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## **Burying the Truth: The Murder of Belfast Human Rights Lawyer Patrick Finucane and Britain's "Secret" Public Inquiries**

### **Cover Page Footnote**

J.D. Candidate, 2007, Fordham University School of Law. I would like to thank Professor Martin Flaherty for his guidance. This Note is dedicated to my parents Joaquin and Patricia Terceno, for everything; and to my grandmother, Margaret Sharpe, for inspiring my love of Ireland.

# BURYING THE TRUTH: THE MURDER OF BELFAST HUMAN RIGHTS LAWYER PATRICK FINUCANE AND BRITAIN'S "SECRET" PUBLIC INQUIRIES

*Joaquin P. Terceño III\**

## INTRODUCTION

On February 12, 1989, Patrick Finucane, a civil rights attorney in Belfast, Northern Ireland, was sitting down to dinner with his wife and three children when two masked men entered the family's home and shot Finucane several times.<sup>1</sup> The following day, the Ulster Freedom Fighters ("UFF")—a paramilitary group loyal to British rule in Northern Ireland—claimed responsibility for Finucane's murder,<sup>2</sup> claiming he was an Irish Republican Army ("IRA") member, a charge no evidence supports.<sup>3</sup> Investigations conducted since the murder have uncovered a conspiracy between his killers and members of the Royal Ulster Constabulary ("RUC"), which is the British police force in Northern Ireland, and the British Army's Force Research Unit ("FRU"), which is an intelligence branch operating in Northern Ireland.<sup>4</sup>

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\* J.D. Candidate, May 2007, Fordham University School of Law. I would like to thank Professor Martin Flaherty for his guidance. This Note is dedicated to my parents Joaquin and Patricia Terceño, for everything; and to my grandmother, Margaret Sharpe, for inspiring my love of Ireland.

1. Sir John Stevens, Stevens Enquiry 3: Overview & Recommendations ¶ 2.1 (2003), available at <http://www.serve.com/pfc/pf/stevensreport.pdf> (stating Finucane was shot fourteen times); see also Justice Peter Cory, Cory Collusion Inquiry Report: Patrick Finucane ¶ 1.16 (2004), available at [http://www.nio.gov.uk/cory\\_collusion\\_inquiry\\_report\\_\(with\\_appendices\)\\_pat\\_finucane.pdf](http://www.nio.gov.uk/cory_collusion_inquiry_report_(with_appendices)_pat_finucane.pdf) (stating Finucane was shot twelve times: six times in the head, three times in the neck, and three times in the torso). Finucane was a solicitor, an attorney in the British legal system who advises clients on legal matters and represents them in certain lower courts.

2. Stevens, *supra* note 1, ¶ 2.1.

3. Cory, *supra* note 1, ¶ 1.12 ("Yet there is nothing in the [Royal Ulster Constabulary ("RUC")] files which indicates that Patrick Finucane was a member of [Provisional Irish Republican Army ("PIRA")], the [Irish Republican Army ("IRA")] or the [Irish National Liberation Army ("INLA")]").

4. *Id.* ¶ 1.293 ("[T]here is strong evidence that collusive acts were committed by the Army (FRU), the RUC SB [Special Branch] and the Security Service."); Stevens, *supra* note 1, ¶¶ 2.15, 4.7-9 (concluding that FRU and RUC agents collaborated with paramilitary groups in Finucane's murder, ranging "from the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, through to the extreme of agents being involved in murder"); see also *Deadly Intelligence: State Involvement in Loyalist Murder in Northern Ireland—SUMMARY*, Conflict Archive on the Internet, Feb.

The region now called Northern Ireland has been under British rule since the sixteenth century, when English and Scottish settlers began colonizing what became known as the "Plantation of Ulster."<sup>5</sup> The British newcomers were Protestants who pushed the native Irish Catholics off their land but did not completely eliminate them, so that the two groups lived almost side by side.<sup>6</sup> "Within several generations the broad outlines of the conflict had been established. The territory contained two groups who differed in political allegiance, religious practice, and cultural values. One group believed that their land had been stolen, while the other was in a constant state of apprehension."<sup>7</sup> The conflict that began in the sixteenth century between Protestants who considered themselves British and Catholics who considered themselves Irish continues to this day.<sup>8</sup>

For centuries, the entire island of Ireland was under British rule, until Irish nationalists rebelled in the early 1900s, most notably by trying to seize prominent buildings in Dublin, Ireland's capital, in April 1916, during what came to be called the Easter Uprising.<sup>9</sup> Though the attempt failed, it generated public support for the rebels, who continued their efforts to gain Irish independence.<sup>10</sup> In 1921, the nationalists won a partial victory: Twenty-six counties in southern and middle Ireland were made independent, while six counties in the northeast—those now known as Northern Ireland—remained under British rule.<sup>11</sup> Originally, Northern Ireland was given its own parliament and had considerable autonomy from the British Parliament sitting in Westminster.<sup>12</sup> Still, the political peace in Northern Ireland was always fragile: "Sectarian strains were never far from the surface. A chronically insecure Protestant majority, an alienated Catholic minority, electoral malpractice, ethnic bias in the distribution of housing and welfare services, and a declining economy meant that the state could never command full political legitimacy."<sup>13</sup>

During the 1960s, a civil rights movement demanding more political access for the Catholic minority led to riots in the streets, and in 1969 the British Army was deployed to Northern Ireland to maintain order.<sup>14</sup> The protestors considered this a British military occupation, and their struggle

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1999, <http://cain.ulst.ac.uk/issues/violence/birw0299.htm> (summarizing the confidential report submitted by British Irish Rights Watch to the British and Irish governments and the United Nations' Special Rapporteur on Independence of Judges and Lawyers, which alleged RUC and FRU collusion in Finucane's murder).

