NORTHERN IRELAND: A REPORT TO THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FROM A MISSION OF THE COMMITTEE ON INTERNATIONAL HUMAN RIGHTS[1]

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I. INTRODUCTION

A. Background

The Committee on International Human Rights of The Association of the Bar of the City of New York ("ABCNY") has been periodically monitoring adherence to international human rights standards in Northern Ireland for the past 17 years. As part of this work, the Committee sponsored missions to Northern Ireland in 1987 and 1998 to examine issues surrounding the administration of justice.[2] We covered the criminal justice system, the use of emergency laws and, in the 1998 mission, the implementation of the Good Friday Agreement.

The Committee undertook a third mission in May 2003 to continue our dialogue with practitioners and officials in Northern Ireland regarding ongoing efforts to reform the criminal justice system. The mission examined issues pertaining to the Justice (Northern Ireland) Act 2002 ("Justice Act 2002"); the transformation of the public prosecution service; new procedures for judicial appointments; human rights training; compliance with the European Convention on Human Rights; the intimidation of defense

[1] The members of the mission, which was chaired by Sam Scott Miller, partner in the law firm of Orrick, Herrington & Sutcliffe, were Judge Sidney H. Stein of the United States District Court for the Southern District of New York; Barbara Paul Robinson, partner in the law firm of Debevoise & Plimpton and former president of The Association of the Bar of the City of New York ("ABCNY"); Gerald P. Conroy, Deputy Commissioner of the office of the Special Commissioner of Investigation for the New York City School District and former Assistant District Attorney of the New York County District Attorney's Office; Fiona Doherty, Senior Associate at the Lawyers Committee for Human Rights; and Marny Requa, student in Fordham Law School's Crowley Program for International Human Rights. A list of those who generously took the time to meet with us and make this report possible is set forth in Appendix A. We thank Scott Horton, former Chair, and Peter W. Tomlinson, former Secretary, as well as current Chair Martin Flaherty, of the Committee on International Human Rights for their support. We thank the H. N. Wilson Foundation for its generous contribution to the Committee on International Human Rights that provided funding for the mission.

[2] For reports of these missions, see William E. Hellerstein, Robert B. McKay and Peter R. Schlam, *Criminal Justice and Human Rights in Northern Ireland: A Report to the Association of the Bar of the City of New York* ("1987 ABCNY Report"), 43 REC. ASS'N B. CITY N.Y. 110 (1988), and Peter G. Eikenberry, Gerald P. Conroy, Barbara S. Jones, Barbara Paul Robinson, and Sidney H. Stein, Committee on International Human Rights, *Northern Ireland: A Report to the Association of the Bar of the City of New York from a Mission of the Committee on International Human Rights* ("1999 ABCNY Report"), (ABCNY June 1999).

lawyers; and the status of the investigations into the murders of lawyers Patrick Finucane and Rosemary Nelson.

Remarkable changes have occurred in Northern Ireland over the past 17 years. Members of our 1987 mission found Belfast a divided city, symbolized by military check points surrounding the city center and signs of violence in many neighborhoods. In contrast, the 1998 mission "encountered a growing sense of optimism" among those interviewed—due in large part to the signing of the Good Friday Agreement on April 10, 1998, and its subsequent ratification by voters in Northern Ireland and the Republic of Ireland on May 22, 1998. The Agreement affirmed the parties' commitment to "the civil rights and the religious liberties of everyone in the community," along with certain internationally recognized civil and political rights,[3] and called upon those in authority to pledge to "serve all the people in Northern Ireland equally."[4] The Agreement contemplated the establishment of a new Northern Ireland Human Rights Commission and a new Equality Commission, along with two other important bodies: a Policing Commission to recommend reforms in the Northern Ireland police force (subsequently known as the "Patten Commission," after its chair, Chris Patten), and a Criminal Justice Review Body to recommend reforms in the criminal justice system.[5]

In the wake of our 2003 mission, which included three members of the 1998 mission, the Committee is even more hopeful about the prospects for lasting peace in Northern Ireland. In the five years since our last visit, there has been a transformation of public life in Belfast. Gone are heavily armed police in armored vehicles; gone are boarded-up windows and empty streets. In their place are new glass-walled buildings—with many others under construction—vibrant restaurants and a bustling street life in the center of Belfast.

The last five years have also been marked by significant political change. Local administrative powers were devolved from the British government to the Northern Ireland Assembly in December 1999, as outlined in the Good Friday Agreement. The Assembly, composed of 108 elected members, has full legislative and executive authority over all matters devolved from Westminster. To carry out its executive functions, the Assembly elects a First Minister and Deputy First Minister, who stand for election jointly and can only be selected with cross-community support. The First and Deputy First Ministers lead an Executive Committee of Ministers, who are appointed by the individual political parties in proportion to their relative showings in the Assembly elections.

Despite the pivotal roles of the Assembly and the Executive, they have been suspended four times in the past four years—twice for only 24-hours—in periods of

[3] Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland ("Good Friday Agreement"), Apr. 10, 1998, Rights, Safeguards and Equality of Opportunity, Human Rights ¶ 1. A list of the documents reviewed by us is attached as Appendix B.

[4] *Id*. Strand One, Democratic Institutions in Northern Ireland, Annex A, Pledge of Office at (c).

[5] *Id*. Rights, Safeguards and Equality of Opportunity, Human Rights ¶¶ 5-6; Policing and Justice ¶ 3, ¶ 5.

political instability. The local government is in fact currently suspended and has been since October 2002. During suspension, the Secretary of State for Northern Ireland, the head of the British government's Northern Ireland Office ("NIO"), assumes responsibility for the administrative activities of the Executive.

The suspensions represent steps backward and are frustrating, considering the wide-spread public support for the Assembly and the flourishing civil society in Northern Ireland.[6] Despite local support for devolution, however, elections held on November 26, 2003, signaled a polarized electorate, with the anti-Agreement Democratic Unionist Party ("DUP") gaining seats from the Ulster Unionist Party ("UUP") and, on the nationalist side, the moderate Social Democratic and Labour Party ("SDLP") losing seats to Sinn Fein.[7] Although negotiations among local political leaders and the governments of Ireland and the United Kingdom are ongoing, it is unclear how long the suspension of the Executive and the Assembly might continue, considering that the DUP has said it will not share power with Sinn Fein. A review of the Good Friday Agreement by the British and Irish governments, in which the Northern Ireland political parties were participating, began on February 3, 2004.[8]

It is important to note that the devolution of administrative powers is distinct from the devolution of criminal justice. The Good Friday Agreement envisioned local governance over health, education, social services, local budgets, agriculture, and development. Regarding devolution of policing and justice issues, the Agreement was hopeful but noncommittal, stating that the British government was "ready in principle" to devolve these areas with the "broad support of the political parties" and after consultation with the Irish government.[9] In practical terms, this means that in order to devolve justice issues, the Assembly must be reinstated, the British government must commit to a local institutional model with responsibility for justice and policing, and it must authorize devolution to that institution.[10]

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[6] An article in the *New York Times* published shortly after the suspension of the Assembly described the people in Northern Ireland as frustrated with the political impasse but confident that the violence of the past would not return. Some of those interviewed said the public had moved ahead of the politicians in trusting the peace process. Warren Hoge, *The Troubles in Ulster Shift from Street to the Assembly*, NEW YORK TIMES, Oct. 14, 2002.

[7] The term "unionist" refers to those whose goal is to maintain Northern Ireland's unity with the United Kingdom. "Loyalists" are also loyal to the British Crown, but there is an implication that at least some of them would support the use of physical force for that political goal. "Nationalist" generally refers to those who desire a reunification of Ireland. "Republicans" also have a united Ireland as their main goal, but historically the term implies the support by some of their members of physical force to achieve that end.

[8] The scope of the review is itself being debated. The DUP would like to renegotiate the Agreement, while the other parties have called for a limited review.

[9] Good Friday Agreement, Policing and Justice ¶ 7.

[10] As described below, the British government has committed to devolve justice issues within the lifetime of the next Assembly, which has a term of five years once the winners of the November 26, 2003, elections take office. *See* section III(B)(1), "The Joint Declaration."

We are dismayed that the local power-sharing government is suspended, because in addition to other concerns, certain criminal justice reforms depend on the devolution of both administrative and criminal justice powers. We hope all involved will ensure that restoration occurs at the earliest date feasible.

B. Focus of the 2003 Mission

In the 2003 mission, our Committee concentrated on the current state of the criminal justice system and the debate surrounding devolution of criminal justice to the local government. Although the new Police Service of Northern Ireland ("PSNI") is unquestionably part of the criminal justice system, the Patten Commission's report on policing was carried out separately from the Criminal Justice Review, which evaluated all other criminal justice agencies and made recommendations for reform. We decided to focus predominantly on the latter reforms as the Patten Commission's recommendations were generally consistent with our earlier recommendations and, in comparison, little international attention has been given to the Criminal Justice Review.

During the mission, we found considerable consensus on the shortcomings of the criminal justice system as well as on the steps required to remedy these shortcomings. Most individuals we met with emphasized that political issues should not be used to forestall the implementation of reforms, as they often have been in Northern Ireland. Indeed, one of the greatest frustrations, repeatedly expressed, was with the slow pace of the implementation process. Although we recognize that it is not a simple task to overhaul government structures while dealing with the legacies of a divided society, we agree that the implementation of the reforms has been unnecessarily and repeatedly delayed. Heartened by the changes that have been instituted to date, however, we believe that the promise of the Criminal Justice Review can and should be fully honored.

Many of those we spoke with believed it was necessary to address the violence of the past and unsolved deaths on both sides of the political divide, in a way that does not jeopardize future stability. From this perspective, reforms to the criminal justice system are one aspect of a larger goal—to ensure a just society for everyone in Northern Ireland and find a way to address divisions of the past and the pain that endures, while strengthening participation in public life.

A central goal of our Committee is to maintain a dialogue with lawyers and officials in Northern Ireland and elsewhere, in order to promote respect for and compliance with human rights norms throughout the world. As we in the United States struggle with the challenges terrorism poses to our own human rights values, we have repeatedly urged our government to ensure that measures taken to increase security do not compromise the rights of the accused, recognizing that we all lose if we disregard the fundamental protections central to our constitutional system.[11] While our Committee has

[11] The ABCNY has argued against civil liberties restrictions and potential human rights violations by the federal government in furtherance of the "war on terrorism." *See, e.g., Brief for Amicus Curiae Association of the Bar of the City of New York in Support of Jose Padilla* (ABCNY), July 29, 2003 (arguing that the

come to better understand the tension between security and liberty in light of our own experiences, we also recognize that experience in Northern Ireland is unique and we have tried to keep Northern Ireland's distinct history in mind when making recommendations.

The delegates on our May 2003 mission interviewed a long list of individuals with specialized knowledge of Northern Ireland's criminal justice system in a series of meetings in Belfast, London, and New York. We met with officials from the Northern Ireland Office, the Office of the Director of Public Prosecutions, the Northern Ireland Court Service, the Police Service of Northern Ireland, the Northern Ireland Human Rights Commission and the Police Ombudsman's office, as well as representatives from the Republic of Ireland, academics and legal practitioners. We also met with three non-governmental organizations, each known internationally for its work in promoting human rights protections in Northern Ireland: the Belfast-based Committee on the Administration of Justice ("CAJ"); the London-based British Irish Rights Watch ("BIRW"); and the Derry/Londonderry[12]-based Pat Finucane Center ("PFC").[13]

During previous ABCNY missions, our delegates did not meet with representatives of Northern Ireland's political parties. In light of the political developments since our last visit, we thought it would be beneficial to discuss criminal justice issues with the parties that were elected to participate in the now suspended Assembly and will share responsibility for justice issues if and when devolution occurs.

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government's assertion of its right to detain Padilla indefinitely, without charge or process, is both unlawful and unprecedented, and that Padilla has a fundamental and undeniable interest in the assistance of counsel); Committee on Immigration and Nationality Law, *Letter to Immigration and Naturalization Service, re: INS No. 2171-01 Custody Procedures, 66 Fed. Reg. 48334* (ABCNY), Sept. 20, 2001 (protesting interim rule that would extend the time in which the INS must make a determination in the event of an arrest without warrant); Committee on Military Affairs and Justice, Inter Arma Silent Leges*: In Times of Armed Conflict,* Should *the Laws be Silent? Report on The President's Military Order of November 13, 2001* (ABCNY), Dec. 2001 (criticizing the military order establishing military commissions); Committee on Communications and Media Law, *The Press and the Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper* (ABCNY), Feb. 2002 (urging that trials of suspected terrorists be made accessible to the media and the public, citing historic precedent); Committee on Professional Responsibility, *Statement Regarding the United States Department of Justice Final Rule Allowing "Eavesdropping" on Lawyer/Client Conversations* (ABCNY), March 2002 (arguing that the federal rule allowing the Attorney General to authorize eavesdropping on attorney/client communications upon a finding of "reasonable suspicion" of "terrorism" strikes at the core of the adversarial system of justice); and Committee on Military Affairs and Justice, *Letter to Department of Defense Re: Enemy Prisoners of War and Other Detainees* (ABCNY), Apr. 18, 2003 (urging that Guantánamo detainees be afforded the right to a formal determination of their status). *See generally* ABCNY, 57 THE RECORD No. 1-2 (Winter/Spring 2002). The ABCNY also served as a signatory on Brief of Amici Curiae Bipartisan Coalition of National and International Non-Governmental Organizations in Support of Petitioners, Rasul v. Bush and Odah v. U.S., 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (Nov. 10, 2003) (arguing that jurisdiction of U.S. courts over Guantánamo detainees is proper).

[12] Although the official name of the city is Londonderry, the city council changed its name to the "Derry City Council" in 1984. Nationalists refer to the city as Derry, while Loyalists generally refer to it as Londonderry, and local politicians are seeking to have Parliament officially change the name to Derry.

