "calling-in" and the possibility of judicial review of decisions not to call in outside forces, would appear to clarify the question of how the package of measures applies to the armed forces.

145. The information received with respect to practical measures taken to prevent interferences with the right of individual petition would appear satisfactory.

III. INFORMATION CONCERNING INDIVIDUAL MEASURES TAKEN OR UNDER WAY

A. Overview

146. The United Kingdom authorities have indicated that, from 1969 onwards, around 3 500 people died in the Troubles. Approximately ninety percent of these deaths were due to terrorist actions and ten percent due to actions of the security forces. The cases in the present group are therefore not the typical cases, and all the more so because for the most part, the persons who caused them have been identified.

147. The United Kingdom authorities consider that it is not clear in four of the cases that the procedural issues identified by the Court as falling short of the requirements of the ECHR of themselves precluded there having been an effective initial investigation by the police. Only in the case of Shanaghan, and subsequently in that of Finucane, did the Court find that there had been a failure in the police investigation, and this related only to the accusations of collusion, not to the circumstances of death. Therefore, in the United Kingdom's view, the efficacy of the investigations and the fact-finding powers of the domestic courts in respect of these cases are not brought into question. As regards any new investigations that may be opened, for example on the recommendation of the SCRT, these would have to be based on the existence of fresh evidence, or they would be pointless.

148. In terms of the obligations incumbent on the United Kingdom under the Convention, the United Kingdom authorities have emphasised that, although the courts have found that there is no continuing obligation under *domestic* law to investigate these deaths (see below, information with respect to the *McKerr* case), this did not in any way prejudge the question of the *international obligations* arising under Article 46. In the latter respect, different factors were at issue in each case and some revealed more problems than others. Further proceedings have been conducted and any measures required are under way in each case. The main question is whether, on the facts in each case, a fresh investigation is actually possible. It is conceded that new investigations in the present cases could not satisfy the Convention requirements in respect of promptness and expedition.

B. State of proceedings in specific cases

149. In the Jordan case, the applicant's solicitors obtained permission, at the end of January 2003, to issue proceedings against the Government seeking an order for a new investigation of the death to be undertaken, and the coroner for Belfast has opened an inquest into the death. This inquest was adjourned pending the outcome of the *Middleton* case before the House of Lords and of the judicial review application before the Court of Appeal in Northern Ireland in the *Jordan* case. However, in the meantime the coroner continued to deal with preliminary issues such as disclosure.

150. The United Kingdom authorities have also previously indicated that if the judgment in the family's judicial review case, which was delivered by the Court of Appeal on 10 September 2004, upheld the coroner's view of the legal framework, then it was expected that the coroner would be able to proceed with the inquest provided the family did not lodge a further appeal to the House of Lords.

151. The family of Mr McKerr has brought legal proceedings seeking to compel the Government to provide a fresh investigation into his death. These proceedings concluded with the House of Lords' judgment, delivered on 11 March 2004 (*In re McKerr*, [2004] UKHL 12, on appeal from [2003] NICA 1). In that case, the House of Lords declined to order a fresh investigation, as it considered that no right to an investigation in accordance with the procedural requirements of Article 2 of the Convention existed under domestic law at the time of the relevant events and that as such, there could be no continuing right under domestic law to such an investigation at present, even after the Human Rights Act came into force on 2 October 2000. The House of Lords left open, however, the question whether such a continuing obligation existed under international law in the *McKerr* case, observing that it was for not for the House of Lords but for the Committee of Ministers to decide on this issue, in exercise of its functions under Article 46 (2) of the Convention.

152. The McKerr family has also brought judicial review proceedings seeking reasons for the decision not to prosecute any person in respect of allegations of perversion of the course of justice in the context of the investigations carried out in that case.

153. The Director of Public Prosecutions has indicated that he is presently considering the issues that arise in the light of the House of Lords' judgment in the *McKerr* case and he will correspond further with the legal representatives of the McKerr family.

154. As regards the McShane case, an inquest is still pending. The coroner held a preliminary hearing on 6 September 2002 in the inquest concerning this case. All interested parties attended, including the police. The hearing dealt with disclosure of documents and was adjourned to allow for the exchange of documents. However, the coroner decided to await the outcome of the *Middleton* case before listing the inquest.

155. Coroners in Northern Ireland are members of the judiciary and independent of Government, and the listing of the McShane inquest is a matter for the coroner. However, the Northern Ireland Court Service indicated in June 2004, after the *Middleton* case was decided, that it had been in contact with the Coroner's Office to offer any assistance. As changes to the coroner's system are phased in (see above, at II.J), it may also be appropriate for contentious cases such as this one to be attributed to full-time coroners.

156. As noted above at point II.A.4, the coroner remains under an obligation to report to the Director of Public Prosecutions any evidence that comes to light at the inquest that appears to disclose that a criminal offence may have been committed.

157. The Shanaghan case falls within the terms of reference of the SCRT, since the perpetrator of the shooting was never identified.