5. John Darby, *Northern Ireland: The Background to the Peace Process*, Conflict Archive on the Internet, 2003, <http://cain.ulst.ac.uk/events/peace/darby03.htm>.

6. *Id.*

7. *Id.*

8. *Id.*

9. History Learning Site, The Easter Uprising—Ireland 1916, [http://www.historylearningsite.co.uk/easter\\_uprising.htm](http://www.historylearningsite.co.uk/easter_uprising.htm) (last visited Apr. 3, 2006).

10. *Id.*

11. Darby, *supra* note 5.

12. *Id.*

13. *Id.*

14. *Id.*

for political reform and greater civil rights transformed into a battle to drive the British forces out and reunite the six Northern Ireland counties with the independent Irish nation, unifying the island.<sup>15</sup> This gave birth to the Provisional Irish Republican Army (“PIRA”), which began a campaign of violence against the British and those who supported British rule. This campaign in turn gave rise to various paramilitary groups that used violence to support British rule.<sup>16</sup> The increasing violence led the London Parliament to dissolve the local Northern Ireland government in 1972 and begin ruling Northern Ireland directly from Westminster.<sup>17</sup> This gave rise to a thirty-year pattern of violence known colloquially as “the Troubles,” during which Republican paramilitaries—such as the IRA and the Irish National Liberation Army (“INLA”)—and Loyalist paramilitaries—such as the UFF and its sister organization the Ulster Defense Association (“UDA”)—committed bombings, murders, and other terrorist acts in an effort to control Northern Ireland’s political destiny.<sup>18</sup>

Eventually, in the late 1980s and early 1990s, violence began to give way to political efforts at reconciliation, leading to a cease-fire agreement in 1994.<sup>19</sup> The political efforts led to the adoption of an agreement reached in multiparty negotiations in April of 1998, known as the Good Friday Agreement.<sup>20</sup> The agreement created a power-sharing assembly in Northern Ireland that would have some autonomy from the British Parliament and would include representation from both the Protestant and the Catholic communities.<sup>21</sup> The agreement states that a majority of the people of Northern Ireland wished to remain part of the United Kingdom, and “that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland.”<sup>22</sup>

The negotiations that led to the Good Friday Agreement included the selection of six murder cases to be reviewed to determine if the British

15. *Id.*

16. *Id.* Those seeking to reunite with the Republic of Ireland are known as Republicans, while those loyal to British rule are known as Loyalists.

17. *Id.*

18. *Id.*

19. *Id.* The cease-fire has never been complete, as Republican and Loyalist paramilitaries continue to commit political murders—though far fewer—each year, with more than one hundred people killed since 1995. Cory, *supra* note 1, ¶ 1.28. See generally Neil Jarman, Institute for Conflict Research, No Longer a Problem? Sectarian Violence in Northern Ireland (2005), <http://www.conflictresearch.org.uk/documents/violence.pdf>.

20. Darby, *supra* note 5. The agreement is also known as the Good Friday Accord. See *The Agreement Reached in Multi-Party Negotiations*, Conflict Archive on the Internet, Apr. 10, 1998, <http://cain.ulst.ac.uk/events/peace/docs/agreement.htm> (including the complete text of the agreement; see also Northern Ireland Office, *The Agreement*, <http://www.nio.gov.uk/agreement.pdf> (last visited Apr. 3, 2006) [hereinafter *Agreement*]. The British Parliament codified most of the Good Friday Agreement in the Northern Ireland Act 1998, c. 47.

21. Darby, *supra* note 5.

22. *Agreement*, *supra* note 20, at 4.

government should conduct a public inquiry into those killings.<sup>23</sup> The murder of Patrick Finucane was one of those six cases.<sup>24</sup> The Cory Report was part of the review process, and Canadian Justice Peter Cory determined that four of those cases, including Finucane's, should be subject to public inquiries.<sup>25</sup> Following Justice Cory's determination that evidence supported a charge of collusion in Finucane's murder on the part of state agents, the British government in 2004 promised to conduct a public inquiry into his killing.<sup>26</sup> However, because the promise included plans to pass new legislation under which to conduct the inquiry,<sup>27</sup> human rights organizations immediately questioned the government's sincerity.<sup>28</sup> Human rights groups are now criticizing the British government for passing the Inquiries Act 2005,<sup>29</sup> which shifts control over public inquiries from Parliament to the Executive.<sup>30</sup> This Act replaces the Tribunals of Inquiry

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23. Cory, *supra* note 1, ¶ 1.295.

24. *Id.* ¶ 1.296.

25. *Id.* ¶¶ 1.293, 1.297. Finucane's murder was one of four high-profile killings—the others being Rosemary Nelson, Robert Hammill, and Billy Wright—into which Justice Peter Cory recommended the British government conduct inquiries. The British government began inquiries into those three murders under already-existing acts (Nelson and Hammill under the Police (Northern Ireland) Act 1998 and Wright under the Prison Act (Northern Ireland) 1953), but those inquiries have stalled and could potentially be restarted under the new legislation. Comm. on Int'l Human Rights of the Ass'n of the Bar of the City of N.Y., *An Analysis of the U.K. Inquiries Bill and U.S. Provisions for Investigating Matters of Urgent Public Concern* 13 (2005), available at [http://www.abcnyc.org/pdf/report/ABCNY\\_Inquiries\\_Bill1.pdf](http://www.abcnyc.org/pdf/report/ABCNY_Inquiries_Bill1.pdf) [hereinafter NY Bar Analysis].