[13] For a full list of individuals interviewed during the mission, see Appendix A.

In that vein, we met with the justice spokespeople for many of the political parties in Northern Ireland.[14] We are respectful of the role local political parties continue to play in the peace process, the devolved government, and strengthening local institutions.

[14] Unfortunately, we were unable to meet with members of the two main unionist parties, the Democratic Unionist Party ("DUP") and the Ulster Unionist Party ("UUP"). The DUP declined to meet with us, although it has subsequently agreed to meet with us in New York, and the UUP cancelled a scheduled interview. We researched the policy positions of both parties and met with representatives of the leading nationalist, republican, and cross-community parties.

II. EXECUTIVE SUMMARY

A. Summary

The Committee on International Human Rights of the Association of the Bar of the City of New York sponsored a mission to Northern Ireland in May 2003. This mission, which focused on ongoing efforts to reform Northern Ireland's criminal justice system, followed up on the Committee's two previous missions to Northern Ireland, in 1987 and 1998 respectively. The 2003 mission examined issues pertaining to the Justice Act 2002; the transformation of the public prosecution service; new procedures for judicial appointments; human rights training; compliance with the European Convention on Human Rights; the intimidation of defense lawyers; and the investigations into the murders of lawyers Patrick Finucane and Rosemary Nelson.

While we were impressed by the significant changes that have occurred in the five years since our last mission to Northern Ireland—a flourishing civil society, the establishment of the new Policing Service, and the growth of domestic human rights jurisprudence, to name a few—it is frustrating to find that five years after the Good Friday Agreement and three years after the Criminal Justice Review, numerous agreed-upon reforms had not been fully implemented or in some cases even initiated. Planned changes to the prosecution service and the judicial appointments process, which could do much to engender public confidence in the criminal justice system, are two examples of reforms that are only now coming about.

The Committee feels strongly that political issues should not be used to forestall the implementation of reforms, as they often have been in Northern Ireland. With the reduction in violence and diminishing need for a heavily armed security presence, delays that once may have been practical necessity now seem more like political leveraging. Although we recognize that it is not a simple task to overhaul government structures while dealing with the legacies of a divided society, we agree with many of our interviewees that the implementation of the reforms has been unnecessarily held back.

One exception to this has been the reform of Northern Ireland's policing service. International and local scrutiny ensured that policing reforms—such as the establishment of the Police Ombudsman's office, the appointment of an Oversight Commissioner, and the drafting of new human rights codes—happened relatively quickly, with opportunity for public consultation and debate on significant issues. Although the process has not been without shortcomings, the pace and transparency of policing reforms has been striking in comparison to reforms of other criminal justice agencies.

For example, the Office of the Director of Public Prosecutions is only now implementing the process of creating its own successor agency, the Public Prosecution Service ("PPS") for Northern Ireland. The PPS will be phased in gradually over the next three years. It will prosecute all crimes (currently lesser offense are prosecuted by police officers), and its caseload is expected to grow to 75,000 cases from the 10,000 cases

currently handled by the Office of the DPP. The number of lawyers in the office will increase from 40 to 150.

Although hiring has already begun—there were 70 lawyers on staff by the time of our visit—information about recruitment and hiring has not been made public and the prosecution office has yet to publish even a draft of a promised code of conduct for the service. The slow pace of reform was cited by many we met with as a source of frustration, as was the lack of transparency in the reform efforts to date.

It will take time to complete the far-reaching changes contemplated for the PPS, and we recognize the importance of gradual increases in staff, offices, and caseload. We do not see any obstacles, however, to initiating some of the reforms immediately, particularly those that improve transparency, accountability, and public confidence. These include public consultation on codes of ethics and practice, issuing annual reports, speeding up the introduction of an independent complaints mechanism, and publishing information about the hiring process and staff demographics.

In another example, we are concerned by the government's failure to implement several important judgments of the European Court of Human Rights that directly impact Northern Ireland's criminal justice system. The European Court has criticized the prosecution service and other criminal justice agencies in a number of recent cases, finding violations of the right to life because of the government's failure to properly investigate the state's use of lethal force. As most of these cases stem from incidents that occurred in the 1970s, the European Court was rightly concerned about delays in investigation and prosecution. Since the judgments, the government has not re-investigated any of the cases or enacted legislation to address the shortfalls signaled in the decisions. This delay further undermines any investigation that the state may be able to conduct.

A related concern is the lack of progress in resolving the cases of Patrick Finucane and Rosemary Nelson, two Northern Ireland solicitors murdered in 1989 and 1999 respectively. Both solicitors represented defendants arrested under Northern Ireland's emergency laws, and both of their cases involve allegations that members of the security forces assisted in the killings. A four-year police investigation of the Finucane case was completed last year. A short public summary of the investigation report made clear that members of the security forces had indeed colluded in Finucane's murder, but the full report, which also documents obstruction of the investigation itself, has not yet been published. In the Nelson case, almost five years after her death, the police investigation is still ongoing, although there have been no prosecutions. A former soldier and police informer are reportedly among the primary suspects.

In January 2004, a judge appointed to review the evidence of collusion in the Finucane and Nelson cases made clear that he had recommended public inquiries into both cases in October 2003. The U.K. government had yet to act on the recommendations, however. We are deeply frustrated with these delays and continue to call on the government to establish immediate public inquiries in these two cases.

Many of those we spoke with believe it is necessary to address the violence of the past and the large number of unsolved killings on both sides of the political divide, in a way that does not jeopardize future stability. From this perspective, reforms to the criminal justice system are one aspect of a larger goal—to ensure a just society for everyone in Northern Ireland and find a way to address divisions of the past and the pain that endures, while strengthening participation in public life. We recognize that traditional criminal investigations many years after deaths present difficulties in terms of cost, delay, and preservation of evidence, and may not be realistic options in many of the cases. We call on the Law Society and Bar Council to help propose alternative means of seeking justice in these cases and, in general, would like to encourage public dialogue on possible options.

It is important to note that, despite incomplete reform of individual criminal justice agencies, there has been progress in the system's regard for human rights in recent years. In addition to policing reform and the review of the criminal justice system, the adoption of the U.K.-wide Human Rights Act incorporating the European Convention on Human Rights into domestic law, and civic activism on criminal justice issues have contributed to increased awareness and compliance with human rights norms. Furthermore, shortly following our return from Belfast, publication of an updated Criminal Justice Review Implementation Plan, together with detailed plans and timetables for the continuing implementation process and the subsequent Justice Bill 2003 marked movement toward implementation of the criminal justice aspects of the Good Friday Agreement. Given this recent progress, we have confidence that promised reforms will be carried out. We believe they must be, if the criminal justice system is to become a cornerstone of a peaceful Northern Ireland society.

While the heads of individual agencies have a great deal of control over the speed and depth of reforms, ultimate responsibility for these agencies rests at the ministerial level: the Northern Ireland Secretary of State, the highest official in the Northern Ireland Office, has general responsibility for criminal justice and policing matters in Northern Ireland; the Attorney General for the United Kingdom and Northern Ireland oversees the Director of Public Prosecutions; and the United Kingdom's Lord Chancellor is responsible for the Northern Ireland Court Service, management of the courts, and judicial appointments. We believe that it is the duty both of agency personnel and of ministerial figures to ensure that promises made in the Good Friday Agreement are fully realized, and we call on them to do so.

B. Committee on International Human Rights Central Recommendations

Overview of the Criminal Justice Reform Process

- It is discouraging to discover that five years after the Good Friday Agreement, reform in the prosecution service, judicial appointments process, and other criminal justice areas has just begun to be implemented and lags far behind policing reforms. Overall we welcome the substance of the reforms

recommended in the March 2000 Criminal Justice Review, but are concerned by this delay and the reported lack of transparency in the process.

- Likewise, the long delayed appointment of Oversight Commissioner is welcomed as it signifies an important step toward meaningful change. We recommend that this post be grounded in statute, believing that this would increase the public accountability of the Oversight Commissioner's office and help ensure that he receives full cooperation from the criminal justice agencies he is overseeing. We also believe the office should be provided sufficient resources.
- Regarding devolution, we believe that local control over criminal justice and policing is a laudable and obtainable goal that will help address human rights concerns. We take no position on the best institutional model for local control, but we strongly believe that there should be public consultation on devolution options. It would be best to start this process right away, so that once the Assembly is reinstated, devolution of criminal justice can occur with minimal delay. (Most of the reforms we discuss in this report, however, are not dependent on devolution.)
- We were pleased that the Justice Bill 2003 was finally issued, but we recommend it be amended before it is enacted to require criminal justice agencies to have due regard to international human rights standards, as promised in the Implementation Plan 2003, and recommend that it codify the powers and duties of the Justice Oversight Commissioner. (Additional desirable amendments to the bill are proposed in the Judiciary and Police Ombudsman sections of our report.)

The Incorporation of International Human Rights Law

- Human rights law is given significantly more weight in Northern Ireland five years after the Good Friday Agreement: it is on the government agenda and that of the Law Society, the Bar Council, and criminal justice agencies, and it is invoked in domestic case law and lobbying efforts by nongovernmental organizations and political parties.
- We would encourage lawyers and judges to further develop Northern Ireland's jurisprudence under the European Convention—a powerful tool in defending rights—in domestic cases. In addition, we recommend that all judges, prosecutors, lawyers, and law students be trained in human rights law and that such curricula be evaluated by the Northern Ireland Human Rights Commission.
- Recent decisions by the European Court of Human Rights pointed to longstanding weaknesses in the Northern Ireland criminal justice system. To comply with these judgments, the government should properly investigate the cases in question and amend its regulations and procedures to prevent future violations. Relevant reforms would include implementing procedures for the investigation of the use of force by security personnel, as well as allegations of security-force collusion with paramilitaries; ensuring that these investigations are independent from the forces implicated and conducted expeditiously; updating and monitoring the inquest system; and establishing guidelines for the giving of reasons for the failure to prosecute. We strongly urge the government to address the European Court judgments in a more cohesive and comprehensive manner.

The Prosecution Function

- We support the creation of the PPS, and measures that will require the PPS to prosecute all crimes. Although we realize that these significant changes cannot take place overnight, we regret that the reforms were only recently initiated and will be introduced over the course of three years. We recommend that the timetable of reforms be accelerated where feasible and that the implementation of reforms be a top priority.
- Publishing a code of ethics should also be a high priority for the office of the DPP, and we regret that it has been delayed. At this stage, we recommend publishing a draft code for public comment forthwith.
- Reform efforts have only recently been publicized, and it is difficult to know what changes have been made to date and what steps have been taken to prepare prosecutors for the new service. Publication of a prosecution-specific implementation plan and a detailed timetable could help to address public concerns. (The 2003 Implementation Plan sets out only general markers for reform to the prosecution service.) We strongly urge the Office of the DPP to issue a detailed annual report next year in order to publicize the status of its reform efforts.
- In general, the Office of the DPP should maintain a higher level of transparency during the reform process than it has to date. There is no need to wait for devolution or full implementation of the PPS to inform the public of prosecution reforms via regular reports, timetables, and a website.
- We recommend that the Northern Ireland Human Rights Commission monitor and lend its expertise in the human rights training of prosecutors.
- The Office of the DPP should publish information about the composition of the prosecution staff and support equality monitoring of the recruitment process. It should ensure that new hires are reflective of society in Northern Ireland and should aim to hire at all levels of the service.
- The recommendation made in the Criminal Justice Review regarding a diversion program for youthful offenders warrants high priority by the DPP as it will enhance public confidence in the prosecutor's office.
- Regarding the DPP's giving of reasons in controversial cases, we believe that the presumption should be shifted toward giving reasons for not prosecuting and that the Office of the DPP should clarify its policy in this regard.

The Judiciary

- The appointment of the Commissioner for Judicial Appointments was a step forward, despite the Commissioner's limited authority.
- We welcome the recent news that the Judicial Appointments Commission will be established prior to devolution, and believe it should be established expeditiously, as should the final procedures for its operation.
- Before the JAC is established, we recommend the Court Service of Northern Ireland accept the recommendations of the Commissioner for Judicial Appointments regarding reform of the current process.
- New criminal justice legislation (the Justice Bill 2003) provides that both legal and lay members on the JAC will be appointed with a view toward making the

JAC as reflective of the community as possible. We welcomed this aspect of the legislation, believing a commission whose members are reflective of Northern Ireland society as a whole will most easily gain the confidence of the entire community in its recommendations.

- We were discouraged, however, that the bill only provides that the Prime Minister would *take into consideration* the recommendation of the local First Minister and Deputy First Minister in appointing the Lord Chief Justice and Lord Justices of Appeals. We recommend that such appointments be made "based on" the recommendation of the local ministers, as proposed in the 2003 Plan.
- We strongly urge the JAC to engage in active outreach to the community in seeking qualified members, and we urge the requirement of ten years' service as a barrister or solicitor for High Court appointments and seven years' service for County Court appointments not to be retained.
- We believe that every effort should be made to appoint qualified women to the bench and to ensure that the applicant pool is representative of all segments of society.

The Police and Police Ombudsman

- We are heartened by the numerous and significant reforms made to the policing service in the last five years: the establishment of the PSNI and a generally representative Policing Board; human rights training of officers and the publication of a police code of ethics that relies on the European Convention on Human Rights; and the closing of special detention facilities. We also commend the PSNI for instituting the audiotaping of police interrogations.
- We were disheartened to hear that there continue to be complaints about police treatment of residents of working class areas, as well as by reports that Catholics who join the PSNI have been intimidated by members of dissident republican groups. Great effort should be made to improve confidence in the policing service and ensure that every community has a voice in ongoing reforms to the PSNI.
- We recommend that training of current PSNI officers and staff in constitutional and human rights issues be expanded beyond the current two-day course. In addition, human rights training of PSNI personnel should be routinely evaluated.
- We recommend that all police misconduct (including non-criminal conduct subject to disciplinary action) should be referred to the Police Ombudsman to ensure independent scrutiny of the evidence. We recommend the government consider amending the Justice Bill 2003 to limit the Office of the DPP discretion in making referrals. Such a reform would be more in line with the language of the new Implementation Plan. We also believe that sufficient resources should be allocated to the office to support the increased caseload and to handle investigations into past cases which were recently reinstigated.
- We were relieved to learn that police harassment of lawyers was less of a concern for defense lawyers today than it was five years ago, but even the small percentage of lawyers who are still harassed is unsettling. We recommend that the Police Obmudsman's office investigate such complaints aggressively and that it

continue to survey lawyers concerning their experience with police, consulting with the Human Rights Commission and others as appropriate on methodology. We also recommend that it regularly publicize its availability to barristers and solicitors throughout Northern Ireland so they will come to the Ombudsman's office in case of intimidation.