158. In the Finucane case, special police inquiries were instituted to respond to concerns arising out of allegations of collusion between loyalist organisations and the security forces. The third of these inquiries was squarely concerned with the Finucane murder and a criminal prosecution has since been brought.[10]

[10] Recent news reports have also referred to a Government decision to hold a further inquiry into the Finucane murder.

159. The United Kingdom authorities have undertaken to provide a complete summary to the Committee of the domestic proceedings undertaken with respect to all six cases concerning the actions of the security forces in Northern Ireland.

Comments received

160. The applicants' representatives in the Jordan and McKerr cases have asked the Committee of Ministers to ask for a proper investigation of the events. According to the representatives, the passage of time should not be an obstacle. Examples of re-opening of investigations have been included in their submissions and references have been made, for example, to the Skeleton Argument submitted by Bernard McCloskey QC and Paul Maguire BL in the case of Jordan v DPP, as well as to the fact that the Police Ombudsman recently re-opened and conducted an investigation into the death of Samuel Devenney who was beaten by police on 16 July 1969 and died as a result of his injuries.

161. According to the applicants' representatives in the Jordan case, the applicant initiated proceedings against the DPP for his refusal to provide reasons for his decision not to prosecute. The DPP indicated that he refused to provide reasons on the basis that "the only decisions known to the Director which could conceivably correspond to the decisions not to prosecute were those which were made on 16 November 1993 and 10 February 1995 respectively. Because each of these decisions predated the effective date of the Human Rights Act 1998, the DPP found no reason on the basis of that Act to provide the applicant with reasons". The applicant challenged that decision by way of judicial review. Those proceedings were heard in the High Court in June 2002 and the applicant's claim was rejected by judgment of 6 January 2003.

162. The representatives of the Jordan family have also previously indicated that, pending the House of Lord's decision in Middleton case, the Jordan inquest could not proceed and was adjourned indefinitely.

163. As mentioned above, the representative has also asked for reasons for the decision of the DPP not to prosecute any police officers in the McKerr case[11].

164. The Irish authorities have previously stated with respect to the matter of defects in the police investigations that a more detailed explanation might be provided on why the police investigations into the deaths cannot be reopened. If investigations were re-opened, it would however still be for the DPP to decide whether to bring a prosecution on the basis of those investigations and that if a prosecution was brought, the lapse of time between the deaths and the date of trial could be taken into account by the trial judge. In any event, it would be difficult to justify a failure to re-open investigation on the sole basis of the passage of time. The very significant advance in forensic science alone offers the real possibility of revisiting existing or old evidence.

Secretariat assessment:

165. The information received regarding the approach of the SCRT to "historical" cases and the passage of time is welcome. Considering the requirements of the Convention, the possibility of reopening the criminal investigations in the present cases still needs to be addressed. As the United Kingdom authorities have noted, the passage of time does not appear to be an element which, as such, justifies a decision not to re-initiate a proper investigation into the circumstances leading to the deaths in question. In view of the examples provided where investigations have been re-opened even after considerable time has elapsed, further explanations regarding the reasons for not re-initiating the investigations in the relevant cases would appear necessary.

[11] The applicant's family's representative had written to the DPP asking for reasons for the decision not to prosecute police officers for offences of obstruction and for the reasons why that decision was justified in the public interest. Proceedings have not been issued against the DPP in relation to the failure to provide reasons.

166. In this context, the House of Lords' judgment of 11 March 2004 in the proceedings related to the request for an Article 2-compliant investigation in the McKerr case is highly pertinent. It is recalled that the House of Lords considered that no right to an investigation in accordance with the procedural requirements of Article 2 of the Convention existed under domestic law at the time of the relevant events and that as such, there could be no continuing right under domestic law to such an investigation at present, even after the Human Rights Act came into force on 2 October 2000. The House of Lords left open, however, the question whether such a continuing obligation existed under international law in the McKerr case, and observed that it was not for the House but for the Committee of Ministers to decide on this issue in exercise of its functions under Article 46(2) of the Convention.

167. Bearing in mind the position it has previously taken in similar cases, that investigations capable of leading to the identification and punishment of offenders are individual measures required where a procedural violation of Article 2 has been found, unless it is clear in the particular circumstances of the case that this would be impossible, the Committee of Ministers may wish to take note of the observations of Lord Steyn at paragraph 46 of the House of Lords' judgment in the McKerr case, noting that evidence remains readily available in that case and casting doubt on the conclusions of a lower court, in other proceedings, as to the irrelevance of that evidence.

168. Further information as to any developments in the light of this judgment as well as in respect of the inquest proceedings[12] in the Jordan case and a possible new inquiry in the Finucane case would also be welcome.

169. Finally, the complete summary of domestic proceedings undertaken in each of the present cases would be appreciated.

[12] These were adjourned pending the outcome of the Middleton case, in which judgment was delivered on 11 March 2004 (see below, at d.)