26. Press Release, Paul Murphy MP, Secretary of State for Northern Ireland, Statement on Finucane Inquiry (Sept. 23, 2004), available at [https://www.britainusa.com/nireland/articles\\_show.asp?SarticleType=21&Article\\_ID=840](https://www.britainusa.com/nireland/articles_show.asp?SarticleType=21&Article_ID=840) [hereinafter Murphy Statement]. In a Ministerial Statement issued after the Cory Report was published, Murphy announced inquiries into the three other murders that Cory had investigated. However, he stated that an inquiry into Finucane's murder would not be opened until ongoing prosecutions were completed, which he said was "some way in the future." Press Release, Paul Murphy MP, Secretary of State for Northern Ireland, Ministerial Statement on Government Response to Cory Reports ¶ 14 (Apr. 1, 2004), <http://www.nio.gov.uk/media-detail.htm?newsID=8547> (providing a link at the end of the article to the full text of the Ministerial Statement) [hereinafter Ministerial Statement]. Murphy said the three inquiries announced would have the full powers available under the Tribunal of Inquiry (Evidence) Act. *Id.* ¶ 18. However, Murphy also said the Government had no view on Cory's findings, which he stated resulted from the judge's "wide definition of collusion." *Id.* ¶ 11.

27. Murphy Statement, *supra* note 26.

28. See *Response to the Government's Announcement of an Inquiry into the Murder of Patrick Finucane*, British Irish Rights Watch, Sept. 24, 2004, <http://www.birw.org/Finucane%20Inquiry.html> ("[W]e view with the gravest foreboding [the British government's] announcement that 'it will be necessary to hold the inquiry on the basis of new legislation'." (quoting Murphy Statement, *supra* note 26)).

29. Inquiries Act 2005, c. 12 (U.K.); see *infra* Part II.

30. Inquiries Act 2005, c. 12, § 1.

(Evidence) Act of 1921,<sup>31</sup> which gave Parliament the authority to call for an inquiry.<sup>32</sup>

The government has said the new law is necessary to protect national security interests during inquiries such as that anticipated in Finucane's case.<sup>33</sup> Human rights groups, meanwhile, claim the new law violates Britain's obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights") because it allows the government to withhold information on state involvement in a murder.<sup>34</sup> At present, any Finucane inquiry would likely be introduced under the new Act.<sup>35</sup>

This Note compares the Inquiries Act 2005 with Britain's obligations under the European Convention on Human Rights, specifically in relation to the Finucane murder. Part I outlines the circumstances of Patrick Finucane's murder and the situation in Northern Ireland, then discusses the history and the provisions of both the European Convention and Britain's Inquiries Act 2005. Part II explains the criticisms of the Inquiries Act 2005 in relation to European Convention obligations, as well as the government's defense of the new legislation. This part also considers the Finucane inquiry's potential impact on the Northern Ireland peace process. Part III argues that the Inquiries Act 2005, in allowing the Executive to refuse to release to the public information that implicates state actors in such a murder, undermines the transparency and accountability that are essential to protecting human rights. This Note recommends that the British government conduct the Finucane inquiry in strict accordance with the European Convention obligations, that British courts declare the Inquiries Act 2005 incompatible with the European Convention, and that Parliament repeal or amend the Inquiries Act 2005 to conform with Convention obligations.

31. *Id.* § 49 (stating the entire 1921 Act is repealed by the 2005 Act).

32. NY Bar Analysis, *supra* note 25, at 14 ("The [Inquiries Act 2005] would repeal the Tribunals of Inquiry (Evidence) Act of 1921, which currently provides that Parliament may establish an independent tribunal to inquire into matters of public importance . . . and instead provide that a government minister may cause an inquiry to be held 'where it appears to him' that there is a matter of public concern." (citations omitted)).

33. *See, e.g.*, Murphy Statement, *supra* note 26.

34. Press Release, Amnesty Int'l et al., The Inquiries Bill: The Wrong Answer (Mar. 22, 2005), [available at](http://web.amnesty.org/library/Index/ENGEUR450082005?open&of=ENG-GBR) <http://web.amnesty.org/library/Index/ENGEUR450082005?open&of=ENG-GBR>.

35. Murphy Statement, *supra* note 26 ("[I]t will be necessary to hold the [Finucane] inquiry on the basis of new legislation which will be introduced shortly."). The British government is reportedly planning to commence a "restricted inquiry" into Finucane's murder under the Inquiries Act 2005, but is having trouble finding a judge to head the inquiry because "the international legal community has advised its members against accepting the position." *Finucane Probe to Go Ahead: Ahern*, BBC News, Mar. 21, 2006, [http://news.bbc.co.uk/1/hi/northern\\_ireland/4830896.stm](http://news.bbc.co.uk/1/hi/northern_ireland/4830896.stm).