- We believe the Police Ombudsman's office should maintain consistent communication with complainants, police officers, and their representatives regarding pending cases.

Emergency Powers and Interrogation

- While we were pleased that in the years since our last visit, Diplock Courts—non-jury, single-judge trials—have been utilized less often, we strongly recommend they be eliminated and we repeat our past calls to do so.
- We believe that emergency measures, now codified in the Terrorism Act 2000, are unnecessary and should be revoked. The Act significantly widens the definition of terrorism, and in a special section relating only to Northern Ireland, extends the use of non-jury Diplock Courts and the authority to conduct warrantless arrests and searches and seizures. The Terrorism Act also allows for 48-hour detentions without access to counsel. We recommend the repeal of these provisions.
- The Northern Ireland Office should publish clear statistics on past and present use of Diplock Courts.

The Patrick Finucane and Rosemary Nelson Cases

- We continue to believe that public inquiries are necessary in these cases, and we are discouraged that almost five years after Rosemary Nelson's death and 15 years after Pat Finucane's, the cases are unresolved and public inquiries have not been held.
- We urge the government to publish Judge Peter Cory's reports on these and other cases forthwith and move quickly to establish public inquiries. We also recommend it publish the full Stevens III report.

The Law Society and Bar Council

- We commend the Law Society and Bar Council for its role in calling for a public inquiry in the Finucane case, and urge them to remain vocal on his case as well as the case of Rosemary Nelson.
- We welcome the increasing number of women in the legal profession, but would like to see more women and people from other underrepresented communities become Queen's Counsel.
- We encourage members of the Law Society and Bar Council to play an even stronger role and to speak publicly on issues such as judicial appointments, reform of the prosecution system and police service, support of the Police Ombudsman, and greater regard for human rights in Northern Ireland.
- Regarding human rights training, we believe the legal organizations should have a greater role in insuring that these programs include appropriate materials and encouraging their members and law students to attend human rights-focused

training sessions. We also believe that both groups should help to educate the public on these issues.

- We call upon the Law Society and the Bar Council to help propose alternatives to criminal investigations regarding unsolved deaths from the violent years of the conflict, in order to help bring a sense of justice and closure to these many unsolved cases.

III. AN OVERVIEW OF THE CRIMINAL JUSTICE REFORM PROCESS

A. The Criminal Justice Review and the Justice (NI) Act 2002

The Criminal Justice Review Group was established on June 27, 1998, under the auspices of the Good Friday Agreement, which called for "a wide-ranging review" of the criminal justice system.[15] The Review Group—composed of four government representatives and five independent experts—was to recommend specific reforms to increase accountability, equity, and efficiency within the system. The members of the Group were also to consider the possibility of devolving criminal justice powers from the British government to the local Northern Ireland Assembly. After almost two years of research, consultation, and evaluation, the Review Group published a report, *the Review of the Criminal Justice System in Northern Ireland* ("the Review"), with 294 recommendations in March 2000.

In November 2001, the British government published its Implementation Plan and a draft Justice (Northern Ireland) Bill in response to the Review. The Bill, which received Royal Assent in July 2002 and became the Justice Act 2002, codified aspects of the Implementation Plan.[16] The Act's provisions did not, however, take immediate effect. Many were contingent on the devolution of criminal justice powers—although the Act established no timetable for devolution. Among the reform provisions that would have to await devolution were the establishment of a post for a new Northern Ireland-specific Attorney General and the establishment of a Judicial Appointments Commission to ensure a more representative judiciary, as recommended in the Review.

The Implementation Plan also made clear that the individual criminal justice agencies were to carry out independently the reform measures that did not require further legislation. The Plan supported human rights training for all criminal justice personnel, for example, but left it to the specific agencies to decide when and how to carry out that training. Human rights organizations criticized the Implementation Plan for not contemplating a mechanism for overseeing the proposed changes, for not laying out a timetable for their implementation, and for not ensuring transparency in the process.[17]

Indeed, although our mission occurred more than three years after the publication of the Review's recommendations, it seemed that criminal justice agencies had only just begun to initiate significant reforms. Those reforms that had been implemented within

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[15] This phrase does not refer to emergency legislation or policing. Review of emergency powers was excluded from the Review's mandate and policing was considered separately in the Good Friday Agreement.

[16] Justice (Northern Ireland) Act 2002 ("Justice Act 2002"), c. 26.

[17] Committee on the Administration of Justice ("CAJ"), *Comments from the Committee on the Administration of Justice (CAJ) on the Implementation Plan for the Criminal Justice Review and the Justice (Northern Ireland) Bill*, Dec. 2001; and British Irish Rights Watch ("BIRW"), *Comments on the Justice (Northern Ireland) Bill and the Implementation Plan for the Criminal Justice Review*, Dec. 2001.

the prosecution service and other agencies were not being systematically monitored or publicized, making it hard to give credit where credit might well have been due. Happily, at the time of our trip, the British government was interviewing for the post of an Oversight Commissioner to oversee the implementation of the criminal justice reforms. (The Justice Oversight Commissioner was appointed in July and is to play a role similar to that of the Oversight Commissioner for Policing Reform, who was appointed in May 2000 to oversee the implementation of the Patten reforms.) The appointment of a Justice Oversight Commissioner earlier in the process could have helped to address problems of transparency and delay, and pushed the justice reform process forward.[18]

Our Committee welcomed the substance of the reforms recommended in the March 2000 Review and we continue to believe that they will significantly enhance justice and accountability in Northern Ireland if fully implemented. Nonetheless, the members of our 2003 mission were disappointed to discover that five years after the Good Friday Agreement, reform in the prosecution service, judicial appointments process, and other criminal justice agencies is really just beginning and has lagged far behind the policing reforms. Nonetheless, we can report some positive recent developments in the next section.

B. Recent Developments in Criminal Justice

1. The Joint Declaration

In a Joint Declaration published in April 2003, the British and Irish governments laid out a series of proposals intended to realize more fully the promises made in the Good Friday Agreement. The Declaration announced that the British government would introduce a second Criminal Justice bill to speed up the creation of a Judicial Appointments Commission and to "make further provision to promote a human rights culture in the criminal justice system."[19] The Declaration also made clear that the government "accepted the desirability of devolving policing and justice" within the lifetime of the next Northern Ireland Assembly, as long as this was done with the broad support of Northern Ireland's political parties.[20] The Declaration did not specify which responsibilities would be devolved, but it did make clear that the British government would retain control over issues such as the armed forces and national security.

In order to pave the way for devolution, the Declaration also proposed four possible models for the local administration of devolved justice powers: (1) the creation of a single justice department headed by one minister; (2) the creation of a single justice department headed by two ministers, in order to "strengthen cross-community

[18] *See* subsection III(B)(3), "Justice Oversight Commissioner."

[19] Joint Declaration by the British and Irish Governments April 2003 ("Joint Declaration"), ¶ 24 (May 2003).

[20] *Id*. ¶ 20.

accountability"[21] by requiring both ministers, presumably from different parties, to agree on decision-making; (3) handing over responsibility for criminal justice matters to the Office of the First and Deputy First Ministers;[22] and (4) the creation of two separate departments, for example policing and justice, headed by ministers from different communities.[23] These potential models raise questions about the relationships that will exist between the ministers in charge of the department(s) as well as the relationships between these officials and the local executive, the judiciary, the Attorney General, and policing officials.

We believe that local control over criminal justice and policing is a laudable and obtainable goal that will help to address human rights concerns about the current system. Although we take no position on the best institutional model for local control, we strongly believe that there should be public consultation on devolution options and a transparent evaluation of them. This process should be started right away, so that once the Assembly is reinstated, devolution of criminal justice can occur with minimal delay.

2. Updated Implementation Plan and New Legislation

A further positive development, which occurred shortly after our mission, was the June 2003 publication of an updated Criminal Justice Implementation Plan. The 2003 Plan significantly revised the 2001 Implementation Plan and set out a timetable for previously agreed-upon reforms. Most importantly, the new Plan committed the government to introducing new Criminal Justice legislation.

On July 2, 2003, shortly after the issuance of the updated Plan, the Irish and British governments published a timetable for the implementation of the governments' new short-term commitments.[24] The timetable included:

- Introduction of the new Criminal Justice bill in the fall of 2003;
- Launching of the new Public Prosecution Service in December 2003, to be phased in over three years[25];
- Publication of statements of ethics by criminal justice agencies by the end of 2003[26]; and

[21] *Id*., Annex 2 ¶ 16.

[22] The First Minister and Deputy First Minister are the top executive positions in the Assembly, "elected into office by the Assembly voting on a cross-community basis." Good Friday Agreement, Strand One, Democratic Institutions in Northern Ireland ¶¶ 14-15.

[23] Joint Declaration, Annex 2 ¶¶ 14-19.

[24] *Annex: Joint Declaration Commitments – Deliverables in the near Term July 2003,* Joint Communiqué, July 2, 2003, *available at* http://www.nio.gov.UK/press/030702a.htm.

[25] *See* section V(A), "A New Public Prosecution Service."

[26] As of February 2004, the statement of ethics for the prosecution service had not been published.

- A review by a (not then appointed) Oversight Commissioner in December 2003, with a report to be published in January 2004.

The new Criminal Justice bill ("Justice Bill 2003") was finally introduced in December 2003 and is expected to become law, after revisions, in the spring or summer of 2004. It will make the following changes to the Justice Act 2002:

- The Judicial Appointments Commission ("JAC") will be established prior to devolution, with a key objective being to secure a judiciary in Northern Ireland that is reflective of society, consistent with merit requirements.[27] Both the lay and legal membership of the JAC will be required to be reflective of society, insofar as possible.[28]
- The Prime Minister will appoint the Lord Chief Justice and Lord Justices of Appeals taking into consideration the recommendation made by the local First Minister and Deputy First Minister, and the JAC will advise the ministers on the procedure for these appointments.[29] In contrast, the 2003 Plan had promised that such appointments would be made "based on" the recommendation of the local leaders,[30] and the government has not provided an explanation for this shift in weight. We recommend that the language of the 2003 Plan be implemented instead, giving local ministers more influence in the appointments process.
- Criminal justice agencies must have regard to guidance issued by the Attorney General for Northern Ireland regarding "the exercise of their functions in a manner consistent with international human rights standards."[31] The 2003 Plan had been more straightforward, committing the government to include a provision in the new bill whereby criminal justice agencies would have due regard to human rights standards.[32] We recommend use of the Plan's language. Also, in the proposed legislation, it was not clear if the referral to the "Attorney General for Northern Ireland" meant that the provision would await devolution and the

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[27] Justice (Northern Ireland) Bill [HL] ("Justice Bill 2003"), § 3 (Dec. 4, 2003). Ultimate responsibility for the Judicial Appointments Commission will be transferred to the Secretary of State of NIO through this bill. *Id.*, sched. 1. The British government "intends to devolve responsibility for judicial appointments alongside other justice functions[;]" upon devolution, responsibility would presumably shift to the First Minister and Deputy First Minister of the Northern Ireland Assembly. Criminal Justice System Northern Ireland, Northern Ireland Office ("NIO"), *Criminal Justice Review Implementation Plan Updated June 2003* ("2003 Implementation Plan"), at 56, recommendations 73-4, 76.

[28] Justice Bill 2003 § 2. *See also* 2003 Implementation Plan at 58.

[29] Justice Bill 2003 § 4.

[30] 2003 Implementation Plan at 57.

[31] Justice Bill 2003 § 8.

[32] 2003 Implementation Plan at 11.

appointment of that post, or if the current Attorney General for the United Kingdom and Northern Ireland would issue the guidance. This point should be clarified before the bill is enacted.

- The Director of Public Prosecutions for Northern Ireland ("DPP") shall refer to the Police Ombudsman matters that appear to the DPP to indicate that a police officer "may have committed a criminal offence; or may, in the course of a criminal investigation, have behaved in a manner which would justify disciplinary proceedings" unless the Ombudsman is already aware of the issue.[33]

Our Committee welcomes this revised legislation. Its provisions more closely reflect the Criminal Justice Review team's recommendations than did the Justice Act 2002. As noted above, however, there are significant discrepancies between the new bill and the commitments made in the 2003 Plan. For all of the matters cited, we believe the promises made in the 2003 Plan are the better course of action, and we urge that the bill be so amended.

3. Justice Oversight Commissioner

The British government agreed to appoint an Oversight Commissioner to monitor criminal justice reforms in late 2002 and filled the post on July 18, 2003, with the appointment of Lord Clyde, a former Scottish law lord.[34] Despite the long delay in establishing this post, we welcome the appointment and believe it signifies an important step toward meaningful change. As previously mentioned, we believe that the appointment of the Oversight Commissioner provides an opportunity not only to monitor progress, but also to push forward the implementation of reform, and we encourage Lord Clyde to work proactively with the criminal justice agencies to increase the pace of reform. In this regard, it is important that Lord Clyde review the provisions of the new Justice Bill.