## I. PATRICK FINUCANE'S MURDER AND PUBLIC INQUIRY FRAMEWORKS

This part explains the history of Patrick Finucane's murder, the European Convention on Human Rights, and the Inquiries Act 2005. Part I.A recounts the murder of Patrick Finucane and the investigations conducted into his killing. Part I.B explains the history and provisions of the European Convention on Human Rights. Part I.C outlines Britain's adoption of the Inquiries Act 2005.

### A. Patrick Finucane's Murder

This section outlines the circumstances of Patrick Finucane's murder and the findings of investigations conducted into his killing. Part I.A.1 provides details of Finucane's murder and the reason he was targeted. Part I.A.2 outlines the evidence of state officials' collusion in his killing. Part I.A.3 explains Justice Peter Cory's findings and his determination that a public inquiry should be conducted into Finucane's murder.

Patrick Finucane was a Belfast defense attorney known for representing IRA suspects, and his killing was politically motivated.<sup>36</sup> Several inquiries conducted to this point have revealed a link between his murder and British authorities who were either directly involved or implicitly allowed the murder to occur.<sup>37</sup> As part of the peace process codified in the Good Friday Agreement, Finucane's murder is one of several into which the British government has vowed to conduct a full public inquiry.<sup>38</sup>

#### 1. An Assassination in Belfast

On the evening of February 12, 1989, thirty-nine-year-old Patrick Finucane was in his Belfast home with his wife, Geraldine, and their three young children.<sup>39</sup> Finucane was a solicitor, a human rights lawyer who had defended detainees alleged to be members of the IRA.<sup>40</sup> Finucane defended these alleged terrorists during one of the most dangerous periods in modern Northern Irish history.<sup>41</sup> From 1987 to 1989 alone, more than 3000 terrorist

36. Cory, *supra* note 1, ¶ 1.10.

37. *See generally id.*; Stevens, *supra* note 1.

38. Agreement, *supra* note 20. For information on the other cases, see British Irish Rights Watch, Reports on Cases, <http://www.birw.org/index.html> (last visited Mar. 27, 2006).

39. Cory, *supra* note 1, ¶¶ 1.15-16.

40. *Id.* ¶ 1.10 ("Yet he also acted for Protestants [Loyalists] in similar situations."). The IRA paramilitary group has tried to unite the Republic of Ireland under a single Irish government by driving the British out of Northern Ireland, partly through terrorist tactics. Both the British authorities, such as the police force and the Army, and Loyalist paramilitary groups that employ the same terrorist tactics have opposed the IRA. *See supra* notes 14-18 and accompanying text.

41. *Id.* ¶ 1.27 ("Northern Ireland was a very violent society for some years both prior and subsequent to 1989. Acts of violence seemed to be the norm. The IRA or more often the PIRA committed many violent crimes, including bombings, shootings, arson and attempted killings. The Loyalist terrorist organisations were equally violent.").

attacks were reported in Northern Ireland, resulting in 261 deaths.<sup>42</sup> On this winter night in 1989, that danger would reach the Finucane home. Three masked men hijacked a taxicab to drive to Finucane's home, telling the driver that what they were doing was for "the cause."<sup>43</sup> Minutes later, two of those masked men, both carrying handguns, burst into the Finucane home as the family was sitting down to dinner and shot Pat Finucane fourteen times, assassinating him while his family watched.<sup>44</sup> His wife Geraldine also was injured in the attack but later recovered.<sup>45</sup>

The following day, the UFF, a paramilitary group loyal to British rule of Northern Ireland and opposed to the IRA, claimed responsibility for Finucane's murder.<sup>46</sup> The UDA, a UFF-connected Loyalist paramilitary group, later was implicated as well.<sup>47</sup> Finucane was murdered because he had defended Republican detainees,<sup>48</sup> though the Loyalists also suspected he was a PIRA member himself.<sup>49</sup> The basis for the groups' suspicion may have come, directly or indirectly, from British Minister Douglas Hogg.<sup>50</sup> Just weeks before Finucane's assassination, Hogg twice stated publicly that there were solicitors in Northern Ireland who were "unduly sympathetic to the cause of the IRA."<sup>51</sup> Hogg's statements were based on information shared with him by the RUC, which Stevens enquiry determined to be unfounded.<sup>52</sup> Allegations also have been made that just weeks before Finucane's murder, RUC Special Branch officers told Loyalist detainees in Castlereagh prison that solicitors, including Finucane, were helping to keep IRA members out of jail.<sup>53</sup> These officers also knew of the threat to Finucane's life ahead of time.<sup>54</sup>

42. Stevens, *supra* note 1, ¶ 1.7.

43. Cory, *supra* note 1, ¶¶ 1.19-20.

44. Stevens, *supra* note 1, ¶ 2.1.

45. Cory, *supra* note 1, ¶ 1.15 ("She had been shot in the ankle probably as a result of a ricocheting bullet.").

46. Stevens, *supra* note 1, ¶ 2.1.

47. *Id.* ¶¶ 2.3, 2.8.

48. Cory, *supra* note 1, ¶ 1.10 ("There can be little doubt that it was his role as a solicitor that led to his murder.").

49. *Id.* ¶ 1.118 (reporting statements made by a Loyalist to a government agent that Finucane was "the brains behind PIRA").

50. *Id.* ¶ 1.11.

51. Stevens, *supra* note 1, ¶ 2.17; *see also* Finucane v. United Kingdom, 2003-VIII Eur. Ct. H.R. 7, 8, available at <http://www.echr.coe.int/echr> (click "Case-Law," then click "HUDOC," then type "Finucane v. UK" in "Case Title") (quoting Douglas Hoggas saying, "I have to state as a fact, but with great regret, that there are in Northern Ireland a number of solicitors who are unduly sympathetic to the cause of the IRA.").