We also recommend that the government codify the powers and duties of the Oversight Commissioner in statute and ensure that the office is sufficiently resourced in light of the scope and importance of the job. Grounding the powers in statute would create the same standing for the Justice Oversight Commissioner as is given to the parallel Oversight Commissioner for Policing. Providing the Commissioner with a statutory mandate would increase the public accountability of his office and help ensure that he receives full cooperation from the criminal justice agencies he is overseeing. We recommend that these provisions be added to the Justice Bill 2003 before it is enacted.

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[33] Justice Bill 2003 § 6(3).

[34] At the same time, Kit Chivers, the Chief Inspector of the Magistrates' Courts Service, was appointed as Chief Inspector of Criminal Justice in Northern Ireland, to oversee the establishment of a Northern Ireland Inspectorate, an office created by the Justice Act 2002 to improve the efficiency and effectiveness of the criminal justice agencies.

IV. THE INCORPORATION OF INTERNATIONAL HUMAN RIGHTS LAW

A. Background of the Human Rights Act

The reform of the criminal justice system can only be properly understood against the backdrop of broader developments in human rights law and practice over the past few years. In the Good Friday Agreement, the British government pledged to complete the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") into Northern Ireland's domestic legal system.[35] The government fulfilled this commitment when it enacted the 1998 Human Rights Act ("HRA"), which applies across the United Kingdom and came into force in October 2000. The HRA incorporated most of the provisions of the European Convention, but it did not incorporate Article 13, which requires national governments to provide an "effective remedy"[36] for violations of Convention rights. As a result, those who don't obtain what they or the European Court of Human Rights ("European Court") would consider to be an effective remedy after a domestic trial must still apply to the European Court for a determination of relief.

The HRA allows individuals to file suit in domestic courts for the enforcement of Convention rights and allows domestic courts to review legislation for compatibility with the Convention.[37] As public authorities, courts cannot "act incompatibly" with the Convention.[38] Although the judgments of the European Court are not binding on them, domestic courts must take them into account in their own decisions. Before the enactment of the HRA, domestic courts did not recognize the Convention. Individuals in the United Kingdom could enforce their Convention rights only by filing suit before the European Court in Strasbourg, a step possible only after they had exhausted all their domestic remedies.

Although it is not yet common for judges in Northern Ireland to invoke the Convention independently, the use of the Human Rights Act has increased over time and

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[35] Good Friday Agreement, Rights, Safeguards and Equality of Opportunity, Human Rights ¶¶ 1-4; Constitutional Issues ¶ 1; and Strand One, Democratic Institutions in Northern Ireland ¶ 5.

[36] Article 13 of the European Convention provides that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." Under the U.K.'s Human Rights Act ("HRA"), upon a finding of a violation, a court "may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate." Human Rights Act 1998 ("HRA"), c. 42, § 8(1) (enacted Oct. 2, 2000).

[37] Legislation can be read to avoid violation of a Convention right, or courts can make a declaration that a statute is incompatible with the Convention. HRA § 3-4.

[38] *Id*. ¶ 6.

courts are increasingly incorporating its provisions into domestic case law. The government has also encouraged the training of judges, prosecutors, and lawyers in human rights law. [39] It is an exciting development that Northern Ireland's legal community is increasingly relying on human rights law, and that these rights are on the agenda of the government, the Law Society, the Bar Council, and criminal justice agencies. We hope that lawyers and judges will work to further develop Northern Ireland's jurisprudence under the European Convention— a powerful tool in defending rights—in domestic cases.

B. Influence of the European Convention on Criminal Justice

Indeed, the European Convention has already exerted a strong influence on the Northern Ireland criminal justice system. In May 2001, the European Court found that the British government had violated Article 2 of the European Convention (the right to life) by failing to investigate properly the state's use of lethal force in four important cases: *Kelly v. U.K.*, *Jordan v. U.K.*, *McKerr v. U.K.*, and *Shanaghan v. U.K.*[40] In these cases, the Court found that the investigations lacked the requisite independence from the forces under investigation, were characterized by unnecessary delays in gathering evidence, suffered from problematic inquest procedures, [41] and were hampered by the prosecutor's refusal to give reasons for failure to prosecute. In *Shanaghan*, the European Court also found that allegations of collusion between members of the security forces and loyalist paramilitaries had not been adequately investigated. Similar findings under Article 2 were issued in two subsequent cases, *McShane v. U.K.* (May 28, 2002) and *Finucane v. U.K.* (July 1, 2003).[42] A recent House of Lords decision, relying on *Jordan* et al, incorporated into domestic law the right to an effective investigation of a death resulting from either the use of force by state agents or the negligence of state officials.[43]

[39] Currently judicial training is conducted in-house, and the curriculum is not public. Human rights training of prosecutors and other lawyers is dealt with elsewhere in this report.

[40] Kelly v. U.K., 2001 Eur. Ct. H.R. 30054/96; Jordan v. U.K., 2001 Eur. Ct. H.R. 24746/94; McKerr v. U.K., 34 Eur. H.R. Rep. 20 (2002) (decided 2001); and Shanaghan v. U.K., 2001 Eur. Ct. H.R. 37715/97, *all available at* http://www.echr.coe.int/eng.

[41] In the United Kingdom, inquests are public hearings conducted by coroners in order to ascertain, certify, and conduct preliminary investigations into the cause of deaths. We decided against investigating the inquest system—a subject unto itself—in order to focus on other aspects of the criminal justice system. It is important to note, however, that the inquest system in Northern Ireland has been criticized by human rights groups, families of victims, as well as the European Court. In lieu of criminal proceedings, an inquest may be the only opportunity for the families of victims to have access to information about their deaths. The government is currently conducting a review of the inquest system throughout the U.K., in anticipation of reform.

[42] McShane v. U.K., 35 Eur. H.R. Rep. 23 (2002); Finucane v. U.K., 37 Eur. H.R. Rep. 29 (2003).

[43] R v Sec'y of State for the Home Dep't, *ex p* Amin, [2003] U.K.H.L. 51 (Oct. 16, 2003). A recent Northern Ireland High Court decision reportedly extends Article 2 protection to cases in which the death was caused by private actors. *In re* McIlwaine (J. Kerr, High Ct. Nov. 21, 2003) (unpublished).

To comply with these judgments, the government must properly investigate the cases in question and amend its regulations and procedures to prevent future violations. Relevant reforms would include implementing procedures for the investigation of the use of force by security personnel, as well as allegations of security-force collusion with paramilitaries; ensuring that these investigations are independent from the forces implicated and conducted expeditiously; updating and monitoring the inquest system; and establishing guidelines for the giving of reasons for the failure to prosecute.

The cases mentioned have yet to be re-investigated,[44] and the Committee of Ministers of the Council of Europe, which supervises the execution of European Court judgments, has yet to verify that the United Kingdom has taken adequate measures in these cases. Even so, the European Court's decisions have already helped shape some of the most important criminal justice reforms. As a result of the 2001 decisions, for example, the U.K. Attorney General, Lord Goldsmith, was questioned in Parliament about the policy of the DPP on the giving of reasons for non-prosecution in controversial cases. Lord Goldsmith replied that the criminal justice reform process would "meet the concerns" of the European Court. He announced that following policy would be followed:

> The policy of the [DPP] … is to refrain from giving reasons other than in the most general terms. The Director recognises that the propriety of applying the general practice must be examined and reviewed in every case where a request for the provision of detailed reasons is made. … [In light of the European Court cases,] there may be [exceptional] cases in the future … 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 his 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.[45]

[44] The government has not re-opened the cases, arguing that much time has passed since the deaths occurred and investigations would be extremely difficult. In contrast, the claimants believe that the government must investigate the cases in order to comply with the judgments. Complainants in the *Jordan* and *McKerr* cases have brought judicial reviews against different government entities in the aftermath of the European Court ruling**s**. These cases are currently working their way through the domestic court system. The House of Lords is also expected to issue a decision on retroactivity of the HRA in the *McKerr* case; the government argued that McKerr is not entitled to an effective investigation because the HRA was not in force at the time of his death. *See also* footnote 57 of this report.

[45] 631 PARL. DEB., H.L., Part No. 98, WA 259-260 (Mar. 1, 2002).

We address the DPP's policy on the giving of reasons for non-prosecutions more thoroughly in the next section of this report, where we argue that there should be a new presumption toward the giving of reasons in controversial cases.

As a general matter, however, we believe that the government should address the European Court judgments in a more cohesive and comprehensive manner. We recognize the difficulties that arise in investigating cases in which the evidence may be very old, but believe that, considering the seriousness of the cases, the government should re-open the investigations to the greatest extent possible, in order to comply with Article 2 of the Convention. We regret that the government has not yet initiated investigations in any of the cases or enacted legislation to address the shortfalls identified by the decisions. We urge the government to do so without further delay.

V. THE PROSECUTION FUNCTION

A. A New Public Prosecution Service

The Office of the DPP is in the process of creating its own successor agency, the Public Prosecution Service ("PPS") for Northern Ireland, as recommended by the Review and approved in the 2001 and 2003 Implementation Plans.[46] The new service will be phased in gradually, and will completely replace the Office of the DPP by 2006.[47]

Currently, the Office of the DPP reports to the Attorney General for the United Kingdom and Northern Ireland. After devolution of criminal justice, an Attorney General responsible solely for Northern Ireland is to be appointed by the First Minister and Deputy First Minister of the Northern Ireland Assembly. The chief prosecutor and deputy chief prosecutor of the planned PPS will be appointed by the new Northern Ireland Attorney General.

The creation of the PPS coincides with the adoption of another significant recommendation of the Review: *All* crimes are to be prosecuted by the new service. Currently, lesser offenses are prosecuted by police officers. This reform will help ensure that the investigation and arrest of each criminal suspect receives review independent of the PSNI. It also removes a potential for conflict of interest by placing responsibility for arrest and prosecution decisions within separate entities. Furthermore, under the new agency, PPS lawyers will intervene in each case between the time of arrest and a suspect's initial court appearance. This welcome development ensures earlier scrutiny of arrest charges by lawyers trained in human rights and criminal law.

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[46] Criminal Justice System Northern Ireland, NIO, *Criminal Justice Review Implementation Plan Nov. 2001* ("2001 Implementation Plan"), at 19, recommendations 17, 58.

[47] 2003 Implementation Plan at 30.

The ABCNY's 1999 Report recommended that in cases involving serious crimes, prosecutors should be involved to assist the police at the investigation stage. The PSNI and the Office of the DPP have differing views on this point. The police favor assigning officers to PPS offices and also believe that this would assist in speedier disposition of cases.[48] The Office of the DPP voiced caution concerning association with the police, and opposes "co-location" of prosecutors in police stations, which it believes could compromise public support for the prosecution service because of historic distrust of the police in many communities.

The Review recommended a diversion program for juveniles, a further enhancement of prosecutorial discretion.[49] The program is comparable to policies in state and federal prosecutors' offices in the United States, and allows the prosecutor to dismiss lower-level charges against first-time juvenile offenders who comply with specific conditions. This will enable a youthful offender who complies with the conditions to avoid a criminal record and its stigma. The Office of the DPP has yet to implement this recommendation. It warrants high priority as it will enhance public confidence in the prosecutor's office.

Because of the shift in prosecution responsibilities from the police to professional lawyers, the PPS's caseload is expected to increase to 75,000 cases from the 10,000 cases currently handled by the Office of the DPP. The number of lawyers on the prosecutor's staff will increase accordingly, from 40 to 150. (Seventy lawyers were on staff by the time of our visit.)

Newly hired lawyers for the PPS undergo six months of training, including courses in human rights law. According to the DPP, veteran staff lawyers also receive training in human rights law and ethics. An official of the Northern Ireland Human Rights Commission ("NIHRC")[50] said that he is "reasonably satisfied" with the human rights training described to him by the Office of the DPP. However, the Commission would prefer that it be allowed to monitor the training.

The new PPS will be located in five regional offices throughout Northern Ireland, in addition to its Belfast office, which has been the sole location of the Office of the DPP.

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[48] The PSNI is planning to establish organized crime task forces, including lawyers, independent of the Office of the DPP / PPS.

[49] Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland* ("Review"), Mar. 2000, at 422, recommendation 179. *See generally id*. at 421-3, recommendations 169-180.

[50] The Northern Ireland Human Rights Commission, established in the Northern Ireland Act 1998 which codified elements of the Good Friday Agreement, is charged with reviewing the "adequacy and effectiveness … of law and practice relating to the protection of human rights," advising the Secretary of State and the Assembly on human rights protection, and promoting understanding and awareness of human rights in Northern Ireland. It may bring legal proceedings related to the protection of human rights. Northern Ireland Act 1998, c. 47, § 69.

The PPS pilot scheme began in South Belfast in December 2003.[51] The five regional offices were to be opened one at a time through 2006.

Although the establishment of the PPS is not dependent on devolution of criminal justice, as are some reforms recommended by the Review, the pace of implementation appears slow, especially when compared to the establishment of the PSNI. The Office of the DPP has defended this gradual approach. Its officials emphasize that the creation of the PPS is a large undertaking in a divided society and that the government only has "one shot to get it right." According to Sir Alasdair Fraser, the DPP, the Crown Prosecution Service in England—which also shifted responsibility for minor offenses from the police to the prosecutor—was introduced too rapidly, with terrible administrative consequences. By using South Belfast as a pilot project for planning the structure of the regional PPS offices, the DPP hopes to "tease out" problems before they might affect the entire service.

While it is wise to conduct reforms at a gradual pace, we regret that the process is only now being initiated. The Office of the DPP should ensure that the implementation of reforms is its top priority. Given that most reforms in the prosecution service are not dependent on devolution, they should not be slowed in any way by political considerations. Where feasible, we strongly recommend that the timetable of reforms be accelerated.

The Office of the DPP was to publish a draft code of ethics and a draft code of practice for the new PPS in December 2003; as of February 2004, neither of the codes had been announced. The government's 2003 Implementation Plan promised that "these draft Codes will be revised and developed during the course of the pilot scheme and publication will follow the experience of the scheme."[52] The DPP informed us that the draft ethics code is based on procedures of the International Association of Prosecutors and the "human rights community," an approach we very much welcome. As it currently stands, the code may not be final until after the completion of the pilot scheme in 2006.[53] (In contrast, the PSNI published a final code of ethics in February 2003.) We are frustrated that the Office of the DPP has not yet published the draft code *and* that its intended timetable for a final code is so protracted. In the short term, publishing the draft code of ethics for public comment would be a positive step toward furthering public awareness of the prosecution service reforms.

B. Transparency and Accountability

An overarching concern, expressed by many, was a lack of transparency in the reform efforts to date. We discovered that even those most engaged in the criminal justice debates lacked any real sense of what exactly the Office of the DPP was doing—

[51] *Annex: Joint Declaration Commitments – Deliverables in the near Term July 2003*, Joint Communiqué, July 2, 2003, *available at* http://www.nio.gov.UK/press/030702a.htm.

[52] 2003 Implementation Plan at 18-19.

[53] *Id*.

including the experts who had served as independent members of the Criminal Justice Review. The lack of a detailed public prosecution implementation plan was of particular concern.

In this vein, we believe the Office of the DPP should issue an annual report next year in order to publicize the status of its reform efforts. The Justice Act 2002 requires the Director of the new PPS to prepare a report after the end of each financial year.[54] The current office has indicated it will not publish a report until transition to the PPS is complete—December 2006 at the earliest. This restrictive interpretation of the requirement undermines the office's efforts to be more open and publicly accountable and to address public concerns about the process.

As the Alliance Party, the largest cross-community political party, emphasized in its response to the Criminal Justice Review, "[i]t is most important that in a deeply divided society like Northern Ireland, fairness and independence of the prosecution should not only exist but *be clearly seen to exist*."[55] The human rights groups and many of the political party representatives told us that by failing to expose the current reform efforts to public view, the Office of the DPP had missed this central point. Many also expressed concern that the retention of senior DPP officials in the new PPS undermined the Review Group's promise of "a fresh start." In contrast to the PSNI and other criminal justice bodies, the Office of the DPP has not replaced top personnel or introduced new officials to augment the existing leadership.

We believe that these concerns make it even more critical that the implementation of the prosecution reforms be as transparent as possible. We see no need to wait for devolution or full implementation of the PPS to inform the public of prosecution reforms via regular reports, timetables, and a website. Allowing the Northern Ireland Human Rights Commission to monitor and lend its expertise in the human rights training of prosecutors would also help to gain critical community support.

The Office of the DPP did hold a public meeting several months after our mission. As part of this meeting, the DPP distributed a short explanation of key reforms and provided a timeline for some of its activities. These kinds of public initiatives will help build confidence in the system and should be considered an important part of the reform process. They should be repeated often throughout the implementation period, reaching as wide an audience as possible. We commend the Office of the DPP for holding this public event and hope that this and future events will help respond to the frustration expressed by many of those we interviewed in Belfast regarding the lack of transparency in the reform process.

To address concerns about staffing, the Office of the DPP should also publish information about the composition of the prosecution staff and support equality

[54] Justice Act 2002 § 39(1).

[55] Alliance Party, *Criminal Justice Review: Response of the Alliance Party*, Sept. 2000.

monitoring of the recruitment process. Although a significant number of new staff members have been hired, the hiring process has not received public scrutiny. Circulating information about hiring efforts could aid in attracting lawyers from under-represented sectors of society and those with backgrounds in criminal defense and human rights law. We urge the DPP to take these steps and believe the newly appointed Oversight Commissioner, Lord Clyde, could play a role in monitoring the office's hiring to ensure that it is as open and competitive as possible. Aside from the transparency aspect of recruiting, the Office of the DPP should ensure that new hires are reflective of society in Northern Ireland and should aim to hire at all levels to signal a substantively new service.

It will take time to complete the far-reaching changes contemplated for the PPS, and we recognize the importance of gradual increases in staff, offices, and caseload. We do not see any obstacles, however, to initiating some of the reforms immediately, particularly those that improve transparency, accountability, and public confidence. These include holding a public consultation on codes of ethics, issuing annual reports, speeding up the introduction of an independent complaints mechanism (which is being developed in conjunction with other office reforms), and publishing demographic information about current staff members.

C. The giving of reasons for non-prosecution

The British government rejected a recommendation by the Criminal Justice Review concerning public statements by the DPP in instances where controversial crimes are not prosecuted. The Review recommended that in such cases, the presumption should shift towards the giving of reasons for non-prosecution to those with a proper interest in the case, if this can be done without harming the interests of justice or the public interest. We agree with the Review, which described the proposal as "an important accountability issue."[56]

The policy set out in the 2003 Implementation Plan mirrors that outlined by the Attorney General, Lord Goldsmith, in March 2002, as discussed in Section IV(B). In response to *Shanaghan v. U.K.* (a 2001 European Court decision which criticized the policy that the DPP would continue to refrain from giving reasons for declining to prosecute), Lord Goldsmith allowed that exceptions may be made in the future in instances in which a victim's death may have been occasioned by agents of the state, leaving it to the DPP to weigh the public interest considerations in each case.[57] The DPP

[56] Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland: A Guide*, Mar. 2000, at 7.

[57] In *Jordan v. U.K.*, a case released at the same time as *Shanaghan*, the European Court found that the circumstances of the death of Pearse Jordan, who was killed by a police officer, "cried out for an explanation," and that although the DPP is not required to give reasons in every case, in controversial cases it may be necessary to foster public confidence and provide information to the family of the victim in order to comply with Article 2 of the European Convention. In this case, the victim's right to life was violated in part because of the DPP's failure to give reasons. Jordan v. U.K., 2001 Eur. Ct. H.R. 24746/94, ¶¶ 122-

advised us that he has not had occasion to apply this policy since it was announced by the Attorney General. Notably, the DPP has not subsequently provided explanations in any of the cases in which the European Court criticized his office for not giving reasons for decisions not to prosecute. Although the 2003 Implementation Plan promised that the government would continue to develop its position on this issue, it did not provide any guidelines for doing so.

We recognize that in some cases, articulating reasons for non-prosecution may taint persons not charged with any offense, or compromise subsequent efforts by the police and prosecutors to charge those responsible for a crime. However, in the past, the non-prosecution of soldiers or police officers who were involved in controversial killings deepened community mistrust of the Office of the DPP, and of criminal justice in general. While the giving of reasons will not be appropriate in all cases, we believe that the presumption should be shifted toward giving reasons and that the Office of the DPP should clarify its policy in this regard, particularly for controversial cases.

VI. THE JUDICIARY

A. Background

In our 1999 Report, the Committee called for greater openness and transparency in the process of selecting judges and urged that efforts be made to involve a broad spectrum of society in that process. The result, we hoped, would be to increase the number of judges from under-represented groups, including women, and to increase the degree of confidence the public has in judicial appointments. Progress has been made since 1999, although certain areas lag behind, especially the selection of women for judicial posts.

The Northern Ireland judiciary continues to deserve considerable credit for its courage and determination to uphold the rule of law under difficult conditions. Judges were targeted and killed because of their official positions during the conflict. There have been no physical attacks on judges since we were last in Northern Ireland, insofar as we could learn. We hope that the day is approaching when judicial officers will not need the protection of armed police officers.

124, 142-145. (According to this and other cases, the right to life, set out in Article 2 of the Convention, requires an effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the state. *Id.* ¶ 105 (citing McCann v. U.K., 21 Eur. H.R. Rep. 97 ¶ 161 (1996) and Kaya v. Turkey, 28 Eur. H.R. Rep. 1 (1999) (decided 1998))). Jordan's family subsequently sought judicial review in domestic court of the DPP's decision not to give reasons, and Justice Brian Kerr found that the DPP would have been required to give reasons for his decisions not to prosecute in this case but for the timing of the DPP's action: when he made the decisions in 1993 and 1995, the HRA was not yet enacted and it is not retroactive. *In re Jordan*, [2003] NIQB 1 (June 2003). The decision is currently being appealed. (On retroactivity, an English Court of Appeal recently found that Article 2 applied in the case of a death that occurred prior to the enactment of the HRA, because of the fundamental nature of the right to life. R. (on the application of Khan) v. Sec'y of State for Health, 4 All E.R. 1239 (2003), ¶¶ 83-85. *See also* footnote 44 of this report.)

The criminal courts in Northern Ireland are divided between the Crown Court, which presides over indictable offenses, and the County Courts and Magistrate Courts, which hear lesser offenses.[58] Judges of the High Court and the County Court are still appointed by the Queen upon the recommendation of the Lord Chancellor of the United Kingdom following advice from the Lord Chief Justice of the High Court in Northern Ireland. Barristers and solicitors with 10 years' practical experience are eligible for appointment to the High Court, but only barristers who are Queen's Counsel ("QCs")—senior-ranked barristers—have traditionally been considered. Solicitors or resident magistrates may be appointed to the County Court in certain circumstances; there is a seven-year experience requirement for these posts. Women judges remain rare. In 1999, none of the High Court justices were women; of the 15 judges on the County Court, only one was a woman; and of the 17 magistrate judges only three were women. The comparable figures in 2003 are: no women on the High Court out of a total of eight justices; of 17 judges on the County Court, two are women; of four district judges, two are women;[59] and of the current 19 magistrate judges, three are women, resulting in a net gain of three women in the judiciary.[60]

Traditionally, the process for judicial appointments in Northern Ireland was cloaked in mystery. It reportedly involved the Lord Chief Justice consulting with his judicial colleagues and select barristers before arriving at his advice for appointments to the bench. In our 1999 report, we criticized this veiled process, concluding that the process would be more credible if there were more openness, public participation, and accountability. We suggested that a nominating commission, such as that used in New York State in connection with appointments to the New York Court of Appeals, would allow for greater public participation without compromising quality. We suggested that such a commission should include lawyers and non-lawyers and represent a broad spectrum of society. We felt that by actively soliciting applications from a variety of sources, checking references, and interviewing leading candidates, the commission would help ensure that attorneys of diverse backgrounds were given full consideration for appointment. We also suggested that statistical reporting in which the need for confidentiality was respected would increase transparency and public accountability.

B. The Commissioner for Judicial Appointments

We were, accordingly, heartened when the Criminal Justice Review recommended a similar mechanism—a new Judicial Appointments Commission ("JAC"),

[58] Crown Court offenses may be heard by High Court judges and County Court judges, as well as the Lord Chief Justice and Lord Justices of Appeal.

[59] District judges hear certain civil cases within County Courts.

[60] For recent statistics, see Centre for Advancement of Women in Politics, *Women Members of the U.K. Judiciary*, July 2003, *available at* http://www.qub.ac.UK/cawp/UK%20htmls/judges.htm. Also see Statistics and Research Branch, NIO, *Gender and the Northern Ireland Criminal Justice System*, Mar. 2002.

discussed in detail below. But until the JAC was up and running, the Review recommended that the government appoint an individual as Commissioner for Judicial Appointments to oversee and monitor the fairness of the existing appointments system.[61] Happily, the government did make this appointment.

The first Commissioner for Judicial Appointments, John Simpson, took office in January 2002. He was appointed for a five-year term that runs until December 2006, subject to review when the JAC comes into existence. The Judicial Appointments Commissioner audits the current procedures for appointing judges and QCs and handles complaints that may arise out of the application of those procedures. Indeed, Commissioner Simpson informed us that he had monitored the eight judicial appointments made in the year prior to our visit. He also has the power to recommend changes to those procedures to the Lord Chancellor, and he publishes an annual report.

Commissioner Simpson's first report auditing the process, completed in February 2003 and followed by an annual report in October, recommended in part that the Court Service immediately develop an adequate monitoring system for the entire judiciary, that all candidates for appointment should make a formal application, and that the Court Service make a formal commitment to diversity.[62] Unfortunately, the Court Service did not unequivocally agree to these recommendations—it agreed to monitor applicants but not the whole judiciary, without specifying a date; it affirmed the requirement of formal applications only up to and including the level of County Court judges (although the Court Service has since followed this procedure for High Court judges); and stated that the recommendation regarding a formal commitment to diversity "requires further consideration."[63] We believe the Court Service should follow Commissioner Simpson's recommendations on these matters.

The appointment of the Commissioner—who is independent of the judiciary although he reports to the Lord Chancellor—is a salutary step in the direction of increasing transparency in the process of selecting judges and in diversifying the bench. By itself, however, it is insufficient to make significant change possible, since the Commissioner's authority is limited to monitoring and recommending rather than having a direct role in appointing judicial officers or in implementing reforms. For significant change, an active JAC is needed.

C. The Judicial Appointments Commission

We believe that an effective JAC will address the credibility issues identified in our 1999 Report, and very much regret that it has not yet been established. In this regard, we welcome government commitments since May 2003 that the creation of the JAC is to

[61] Review at 413, recommendation 95.

[62] Commissioner for Judicial Appointments for Northern Ireland, *Audit Report*, Feb. 2003.