52. Stevens, *supra* note 1, ¶ 2.17. Hogg's statements were based at least in part on information passed to him by the RUC, and because "they were not justifiable . . . the Minister was compromised." *Id.*

53. Relatives for Justice, Collusion: The Killing of Pat Finucane (2003), <http://www.relativesforjustice.com/collusion/patfinucane.htm>.

54. *Finucane*, 2003-VIII Eur. Ct. H.R. at 8 ("On 5 January 1989, five weeks before his death, one of Patrick Finucane's clients reported that an RUC officer had said that [Patrick Finucane] would meet his end. On 7 January 1989 another client claimed that he was told that Patrick Finucane was 'getting took out' (murdered).").

## 2. Investigations to This Point

Republican and Loyalist paramilitaries killing each other was not uncommon in 1980s Northern Ireland, and neither was the targeting of potentially innocent individuals believed to support the paramilitary groups.<sup>55</sup> What makes Finucane's assassination different—though arguably not unique—is that, according to sixteen years of investigations, the British Army and the RUC police were complicit in his murder.<sup>56</sup> One of the weapons used to gun down Finucane had been stolen from the British Army Ulster Defense Regiment's barracks by a quartermaster named William Stobie, who was both an agent for the RUC and a member of the paramilitary UDA.<sup>57</sup> Stobie later was charged in the weapon theft and Finucane's murder, but was shot dead by another paramilitary group before his trial concluded.<sup>58</sup>

Then there is Brian Nelson. Nelson was both an Army intelligence officer with the Force Research Unit ("FRU"), which handled informants in Northern Ireland, and an intelligence officer for the UDA.<sup>59</sup> Nelson had previously been convicted for a terrorist offense, yet the Army hired him to work for the FRU despite this conviction and his Loyalist paramilitary connections.<sup>60</sup> Before Finucane's murder, Nelson had been involved in the murder of at least one Republican leader<sup>61</sup> and had provided Loyalist paramilitaries with information regarding other potential targets.<sup>62</sup> Army officials in the FRU were aware of Nelson's activities in targeting Republican members for assassination, but took no action to prevent them.<sup>63</sup> Just six days before Finucane's murder, Nelson's FRU handler noted that "Nelson initiates most of the targeting, although it is often unclear when the targeting has been completed and an attack is to take place. Of late, Nelson has been more organised and he is currently running an operation against selected Republican personalities."<sup>64</sup>

Nelson passed a photograph of Finucane to one of the UDA's top hit men<sup>65</sup> and participated in casing Finucane's home days before the murder.<sup>66</sup>

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55. Cory, *supra* note 1, ¶¶ 1.27-.29; *see also* David McKittrick et al., *Lost Lives: The Stories of Men, Women and Children Who Died as a Result of the Northern Ireland Troubles* (2001).

56. Cory, *supra* note 1, ¶ 1.293 ("[T]here is strong evidence that collusive acts were committed by the Army (FRU), the RUC SB and the Security Service."); Stevens, *supra* note 1, ¶ 4.9 (finding all elements of collusion—failure to keep records, absence of accountability, agent participation, and withholding of information—present in Finucane's murder).

57. Stevens, *supra* note 1, ¶¶ 2.2-.3.

58. *Id.* ¶ 2.8.

59. Cory, *supra* note 1, ¶ 1.45.

60. *Id.*

61. *Id.* ¶¶ 1.46-.47.

62. *Id.* ¶¶ 1.57-.60.

63. *Id.* ¶ 1.61.

64. *Id.*

65. *Id.* ¶ 1.121.

66. *Finucane v. United Kingdom*, 2003-VIII Eur. Ct. H.R. 7, 11.

Official collusion seemingly did not stop with Nelson's individual acts—he reportedly told British intelligence officials (his handlers in the FRU) of the threat to Finucane's life, but they never warned the solicitor.<sup>67</sup> Investigators also reportedly failed to properly investigate the murder, including failing to share information with senior investigators<sup>68</sup> and failing to follow up on Stobie's reports regarding the weapon used.<sup>69</sup> Nevertheless, Nelson was eventually charged with thirty-five terrorist offenses, partly in relation to the Finucane murder, was convicted, and is spending ten years in prison.<sup>70</sup>

### 3. The Call for a Public Inquiry

The death of Stobie and conviction of Nelson have ended the debate over Finucane's murder. Justice Cory has called for a public inquiry into the Finucane murder based on his findings of evidence of collusion implicating the Army and the RUC.<sup>71</sup> In the conclusion to the Cory Report, he stated,

Some of the acts summarized above are, in and of themselves, capable of constituting acts of collusion. Further, the documents and statements I have referred to in this review have a cumulative effect. Considered together, they clearly indicate to me that there is strong evidence that collusive acts were committed by the Army (FRU), the RUC [Special Branch] and the Security Service. I am satisfied that there is a need for a public inquiry.<sup>72</sup>

Justice Cory went on to outline the “essential characteristics” of a public inquiry:

An independent commissioner or panel of commissioners.

The tribunal should have full power to subpoena witnesses and documents together with all the powers usually exercised by a commissioner in a public inquiry.

The tribunal should select its own counsel who should have all the powers usually associated with counsel appointed to act for a commission or tribunal of public inquiry.