[63] Commissioner for Judicial Appointments for Northern Ireland, *Annual Report, 21 January 2002 to 31 March 2003*, Oct. 2, 2003, App. 3 ¶¶ 5.5.21, 3.5.11, 5.4.3.

be accelerated and established before devolution.[64] The 2003 Implementation Plan states that the government intends to devolve responsibility for judicial appointments alongside other justice functions.[65]

The 2003 Implementation Plan and the Justice Bill 2003 do contain significant movement toward the implementation of the Review recommendations on judicial appointments. The Bill adopts the position that the power to appoint the Lord Chief Justice and the Lord Justices of Appeal will be vested in the Prime Minister, taking into consideration joint recommendations by the First Minister and Deputy First Minister.[66] We believe that the stronger language included in the 2003 Plan was more appropriate—that the Prime Minister make appointments *based on* the recommendation of the local ministers—and further believe that the Prime Minister should be required to accept that recommendation.[67] The Justice Bill also states that the government is fully committed to the objective of securing a judiciary that is as reflective of Northern Ireland society, in particular by community background and gender, as can be achieved consistently with the overriding requirement of merit, and requires that the JAC so far as it is reasonably practicable, secure that a range of persons reflective of the community in Northern Ireland is available for consideration.[68]

The Justice Bill 2003 also provides that both legal and lay members on the JAC will be appointed with a view toward making the JAC as reflective of the community as possible. Although the exact division of positions between legal members (from the judiciary, the Bar, and the Law Society) and lay members has not been decided upon, we take no specific position on that issue, other than to recommend that there be a meaningful degree of lay participation. Most importantly, we believe that a commission whose lay and legal members are reflective of Northern Ireland society as a whole will most easily gain the confidence of the entire community in its recommendations. We strongly recommend that the JAC engage in active outreach to the community in seeking qualified members. We recommend as well that the requirement of ten years' service as a barrister or solicitor for High Court appointments—and seven years' service for County Court appointments—not be retained.[69] Every effort should be made to appoint qualified

[64] Joint Declaration ¶ 24 and 2003 Implementation Plan at 54, recommendation 69. *See generally* Justice Bill 2003 §§ 1-5.

[65] 2003 Implementation Plan at 56, recommendations 73-4.

[66] Justice Bill 2003 § 4.

[67] 2003 Implementation Plan at 57, recommendation 75. According to the text accompanying the recommendation, "the First Minister and Deputy First Minister acting jointly will make recommendations to the Prime Minister, who in turn will recommend appointments on that basis."

[68] Justice Bill 2003 § 3. *See also* 2003 Implementation Plan at 54, recommendation 69.

[69] In a recent newspaper article, two Queens Law School professors suggest that communications skills and a broad understanding of society, in addition to legal knowledge and courtroom experience, might be valuable qualities in a judge. Stephen Livingstone & Kieran McEvoy, *The Challenges Facing Ulster's New Top Judge*, BELFAST TELEGRAPH, January 13, 2004. The publication of their study on how judges and

women to the bench, considering the gender imbalance that continues in the Northern Ireland judiciary.

With the new Implementation Plan and Justice Bill 2003, the government has now put its imprimatur on a program of action and outreach to stimulate interest in becoming a judge, especially from sections of the community where historically applications have been disproportionately low, and has announced that the requirements for recruitment to all levels of the bench will not differentiate between barristers and solicitors. We believe the government should move quickly on these reforms, strongly agreeing that the establishment of the JAC should not await the devolution of other justice functions to the Northern Ireland executive. The JAC should be established expeditiously, as should the final procedures for its operation. Political responsibility and accountability for the judicial appointments process can then be transferred to the First Minister and Deputy First Minister after the Northern Ireland Assembly and Executive have been restored.

VII. THE POLICE AND POLICE OMBUDSMAN

A. The New Policing Service

The policing reform process has been the most expansive of the criminal justice reforms since the 1998 ABCNY mission and has received the most international scrutiny. The Independent Commission on Policing for Northern Ireland—the Patten Commission—was established pursuant to the 1998 Good Friday Agreement. For 15 months this international commission took testimony at public hearings throughout Northern Ireland, and studied the most effective means of reforming the Royal Ulster Constabulary ("RUC"), the composition of which was disproportionately Protestant and Unionist. In response to the Patten Commission's recommendations, a new police service, the PSNI, was established with a new governing authority, the Northern Ireland Policing Board ("Board").

The Board, comprised of nineteen members, first met in November 2001. Ten of the Board's seats are filled by previously elected members of the suspended Northern Ireland Assembly, proportionate to their parties' representation in the Assembly, with the exception of Sinn Fein members, who have declined to take seats on the Board.[70] (This composition has remained in place during the suspension of the Northern Ireland Assembly.[71]) The remaining nine members of the Board—including the current Chairperson and Vice Chairperson—are selected by the Secretary of State for Northern

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lawyers deal with transition is forthcoming. *See* Stephen Livingstone, Kieran McEvoy & Rachel Rebouche, JUDGES AND LAWYERS IN TRANSITION: HUMAN RIGHTS AND LEGAL CULTURE (Human Rights Centre, Queens University School of Law forthcoming 2004).

[70] Currently, four Board members are representative of the UUP, three of the DUP, and three of the SDLP.

[71] When the Assembly was suspended, the Secretary of State re-appointed the incumbent Assembly members of the Board in order to keep it active.

Ireland following an open competition. Only two Board members are women, and only one is a member of an ethnic minority group.

Operational responsibilities of the PSNI, launched in April 2002, are overseen by the Chief Constable, who reports directly to the Board. In September 2002, the Board appointed Hugh Orde, formerly a lead investigator on the Patrick Finucane case and a former Deputy Assistant Commissioner of the London Metropolitan Police, to this position. The Board conducts at least ten public meetings per year, produces an annual report and, pursuant to the Police (Northern Ireland) Act 2000, publishes a policing plan each year. The plan sets forth annual performance targets for the PSNI and strategic planning for succeeding years. The Chief Constable prepares the plan, which is subject to the approval of the Board and the Secretary of State.

The Patten Commission recommended a code of ethics for police officers, and the Policing Board published the Code of Ethics for the Police Service of Northern Ireland in February 2003.[72] The PSNI drafted the ethics code in consultation with human rights groups, including the Northern Ireland Human Rights Commission, as part of a wide consultation exercise. It is modeled on a code promulgated by the International Association of Chief Police Officers. The PSNI ethics code states in its preamble that among its intentions is "to make police officers aware of the rights and obligations arising out of the European Convention on Human Rights."[73] It cites the Convention and European Court decisions as source authority five times throughout its thirteen pages and specifically directs that "[a]rrest and detention shall only be carried out in accordance with the provisions of Article 3, 5 and 6 of the [Convention], relevant legislation and associated Codes of Practice."[74] We applaud the PSNI's emphasis on Convention rights and its interaction with human rights bodies in drafting the code.

The PSNI has also established a two-day training course in ethics, human rights issues, and the new constitutional framework, which the Chief Constable described to us as "unique in the United Kingdom." It is compulsory for all police officers and civilian staff of the PSNI. The Oversight Commissioner for Policing Reform, a post established in 2000, was supportive of the PSNI's effort in establishing the training, but criticized it for not being adequate considering the complexity of the topics, particularly in relation to teaching the new constitutional arrangements; for not integrating human rights into all aspects of police training, as recommended by the Patten Commission; and for not providing a plan for the evaluation of the training.[75] CAJ and other groups were

[72] Code of Ethics for the Police Service of Northern Ireland (Northern Ireland Policing Board Feb. 2003), *available at* http://www.psni.police.UK/nipbcodeofethics.pdf#xml.

[73] *Id*., preamble § (d)(2).

[74] *Id*., art. 5.1. The Code notes that the referenced "Codes of Practice" include the Terrorism Act 2000, which allows detention of certain suspects for up to 48 hours without access to counsel.

[75] Oversight Commissioner for Policing Reform, *Overseeing the Proposed Revisions for the Policing Services of Northern Ireland*, Seventh Report, May 6, 2003, at 19-20, 102.

disappointed that the PSNI did not consult with outside organizations on the content of the training material. The Northern Ireland Office was in the process of auditing the training program at the time of our visit, but a report on the topic has not been published. We concur with the Oversight Commissioner: two days is insufficient to train law enforcement personnel in a broad range of constitutional and human rights issues.

Members of the Policing Board informed us that the PSNI is on target with respect to the Patten Commission's recommendations on shifting the composition of the PSNI to better reflect the community. To meet the Patten requirements both to reduce the overall numbers of police and to ensure a more representative force, incentives were given to encourage the pool of (primarily Protestant) senior police officers to retire. Recruits are appointed from a merit pool on a 50 percent Catholic/50 percent non-Catholic basis. Currently, Catholics constitute 36 percent of applicants to the PSNI, and women constitute 37 percent of applicants.[76] At the start of 2003, Catholic officers made up about 12 percent of the regular PSNI and women about 15 percent.[77] In addition to community background and gender, efforts are being made to address the low numbers of members of ethnic minorities, disabled persons, and other underrepresented groups in the PSNI. While we realize there is still a long way to go before the PSNI is truly representative of Northern Ireland society, we were impressed by the policies of the PSNI leadership and by their recruitment efforts.

Despite improvements in the police service, Sinn Fein, the largest republican political party, has declined to take its allotted seats on the Policing Board. We met with a Sinn Fein representative, who explained that his party believes that the "spirit of the Patten Report has not been lived up to" by the Board and the PSNI. He said that there was no constituent support for his party's participation on the Board, and that Sinn Fein still views the police as a political institution. Other observers with whom we spoke, not politically affiliated, agreed that there was still distrust of the police in the republican and nationalist communities, but that the new police service was moving in the right direction. The participation of Sinn Fein would, of course, demonstrate and help to institutionalize further community support of policing reforms.

As a general matter, we were discouraged to hear that there continue to be complaints about police treatment of residents of working class areas, as well as by reports that Catholics who join the PSNI have been intimidated by members of dissident republican groups.[78] There have also been attacks on members of the Policing Board and

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[76] Oversight Commissioner for Policing Reform, *Overseeing the Proposed Revisions for the Policing Services of Northern Ireland*, Eighth Report, Sept. 16, 2003, at 11.

[77] Northern Ireland Policing Board, *Annual Report 2002-2003*, tables A & B, *available at* http://www.nipolicingboard.org.uk/publications/annual_report03.htm. Catholic membership was reported to be just over 13 percent in fall 2003. Taking into account full and part-time reserve members of the PSNI, the percentage of Catholics is about 10 percent. BIRW, *Submission to the NIO on the Renewal of the 50/50 Recruitment Policy*, Oct. 2003.

[78] According to a survey conducted by the Policing Board, 72 percent of the Catholics who were questioned cited fear of intimidation or attacks as reasons that Catholics might be deterred from joining the PSNI.

the District Policing Partnerships, who act as police/community liaisons, to try to intimidate them from serving. We deplore such acts and are disheartened by the difficulties they create in the recruiting and reform process. We are cognizant that change—in a policing service and society—cannot happen overnight, but we believe that great effort should be made to improve confidence in the policing service and ensure that every community has a voice in ongoing reforms to the PSNI.

B. The Police Ombudsman

1. Background on Office and Powers

The Office of the Police Ombudsman was still in the planning stages during our last mission to Northern Ireland. This new office investigates complaints of police misconduct brought by the public or at the Ombudsman's own initiative. The office may make referrals to the Chief Constable or to the Policing Board for disciplinary action, or to the Office of the DPP for criminal prosecution. Nuala O'Loan, who met with members of the 2003 mission, was appointed as the first Police Ombudsman by the Northern Ireland Secretary of State in November 2000. Her office is accountable to the British Parliament through the Secretary of State and is independent of the Policing Board and the Chief Constable of the PSNI.

Many of the officials and practitioners we met in Northern Ireland shared respect for Ombudsman O'Loan as well as a consensus that she had brought credibility to the position. A nationalist elected representative with whom we met described the Police Ombudsman as "very effective—the most effective of all police reforms." Chief Constable Orde said that the Police Ombudsman has "a good team" of investigators. We are very supportive of Ombudsman O'Loan's activities and are impressed by the progress of her newly established office.

There has been, however, some political and institutional resistance to the new office. David Trimble, leader of the UUP and the First Minister of the Northern Ireland Assembly before its suspension, called for a "review" of the Police Ombudsman's office in 2001 to reconsider its powers. Other unionists also called for a review of the office. Reviews that audit and evaluate the effectiveness of a government entity are undertaken as a matter of course at five-year intervals. We can see no reason to accelerate this process during this critical formative period as the Police Ombudsman strives to gain the confidence of a divided community. In what may be a backhanded compliment to the effectiveness of the Police Ombudsman, the office was subjected to three judicial reviews, or lawsuits challenging its authority. The Police Ombudsman prevailed in all three reviews. The union representing police officers withdrew one such suit on the eve of the initial hearing.

Northern Ireland Policing Board, *Community Attitudes Survey 2002*, Mar. 19, 2003, at 6. In the same survey, 13 percent of Protestants and 30 percent of Catholics felt that the police did not deal fairly with everyone. *Id.*, table 3.

The DPP's office is currently obligated to report evidence of criminal conduct by the police to the Police Ombudsman's office for investigation and referral, as appropriate, for prosecution. The new Justice Bill 2003 directs the Office of the DPP to refer all cases to the Police Ombudsman where it "appears to the Director to indicate" that a police officer "may have committed a criminal offense; or may, in the course of a criminal investigation, have behaved in a manner which would justify disciplinary proceedings."[79] We believe that all police misconduct (including non-criminal conduct subject to disciplinary action) should be referred to the Police Ombudsman to ensure independent scrutiny of the evidence and recommend the government consider amending the Justice Bill 2003 to limit the Office of the DPP's discretion in making referrals. Such a reform would be more in line with the language of the new Implementation Plan.[80]

Our 1999 report expressed concern that the Police Ombudsman's office was inadequately funded at three million pounds, or less than half the budget of the investigatory agency it was designed to replace. The office was subsequently funded at seven million pounds, and has a staff of 125, which its director described to us as "adequate." At the time of our visit, O'Loan said that she had approached the NIO for more resources to investigate a number of past cases, but her request had been denied. BIRW criticized the Ombudsman's office for delaying investigation of controversial past cases, arguing that she should spread the resources she has among both old and new cases and pointing out that these cases were most at risk of evidence being lost. Recently, the Ombudsman's office reinstigated investigations into past cases, a development we support. We call on the government to ensure that sufficient resources are allocated to the office to support both this effort and the office's increased caseload as a result of the Justice Bill.

After returning from Belfast, we were told by human rights groups that some legal representatives of both complainants and police officers had complained about treatment by the Police Ombudsman. Specifically, the office was criticized for not keeping complainants, solicitors, and/or NGOs informed about cases and for objecting to representative attendance at meetings. The Police Ombudsman has stated that it is the policy of the office not to exclude solicitors from meetings. We believe the office should maintain consistent communication with complainants, police officers, and their representatives.