The tribunal should also be empowered to engage investigators who might be police officers or retired police officers to carry out such investigative or other tasks as may be deemed essential to the work of the tribunal.

The hearings, to the extent possible, should be held in public.

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67. See Cory, *supra* note 1, ¶ 1.146.

68. *Id.* ¶ 1.24.

69. Stevens, *supra* note 1, ¶ 2.7.

70. *Id.* ¶ 2.11.

71. Cory, *supra* note 1, ¶ 1.293.

72. *Id.*

The findings and recommendations of the Commissioners should be in writing and made public.<sup>73</sup>

From 1966 to 2001, Republican and Loyalist forces, as well as police and military forces, killed thousands of people in Northern Ireland during a time of increased violence dubbed “the Troubles.”<sup>74</sup> In the late 1990s, through the Good Friday Agreement, the British government agreed to create more autonomy for Northern Ireland through its Parliament, and the IRA agreed to disarm<sup>75</sup> (a promise that was not honored until the fall of 2005).<sup>76</sup> While the peace process has suffered setbacks, most recently the Loyalist riots of September 2005,<sup>77</sup> efforts continue to quell the violence and create a governing structure that both Republicans and Loyalists can accept.<sup>78</sup>

One aspect of those efforts is public inquiries into several high-profile murders, many of which are already underway.<sup>79</sup> However, the murder of Patrick Finucane has not yet been granted such an inquiry.<sup>80</sup> Various investigations into Finucane’s murder have been conducted over the years,<sup>81</sup> and one of the killers, Kenneth Barrett, a former police informant, has been convicted.<sup>82</sup> But no inquiry to this point has been considered complete or sufficient to answer all the questions raised by this assassination.<sup>83</sup>

In light of Justice Cory’s recommendation, the British government has promised to conduct a public inquiry into Patrick Finucane’s murder.<sup>84</sup>

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73. *Id.* ¶ 1.294.

74. *See supra* notes 14-18 and accompanying text.

75. Agreement, *supra* note 20.

76. Brian Lavery, *Destruction of I.R.A.’s Arms Is Confirmed by Monitors*, N.Y. Times, Sept. 27, 2005, at A4.

77. Brian Lavery, *Protestants Say Anger and Alienation Are Fueling Riots in Belfast*, N.Y. Times, Sept. 15, 2005, at A3.

78. *See generally* Director’s Rep. (British Irish Rights Watch, London), November 2005, <http://www.birw.org/report%202005/Nov%2005.html>.

79. Cory, *supra* note 1, ¶ 1.295 (“During the Weston Park negotiations, which were an integral part of the implementation of the Good Friday Accord, six cases [including Finucane’s murder] were selected to be reviewed to determine whether a public inquiry should be held with regard to any of them.”). The Cory Report was a result of the British government’s Weston Park promise to review the Finucane murder.

80. *See Daily Pass Finucane Inquiry Motion*, BBC News, Mar. 8, 2006, [http://news.bbc.co.uk/1/hi/northern\\_ireland/4788012.stm](http://news.bbc.co.uk/1/hi/northern_ireland/4788012.stm).

81. In addition to police investigations, Sir John Stevens conducted three official enquiries, the third of which is still ongoing, and several human rights groups have conducted their own review of the investigation materials. Stevens, *supra* note 1, ¶¶ 1.1-.2.

82. Sean O’Neill, *A Killer, a Bloody Death and a Dirty War*, Times (London), Sept. 14, 2004, at 3.

83. Cory, *supra* note 1, at 3 (“I have found that in each of the four cases [including the Finucane murder] the documentary evidence indicates that there are matters of concern which would warrant further and more detailed inquiry.”).

84. Murphy Statement, *supra* note 26. The British government delayed publication of Justice Cory’s Collusion Report from its completion in October 2003 until April 2004, and further delayed any decision on conducting a public inquiry until the conclusion of an ongoing prosecution. Jane O’Hare, *Patrick Finucane: An Inquiry at Last*, Law in a Box Newswire, 2003, <http://www.lawinabox.net/lbnewswire03b.html>. Conservatives in the government do not fully support a public inquiry into Finucane’s death. In response to

“The Government has consistently made clear that in the case of the murder of Patrick Finucane, as well as in the other cases investigated by Justice Cory, it stands by the commitment made at Weston Park [the Good Friday Agreement],” said Secretary of State Paul Murphy, Member of Parliament.<sup>85</sup> Murphy said a public inquiry had been delayed until the trial of Kenneth Barrett concluded so that an inquiry would not interfere with prosecution efforts.<sup>86</sup> Though suggesting that future prosecutions were possible, Murphy said that Barrett’s conviction and consultation with the Attorney General had convinced the government “that steps should now be taken to enable the establishment of an inquiry into the death of Patrick Finucane.”<sup>87</sup> Murphy said the inquiry tribunal “will be tasked with uncovering the full facts of what happened, and will be given all the powers and resources necessary to fulfil that task.”<sup>88</sup>

### B. *The European Convention on Human Rights*

This section explains the history and the relevant provisions of the European Convention on Human Rights. Part I.B.1 provides historical background to the Convention’s adoption. Part I.B.2 explains the Convention’s right to life provision and the obligation of signatory nations to conduct public inquiries into killings that violate the right to life.

Western nations, including the United Kingdom, adopted the European Convention on Human Rights in the wake of World War II to protect individuals from human rights violations, most notably torture and murder.<sup>89</sup> The Convention has specific articles relating to the actions of state agents in such rights violations. Perhaps one of the most important Convention articles is article 2, the right to life, which protects an individual’s right to be free from execution without due recourse to the law.<sup>90</sup>

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Murphy’s announcement, Shadow Northern Ireland Secretary David Lidington said such an inquiry would not lead to justice or peace, and hinted at expectations of allegations of official collusion by stating, “[I]t would be a travesty if this inquiry became yet another vehicle to denigrate and besmirch the collective reputations of the RUC and the Armed Forces. For thirty years they held the line against vicious and evil terrorism. None of [sic] should forget the debt we owe to them.” *Finucane Inquiry: Conservatives—Inquiry Will Not Lead to Justice*, Politics Unspun, Sept. 24, 2004, <http://www.politics.co.uk/issueoftheday/conservatives-inquiry-will-not-lead-justice-3469270.htm>.

85. Murphy Statement, *supra* note 26.

86. *See id.*

87. *Id.*

88. *Id.* Part II considers what powers and resources various parties consider necessary for a successful public inquiry into Finucane’s murder.

89. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, available at <http://www.echr.coe.int> (click “Basic Texts” then click your language choice) [hereinafter European Convention].

90. *Id.* at 2-3.

## 1. History of the European Convention on Human Rights

The governments that ratified the European Convention on Human Rights, including Britain, did so in response to the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on December 10, 1948.<sup>91</sup> The European Convention was designed to secure “universal and effective recognition and observance” of basic human rights.<sup>92</sup> The Council of Europe’s aim in adopting the Convention was the “achievement of greater unity between its members,” an aim pursued through the “maintenance and further realisation of human rights and fundamental freedoms.”<sup>93</sup> The signatory governments<sup>94</sup> claimed that by adopting the European Convention, they were reaffirming “their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend.”<sup>95</sup> The European Convention was seen as one of the first steps for the collective enforcement of human rights taken by governments sharing a “common heritage of political traditions, ideals, freedom and the rule of law.”<sup>96</sup>

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91. *Id.* at 2.

92. *Id.*

93. *Id.*; see also Exploring the Law: The Dynamics of Precedent and Statutory Interpretation 125 (Colin Manchester et al. eds., 2000) (“[The European Convention] protects only the ‘core’ of basic human rights which, by consensus, were recognised as necessary to underpin the foundations of a Western democracy.”).

94. Forty-six European and Eastern European countries, including Russia and other former Soviet Union countries, had ratified the European Convention. The first to do so in 1953 were Denmark, Germany, Iceland, Ireland, Luxembourg, Norway, Sweden, and the United Kingdom. The most recent country to ratify the Convention was Monaco in November 2005. Not all nations have ratified additional protocols that have been added during the Convention’s history. European Court of Human Rights, Dates of Ratification of the European Convention on Human Rights and Additional Protocols, <http://www.echr.coe.int/ECHR> (click “Basic Texts” then click “Dates of Ratification”) (last visited Apr. 3, 2006).

95. European Convention, *supra* note 89, at 2.

96. *Id.* Three institutions were created to enforce the Convention: the European Commission of Human Rights, the European Court of Human Rights, and the Committee of Ministers of the Council of Europe, which is composed of the Ministers of Foreign Affairs of the signatory nations or their representatives. Signatory nations, individuals, or organizations can bring before the court complaints alleging violation of the Convention by other signatory nations. In 1998, Protocol 11 replaced the previous part-time court with a full-time court, due to the large number of cases being brought, particularly after former Soviet bloc nations began ratifying the Convention after 1990. See European Court of Human Rights, Historical Background, <http://www.echr.coe.int/ECHR> (click “The Court”) (last visited Apr. 3, 2006). For more information on the Convention and the procedures of the European Court of Human Rights, see Clare Ovey & Robin C.A. White, Jacobs & White: The European Convention on Human Rights (2002).

## 2. The Right to Life and Inquiries into State Actors

Several articles within the European Convention on Human Rights have been read to require full, open, and transparent governmental inquiries into unnatural deaths as part of the framework created by the Convention to promote and protect human rights.<sup>97</sup> This is especially true when governmental agents are implicated in the death.<sup>98</sup> Most notable among the relevant articles is article 2, right to life, which states in full,

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.<sup>99</sup>

Scholars read this article as creating an obligation on the part of signatories to conduct public inquiries into any deaths that may violate the right to life.<sup>100</sup> Article 13, right to an effective remedy, underscores the importance of inquiries when state actors are involved in violating human rights:

Everyone 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.<sup>101</sup>

Other articles often cited to further advance this obligation include article 3 (the right to freedom from torture or inhuman or degrading treatment or punishment) and article 6 (which calls for an "independent and impartial tribunal" to determine an individual's civil rights).<sup>102</sup>

97. *Finucane v. United Kingdom*, 2003-VIII Eur. Ct. H.R. 7, 22-24.

98. *Id.* at 22 ("The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.").

99. European Convention, *supra* note 89, at 2-3.

100. *Finucane*, 2003-VIII Eur. Ct. H.R. at 23 ("[A]uthorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures . . . ." (citation omitted)).

101. European Convention, *supra* note 89, at 6.

102. *Id.* art. 3, 6.