The Ombudsman is currently empowered to investigate active police officers. Because large numbers of police officers have recently retired as part of the Patten process on securing a police force more reflective of the community, the Police

[79] Justice Bill 2003 § 6.

[80] 2003 Implementation Plan at 33. According to the text accompanying the recommendation, "[t]he Government has given a commitment to bring forward fresh legislation to place a requirement on the Director to refer to the Police Ombudsman all cases where a member of the police force may have committed an offence or behaved in a manner which would justify disciplinary proceedings." CAJ has argued that an objective test would be more reliable in referring incidents of misconduct than the subjective language used in the Justice Bill 2003.

Ombudsman's inability to compel cooperation from these retirees in her investigations of past cases presents a limitation on the office's investigatory powers in the near term.

2. Survey of Barristers and Solicitors

In a recent publication, released in March 2003, the Police Ombudsman reported on the results of a survey of Northern Ireland barristers and solicitors regarding their treatment by the police.[81] Police harassment of criminal lawyers, sometimes in the form of threats communicated via the lawyers' clients, was a grave concern of the members of the 1998 mission and remains so. According to the Ombudsman's report, slightly more than half the surveyed lawyers responded. Of those, 55 respondents (3.8 percent of those who responded) said that they had received intimidation, harassment or threats from the police. About 60 percent of those who reported harassment chose not to make a complaint at the time, in many cases because they said they believed that the police would not do anything about the matter. According to the report, the majority of the incidents reported occurred before the establishment of the Police Ombudsman's office, although dates of incidents were not included in the survey results.

The Police Ombudsman's office interviewed a sample of the respondents who reported harassment. The five lawyers interviewed characterized the incidents they experienced as relatively minor. They discussed various areas of concern in their interviews and described the incidents of harassment as: (1) defamation of character; (2) delay in access to clients; (3) being treated in the same way as the alleged criminals; and (4) intimidation during interviews.[82] Other lawyers who complained of harassment in the survey but were not interviewed reported physical threats, sectarian abuse, and threats that officers would pass their information to paramilitary organizations. Although the number of lawyers reporting harassment was low, the majority of those who did so reported three or more incidents, signaling that certain lawyers seem to have been "frequent targets," according to the study. From past experience, we know this to be true: a small group of lawyers regularly carries out paramilitary defense work in Northern Ireland, and they have been the targeted lawyers.

The NIHRC and other observers have criticized the methodology of the Ombudsman's report because the dates of the incidents of harassment were not specified in the results, making it difficult to know if the situation improved in recent years. BIRW was also critical of the report, commenting that the nature of the survey underestimated the number of lawyers involved, the depth of the problem, and the effect harassment has had on the legal profession in Belfast.[83]

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[81] Police Ombudsman for Northern Ireland, *A Study of the Treatment of Solicitors and Barristers by the Police in Northern Ireland* ("Ombudsman's report"), Mar. 2003.

[82] *Id*. at 7.

[83] BIRW, *Comments on the Research Conducted by the Police Ombudsman for Northern Ireland into the Treatment of Lawyers by the Police*, Apr. 2, 2003. BIRW has conducted its own research on police harassment of lawyers, finding that "almost all lawyers who acted for clients detained under emergency

Despite these questions on methodology, we were relieved to learn that police intimidation is clearly less of a concern for defense lawyers today than it was five years ago, a finding that correlates with a reduced number of terrorism cases. Most of the respondents to the Ombudsman's survey said that they viewed "the establishment of the Police Ombudsman's Office as a positive development… and expected there to be an improvement in the way complaints against the police would be dealt with."[84] We hope the trend away from intimidation by police holds if there is ever any resurgence in terrorism cases, but recent history demonstrates that there must be constant vigilance against police harassment of lawyers. The Office of the Police Ombudsman is the logical agency to investigate such complaints. We recommend that it do so aggressively and that it continue to survey lawyers concerning their experience with the police, consulting with the Human Rights Commission and others as appropriate on methodology. We also recommend that it regularly publicize its availability to barristers and solicitors throughout Northern Ireland so they will come to the Ombudsman's office in case of intimidation.

VIII. EMERGENCY POWERS AND INTERROGATION

In our 1999 report, we questioned the government's continued reliance on emergency powers in the wake of the Good Friday Agreement. In particular, we were critical of the Prevention of Terrorism Act 1989 ("PTA"), which entitled the police to detain terrorism suspects for up to seven days without charge and hold them for 48 hours without access to counsel. We were also critical of the continued use of non-jury "Diplock" courts, originally introduced in 1973 to prevent "perverse verdicts and juror intimidations" in terrorism cases.[85] In our 1999 report, we advocated "an immediate return to the jury trial, a right enjoyed by all citizens of the United Kingdom not being tried for alleged terrorist offenses in Northern Ireland,"[86] noting that in 1998 the government had committed to returning as rapidly as possible to jury trials for all offenses.[87]

Unfortunately, the British government specifically excluded emergency laws from the remit of the Criminal Justice Review, and many of the emergency powers were placed on permanent, U.K.-wide footing in the Terrorism Act 2000, adopted more than

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laws came in for abuse from the police," and that such abuse "has become a thing of the past," although loyalist paramilitary intimidation of lawyers still occurs. *Id*.

[84] Ombudsman's report at 7.

[85] 1999 ABCNY Report, citing Lord Diplock, *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland*, (Dec. 1972).

[86] 1999 ABCNY Report, "Trials in Diplock Court" section.

[87] Secretary of State for the Home Department and Secretary of State for Northern Ireland, *Legislation Against Terrorism: A Consultation Paper*, Dec. 1998 ¶ 13.5.

two years after the Good Friday Agreement.[88] Under the new law, which went into force in February 2001, the police can detain any person they suspect of terrorism for up to 48 hours without charge or access to counsel; the detention can be extended for a further five days with judicial authorization. The Act significantly widens the definition of terrorism, and in a special section relating only to Northern Ireland, extends the use of non-jury Diplock Courts and the authority to conduct warrantless arrests and searches and seizures.[89] The Northern Ireland provisions of the Act expire automatically if they are not renewed each year by order of the Secretary of State for Northern Ireland. So far, they have been renewed each year.[90] The Joint Declaration indicated, however, that the British government intended to repeal these provisions by April 2005 if there was a "continuing enabling environment."[91]

We are concerned that the Terrorism Act 2000 defines terrorism too vaguely and that its provisions allowing the use of Diplock Courts, the possibility of 48-hour detention without access to a lawyer, and warrantless arrest violate international human rights law. The U.N. Human Rights Committee has expressed its concern about Diplock Courts and 48-hour detention[92] and other human rights groups have criticized the Act. [93]

Many of the practitioners and officials we talked to in Belfast, however, said that the Northern Ireland provisions of the Act are rarely used. The Northern Ireland Office has not reported the number of Diplock trials in recent years, but statistics indicate that there were 149 offenses heard before Diplock courts in 2002. (The number of trials was significantly less, in that defendants in each case are likely to have been charged with multiple offenses.)[94] Although we are pleased that Diplock trials are no longer used as

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[88] In a separate development, the British government enacted the Antiterrorism, Crime and Security Act 2001, after September 11, 2001. Similar to its U.S. counterpart, the USA PATRIOT Act of 2001, this legislation is most criticized for allowing indefinite detention without charge. In order to enact the law, the U.K. derogated from Article 5(1) of the European Convention, which "guarantees the right to liberty and prohibits detention without trial." Philip A. Thomas, *9/11: USA and U.K.*, 26 FORDHAM L. REV. 1193, 1216-1219 (2003).

[89] Terrorism Act 2000, c. 11, pt. VII.

[90] The Secretary of State recently decided to renew most of the Northern Ireland provisions of the Act because of "the current security situation." Northern Ireland Office, *Temporary Northern Ireland Provisions of the Terrorism Act 2000 to be Renewed for a Further Year*, Jan. 15, 2004, *available at* http://www.nio.gov.uk/press/040115a.htm.

[91] Joint Declaration, Annex 1 ¶ 9.

[92] *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CCPR/CO/73/UK (Dec. 6, 2001).

[93] Amnesty International ("AI"), *Terrorism Act 2000 (United Kingdom)*, Feb. 20, 2001.

[94] According to recent statistics, at least 111 offenses in 2001 and 149 in 2002 were not "certified out of the scheduled mode of trial by the Attorney General" after defendants applied for certification, meaning that these offenses were heard in Diplock trials. *See* D. Lyness & M. Carmichael, NIO, *Northern Ireland Statistics on the Operation of the Terrorism Act 2000: Annual Statistics 2002*, RESEARCH AND STATISTICAL

frequently as in the past, it is difficult to understand why the special procedures are still on the books and used to the extent that they are. We criticized these courts and other emergency powers in 1987 and again in 1999, and we believe that reduced violence and the small number of terrorism arrests signal that there is even less justification for them on national security grounds now. We believe the Northern Ireland provisions of the Terrorism Act are unnecessary and that revocation should occur before April 2005, the date proposed in the Joint Declaration. In addition, the Northern Ireland Office should publish clear statistics on past and present use of these courts.

With regard to interrogations, our 1999 report applauded the then-recently established practice of audiotaping police interrogations of detained suspects in Northern Ireland. The taping of such interviews had been a long-standing police practice in England and Wales at the time. According to Chief Constable Orde, audiotaping and videotaping of suspect interrogations is now standard practice in Northern Ireland as well. We support this development, believing that accurate records of these interviews will help to ensure that police have complied with European Convention standards in their treatment of suspects. We were also pleased to note that the notorious holding centers for detained suspected terrorists—little used by the time of the 1998 mission—are now officially closed.

IX. THE PATRICK FINUCANE AND ROSEMARY NELSON CASES

Our Committee has long been pressing for public inquiries into the murders of Patrick Finucane and Rosemary Nelson—two lawyers who were killed for their work in representing individuals detained in those holding centers. Both Finucane and Nelson represented people arrested under Northern Ireland's emergency laws and took on other high-profile terrorism cases. Shortly before his death, for example, Patrick Finucane brought a case to the European Commission on Human Rights, challenging the government's seven-day detention powers and its derogation from the European Convention. According to many sources, both lawyers were told repeatedly by their clients that police officers had issued threats against them during interrogation sessions at the holding centers (during which lawyers were not allowed to be present).

Patrick Finucane was murdered on February 12, 1989, when masked gunmen broke into his Belfast home and shot him 14 times in front of his wife and three children. Although the Ulster Defense Association, a loyalist paramilitary group, claimed responsibility for the killing, strong evidence has emerged linking members of the British security forces to the murder. In April 2003, Sir John Stevens, the Chief Commissioner of the London Metropolitan Police, delivered a report on the case to PSNI Chief Constable Hugh Orde. The report, known as "Stevens III," was the result of a four-year investigation. A summary of the report was published, making clear that members of the security forces, both the police and the army, had actively colluded with loyalist

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BULLETIN, Sept. 2003, table 10 (titled "Number of instances in Northern Ireland for which offences are certified out of the scheduled mode of trial by the Attorney General").

paramilitaries in the murder. Stevens also reported that the authorities could have prevented Finucane's murder and that the original investigation into his death should have led to early arrests.[95] In addition, the Stevens III report documented obstruction of the investigation, including a fire in his team's office, which the Stevens team believes "was a deliberate act of arson."[96] Chief Constable Orde—who ran the investigation's day-to-day operations before his current position—is charged with implementing the recommendations and deciding whether to make the entire report public.[97] As of February 2004, the report had not been published.

Rosemary Nelson established her own law practice shortly after Patrick Finucane's murder, taking on a handful of high-profile terrorism cases along with a regular caseload. We met with Nelson during our 1998 mission, and she told us of the many threats on her life—including the reports of police threats against her at the holding centers. Nelson was murdered on March 15, 1999, less than six months after we met with her, when a booby-trapped bomb exploded under her car as she drove from her home to her office. A loyalist paramilitary group called the Red Hand Defenders claimed responsibility for her murder. Nearly five years later, the police investigation into the murder is still ongoing, but there have been no prosecutions in the case. In September 2003, members of her family released a statement revealing that the investigating officers had informed them that among those implicated in the murder were a former soldier and an informer for the police service.[98]

In May 2002, the British and Irish governments jointly appointed Judge Peter Cory, a retired justice of the Supreme Court of Canada, to investigate the evidence of security force collusion in the murders of Patrick Finucane and Rosemary Nelson, along with four other controversial cases—two from Northern Ireland[99] and two from the Republic of Ireland.[100] In each of the six cases, the judge was given the power to recommend the establishment of a public inquiry, and the governments pledged to abide by his recommendations.

Human rights groups, as well as U.N. Special Rapporteur Dato' Param Cumaraswamy, expressed concern that the Cory investigation might unduly delay the process, as they had long argued that there was already sufficient evidence for public

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[95] Sir John Stevens, *Stevens Enquiry 3. Overviews & Recommendations* ("Stevens 3"), Apr. 17, 2003.

[96] Stevens 3 ¶ 3.4.

[97] On July 1, 2003, the European Court found that Finucane's right to life under Article 2 of the European Convention was violated because the state failed to promptly and effectively investigate the evidence of collusion in his murder. Finucane v. U.K., 37 Eur. H.R. Rep. 29 (2003).

[98] Steven McCaffery, *Soldier Is Suspect in Murder of Solicitor*, THE IRISH NEWS, Mar. 13, 2003, at 1.

[99] These two cases are the murders of Billy Wright and Robert Hamill.

[100] These are the cases of Lord Justice and Lady Gibson and Chief Superintendent Harry Breen and Superintendent Bob Buchanan.

inquiries in the Finucane and Nelson cases.[101] But Judge Cory worked promptly and delivered reports to the British and Irish governments in all six cases in early October 2003. The governments were expected to make the reports public in December 2003, and on December 18, 2003, the Irish government did publish its two reports. The British government has yet to release its four reports, however, maintaining that they are still under review by government lawyers. Judge Cory was dismayed by the delay in regard to the British cases, and on January 12, 2004, independently informed the families—including the Nelson and Finucane families—that he has recommended a public inquiry in each case.

The Finucane, Nelson, and Wright families filed suit in an effort to force the British government to publish the reports. In early March 2004, the British government announced that it would publish Cory's reports by the end of the month and at the same time "disclose their intentions for following up the reports."[102] As a result, the High Court in Belfast agreed to a three-week adjournment of the families' suit. On the same day the Finucane family filed an additional suit to compel the government to set up a public inquiry immediately[103] and on March 8 the High Court granted the family leave to apply for judicial review in the matter, setting a hearing date for April 22.[104]

Now that it is clear that Judge Cory has recommended public inquiries in these cases, we urge the government to publish his reports forthwith and move quickly to establish public inquiries. No more delay can be permitted. Indeed, our Committee has been discouraged that almost five years after Rosemary Nelson's death and 15 years after Patrick Finucane's, the cases are unresolved and inquiries have not been held. The British government should abide by its May 2002 commitment and move to implement Judge Cory's recommendations.

X. THE LAW SOCIETY AND BAR COUNCIL

A. Background

The Law Society and Bar Council seem invigorated by their recent roles in criminal justice and policing reform, and the contrast between the concerns of lawyers

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[101] United Nations, Econ. & Soc. Council, Comm'n on Human Rights, *Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration of Justice, Impunity. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Cumaraswamy*, U.N. Doc. E/CN.4/2003/65 ¶ 51 (Jan. 10, 2003); Lawyers Committee for Human Rights ("LCHR"), *Lawyers Committee Calls for Public Inquiry into the Murder of Rosemary Nelson on the Third Anniversary of Her Death*, Mar. 15, 2002; CAJ, *CAJ Continues to Lobby Internationally for Public Inquiries*, JUST NEWS, Apr. 2002, at 1.

[102] Brian Walker, *Cory Reports "Out Later This Month*," THE BELFAST TELEGRAPH, Mar. 3, 2004.

[103] *Blair's Pledge on NI Killings Report*, UTV, Mar. 3, 2004.

[104] *Green Light for Finucane Review*, BBC NEWS, Mar. 8, 2004.

today and five years ago is impressive. In Northern Ireland, the legal profession is bifurcated into two segments, the solicitors who advise and counsel clients, and the barristers who appear in court on their behalf; all solicitors admitted to practice must belong to the Law Society and all barristers to the Bar Council.

The Law Society and Bar Council historically had relatively few women members. Women now constitute over 25 percent of the membership of the Bar Council and a greater percentage of the Law Society.[105] Despite this progress, thus far only five women have become Queen's Counsel, out of a total of 50 QCs. Since QCs are the most likely source of candidates for appointment to the highest positions in the judiciary, we hope that these numbers will continue to improve.

The legal organizations historically avoided activism but, as noted in our 1999 Report, the Law Society, which includes lawyers who are the first line of defense for those accused of crimes, held what they describe as an "historic meeting" to decide whether to publicly acknowledge the Patrick Finucane and Rosemary Nelson cases on May 11, 1999. Called by petition by some of its members, the meeting threatened to divide the Law Society into two different Societies. To the surprise of some, a consensus emerged at that meeting that the Law Society should call for a public inquiry into the murder of Finucane and an independent investigation into that of Rosemary Nelson.[106] The majority of the Law Society's members recognized their shared responsibility to defend lawyers representing clients, including unpopular clients, without being identified with or threatened because of their clients' alleged activities. The Bar Council's Human Rights Committee had already called for a public inquiry into the Finucane case in February 1999 and expressed outrage at the Nelson murder in March of that year.[107]

Both the Law Society and the Bar Council now have Human Rights Committees involved in addressing the recent incorporation of the European Convention into domestic law through conferences and training among their members. While the organizations have become more proactively engaged in issues of law reform and the restructuring of the justice system to reflect human rights, both are still reluctant to speak out forcefully and publicly on issues that might divide their memberships. We applaud their progress and urge their ongoing and more proactive involvement in the promotion of reforms supporting a greater regard for human rights in the domestic legal system. We particularly applaud the Bar Council for its support of fellow members who wished to become QCs but refused to take the declaration to the sovereign of the United Kingdom,

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[105] According to the NIO, 26 percent of barristers were women in 2000 and 36 percent of solicitors were women. Statistics and Research Branch, NIO, *Gender and the Northern Ireland Criminal Justice System*, Mar. 2002.

[106] *North Solicitors Call for Independent Inquiry into Finucane Matter*, RTE NEWS ONLINE, May 11, 1999, *available at* http://www.rte.ie/news/1999/0511/solicitors.html.

[107] The Bar Council, *Bar Human Rights Committee Outraged by Murder of Rosemary Nelson*, March 16, 1999. The Bar Council repeated its call for an independent judicial inquiry in the Finucane case in 2002 and 2003.

because it demonstrates that the Council is representative of all barristers regardless of their political allegiances.[108]

Since our 1998 mission to Northern Ireland, we have been pleased to find that many of the problems identified in our 1999 report are no longer significant issues for the legal profession. Both the Law Society and the Bar Council confirmed that harassment of lawyers defending unpopular clients—particularly those accused of acts of terrorism—has been significantly reduced.[109] The notorious detention centers have been closed, all police interviews of those accused of crimes are now taped with the option to have a defense lawyer present, lawyers have prompt access to their clients and there are generally speedier hearings. When there is geographical difficulty in accessing clients in detention, lawyers often gain access to distant jails by means of video communication. From the perspective of the United States, suddenly faced anew with the difficulty of protecting national security while upholding the rights of those accused, we appreciate how difficult it has been in Northern Ireland. As we in the United States are more directly tested, it is heartening to see the increased respect the Northern Ireland legal system has for the rights of the accused under trying circumstances.

B. Role in the Criminal Justice Reforms

The Law Society and the Bar Council have viewed their roles as consultative regarding the Criminal Justice Review and subsequent implementation efforts. Importantly, both submitted comments and recommendations to the Review Group,[110] and one member of the Bar Council served on the Review body, but both continue to be true to their tradition of playing quiet roles. Both acknowledge support for the reform of the judicial appointments process, as a departure from the closed door "tap on the shoulder system" which had been the style for appointments in the past. Both have high regard for the Police Ombudsman and her role in the reform of the policing system and oversight of complaints about police misconduct. Both support the strengthening of an independent prosecution service and the critical role of an independent judiciary, but their voices have been muted by traditional reluctance to speak out forcefully on these issues. We commend the Law Society and the Bar Council for their positions, but urge them to play an even stronger and more public role on these issues.

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[108] *High Court Rules Against Declaration*, SUNDAY BUSINESS POST, May 7, 2000, *available at* http://archives.tcm.ie/businesspost/2000/05/07/story289726.asp.

[109] Even so, while *police* harassment of lawyers has been virtually eliminated, complaints are still made regarding lawyers' details being found on loyalist hit lists, resulting in reluctance by lawyers to take on high-profile cases.

[110] Review, App. A. For the complete Law Society submission, see The Law Society of Northern Ireland, *The Society's Submission to the Criminal Justice Review*, 2000, *available at* http://www.lawsoc-ni.org/cjr_review.htm.

The Law Society and the Bar Council do provide some education for their members and the broader public on issues of criminal justice and human rights.[111] But in Northern Ireland, unlike New York City, they do not provide ongoing continued legal education programs, which are currently required for members of the Law Society but not members of the Bar Council. At present, independent providers offer these services. We would hope there might be a greater role for both the Law Society and the Bar Council in insuring that these programs include appropriate materials on human rights issues, whether by offering their own programs or through advice to and cooperation with independent providers, and encouraging their members and law students to attend human rights-focused training sessions.[112] In addition, we believe that both legal organizations should help educate the public at large on these issues.

One of the great challenges facing the Northern Ireland criminal justice system in the aftermath of political conflict is the need to address the unsolved deaths of hundreds of people,[113] on both sides of the divided community. While we continue to call for public inquiries into the murders of Patrick Finucane and Rosemary Nelson because there is substantial evidence supporting the conclusion that their deaths were motivated in large part by their role as lawyers acting in defense of their clients, we recognize that many others in Northern Ireland lost family members during the political conflict, including many members of the police force. There is a need for accountability, but we recognize that traditional criminal investigations many years after deaths present difficulties in terms of cost, delay, and preservation of evidence, and may not be realistic options. We call upon the Law Society and the Bar Council to help propose alternatives that might help bring a sense of justice and closure to these many unsolved cases. Other societies have struggled with alternatives, and none offer a perfect solution. The Law Society and the Bar Council can and should play a valuable role in exploring and crafting alternatives helpful to the particular needs of Northern Ireland.

[111] The Criminal Justice Review considered human rights protections central to the criminal justice system and the Implementation Plans have endorsed human rights training. Criminal justice agencies, including the NIO, the Office of the DPP, the PSNI and the Court Service, provide training for their staff. 2003 Implementation Plan at 11.

[112] While human rights issues are increasingly included in legal training modules, they are a minor part of law school curricula in Northern Ireland.

[113] Chief Constable Orde has estimated that there are more than 1800 unsolved deaths. Charles M. Sennott, *To move on, a call for 'total truth'*, THE BOSTON GLOBE, July 8, 2003. The figure does not include deaths caused by state actors or collusion.

APPENDIX A
CHRONOLOGY OF MEETINGS

New York

Wednesday, September 18, 2002

- Sir Joseph Pilling, Permanent Under-Secretary of State

Northern Ireland Office

Friday, March 21, 2003

- Paul Mageean, Legal Office (current Acting Director)

Committee on the Administration of Justice

- Jane Winter, Director

British Irish Rights Watch

July 25, 2003

- Lord Goldsmith, Attorney General for the United Kingdom and Northern Ireland

Wednesday, October 8, 2003

- Justice Brian Kerr, QC, High Court (incoming Lord Chief Justice)

London

Friday, May 9, 2003

- Jane Winter, Director

British Irish Rights Watch

Belfast

Sunday, May 11, 2003

- Kieran McEvoy, Professor of Law and Transitional Justice
- Stephen Livingstone, Professor of Law and Director, Human Rights Centre

Queen's University Belfast School of Law

- Martin O'Brien, Director
- Paul Mageean, Legal Officer (current Acting Director)

Committee on the Administration of Justice

Monday, May 12, 2003

- Kevin Winters, Solicitor

Kevin R. Winters and Co.

- Monica McWilliams, former member of the Northern Ireland Legislative Assembly ("MLA")

Northern Ireland Women's Coalition

- Dr. William Lockhart, Chief Executive and former member of the Criminal Justice Review

Extern

Tuesday, May 13, 2003

- Alban Maginness, former MLA

Social Democratic and Labour Party

- Gerry Kelly, former MLA and policing and criminal justice spokesperson
- Kathy Stanton, former MLA
- Sam Porter, Policy Advisor

Sinn Fein

- Sir Joseph Pilling, Permanent Under-Secretary of State

Northern Ireland Office

- Paul Priestly, Head of Criminal Justice Reform Division
- Kirsten McFarlane, Human Rights and Equality Unit
- Maura Quinn, Criminal Justice Review Implementation Team
- Stephen Leach, Director, Criminal Justice

Northern Ireland Office

- John Simpson, Commissioner for Judicial Appointments

Office of the Commissioner for Judicial Appointments for Northern Ireland

- Professor Brice Dickson, Chief Commissioner
- Angela Stevens, Acting Caseworker

Northern Ireland Human Rights Commission

Wednesday, May 14, 2003

- Nuala O'Loan, Police Ombudsman
- Sam Pollock, Chief Executive

Office of the Police Ombudsman for Northern Ireland

- Eamonn McKee, Counsellor, Anglo-Irish Division

- Máire Flanagan, First Secretary, Ango-Irish Division

Department of Foreign Affairs, Republic of Ireland

- Justice Brian Kerr, QC, High Court (incoming Lord Chief Justice)

Royal Courts of Justice

- David Lavery, Director
- Sandra Moore

Northern Ireland Court Service

- Professor Desmond Rea, Chair
- Denis Bradley, Vice Chair
- Lorraine Calvert, Acting Head of Press and Public Relations Branch
- Sinead Simpson, Head of Policy and Accountability Branch

Northern Ireland Policing Board

- John Jackson, Professor of Law, Queens University Belfast, and former member of the Criminal Justice Review
- Professor Eugene Grant, QC, former Chair, Bar Council of Northern Ireland and former member of the Criminal Justice Review

- Colm Owens, solicitor
- Family members of Rosemary Nelson

Thursday, May 15, 2003

- Sir Alasdair Fraser, C.B., QC, Director of Public Prosecutions
- Roy Junkin, Deputy Director of Public Prosecutions
- James Scholes, Senior Assistant Director

Royal Courts of Justice

- Hugh Orde, Chief Constable
- J.A. Kearney, Chief Inspector

Police Service of Northern Ireland

- Paul O'Connor

Pat Finucane Center

- Joseph A. Donnelly, President
- John Bailie, Chief Executive and Secretary
- Kevin Delaney, Assistant Secretary and Chair of Human Rights Committee
- Peter O'Brien, Assistant Secretary
- Elliott Duffy Garrett
- Pierce McDermott

Law Society of Northern Ireland

- Brian Fee, QC, Chair, Human Rights Committee and former Chair of the Bar Council
- Brendan Garland, Chief Executive

Bar Council of Northern Ireland

Friday, May 16, 2003

- Stephen Farry, General Secretary

Alliance Party of Northern Ireland

- John McAtamney, solicitor, Trevor Smyth & Co.
- Peter Madden, solicitor, Madden & Finucane
- Sean McCann, solicitor, McCann & McCann
- Noel Phoenix, solicitor

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