The European Court of Human Rights specified the characteristics of an inquiry that would satisfy article 2 obligations in *Jordan v. United Kingdom*.<sup>103</sup> The court said that the state involved must initiate the inquiry promptly; the inquiry must be independent; the inquiry must be able to pass judgment on whether the force used in the incident in question was justified and determine whether those responsible were identified and/or punished; the inquiry must be sufficiently open to public scrutiny to ensure accountability; and the deceased's family members must be involved in the inquiry to protect their interests.<sup>104</sup>

Geraldine Finucane, the solicitor's widow, lodged a complaint against the United Kingdom under the European Convention on Human Rights with the European Commission of Human Rights in 1994.<sup>105</sup> The suit, in which Geraldine Finucane was represented by Peter Madden, her husband's former law partner, alleged that the British government had failed to conduct a "proper, effective investigation" into Finucane's killing.<sup>106</sup> The European Court of Human Rights, sitting in Strasbourg, issued its final judgment in the case on January 10, 2003, unanimously holding that the British government had violated article 2 of the European Convention.<sup>107</sup> The court, relying on its own precedent, refused to order the new investigation into the killing that Geraldine Finucane had sought.<sup>108</sup> The court said that it had never previously held that a government guilty of violating article 2 should hold a new investigation and had on at least one occasion "expressly declined to do so."<sup>109</sup> The court said it was not appropriate to order a new investigation into Finucane's murder because

[i]t cannot be assumed in such cases that a future investigation can usefully be carried out or provide any redress, either to the victim's family or to the wider public by insuring transparency and accountability. The lapse of time and its effect on the evidence and the availability of witnesses inevitably render such an investigation unsatisfactory or inconclusive, by failing to establish important facts or put to rest doubts and suspicions.<sup>110</sup>

Geraldine Finucane refused to accept money damages.<sup>111</sup> The United Kingdom was ordered to pay Geraldine Finucane 43,000 euros for costs and expenses.<sup>112</sup>

Despite ratification by the United Kingdom, the European Convention on Human Rights was not enforceable in British courts until the Human Rights

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103. 37 Eur. H.R. Rep. 52 (2003).

104. *Id.* at 87-88.

105. *Finucane*, 2003-VIII Eur. Ct. H.R. at 7.

106. *Id.*

107. *Id.* at 27.

108. *Id.* at 29.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 30.

Act 1998<sup>113</sup> became fully activated in October 2000,<sup>114</sup> though aspects were applicable in Northern Ireland earlier.<sup>115</sup> The 1998 Act incorporates all European Convention rights into English law.<sup>116</sup> In Northern Ireland, where opposition to British rule has led to more human rights violations than anywhere else in the United Kingdom,<sup>117</sup> the 1998 Act means that all public authorities, as well as private authorities exercising public functions, are obligated to respect Convention rights.<sup>118</sup> “For the first time, individuals who consider that their European Convention rights have been breached will be able to seek redress in the courts in Northern Ireland instead of having to incur the cost and delay of taking a case to the European Court of Human Rights in Strasbourg . . . .”<sup>119</sup> This has led to an increase in human rights litigation in English courts: “As expected, the Human Rights Act 1998 has proved to be a fertile source of litigation, and will, no doubt, continue to be so . . . . In both civil and criminal cases, the 1998 Act has spawned all manner of claims (many of them spurious) that European Convention rights have been violated.”<sup>120</sup>

### C. Britain’s Inquiries Act 2005

This section reviews the provisions of the Inquiries Act 2005 and its potential impact on public inquiries. Part I.C.1 provides an overview of the Tribunals of Inquiry (Evidence) Act of 1921, which the 2005 Act repealed. Part I.C.2 explains the provisions of the new Act and how it differs from the 1921 Act.

Britain has had legislation outlining the method of conducting public inquiries into matters of grave public concern since the 1921 Act.<sup>121</sup> In April 2005, the Parliament passed the Inquiries Act 2005, which repealed and replaced the 1921 Act as well as other inquiries acts, creating a single

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113. Human Rights Act 1998, c. 42 (U.K.), available at <http://www.opsi.gov.uk/acts/acts1998/19980042.htm>. The Act was passed “to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.” *Id.*

114. Until Parliament passed the Human Rights Act, the Convention was not part of British domestic law and so could not be enforced in the British courts. Terence Ingman, *The English Legal Process* 378 (9th ed. 2002) (“The Convention, however, was not part of English domestic law and, therefore, not *directly* enforceable in our courts, until the Human Rights Act 1998 came fully into force in England and Wales on 2 October 2000.”).

115. Human Rights Directorate, Office of the First Minister & Deputy First Minister, *The Human Rights Act 1998: Guidance for Northern Ireland Departments* 1 (2000).

116. Ingman, *supra* note 114, at 378.

117. See McKittrick et al., *supra* note 55.

118. Human Rights Directorate, *supra* note 115, at 1.

119. *Id.*

120. Ingman, *supra* note 114, at 381.

121. Tribunals of Inquiry (Evidence) Act, 1921, 11 & 12 Geo. 5, c. 7 (Eng.).

method for conducting inquiries that shifted the power to initiate and control such inquiries from Parliament to government ministers.<sup>122</sup>

### 1. The Tribunals of Inquiry (Evidence) Act of 1921

Britain passed the Tribunals of Inquiry (Evidence) Act of 1921 to enable matters of urgent public importance to be inquired into by an independent tribunal.<sup>123</sup> Under the 1921 Act, Parliament could pass a resolution to create a tribunal to investigate matters of public concern.<sup>124</sup> The tribunal was given certain powers to conduct its investigation, including the power to hold private or public hearings, compel witnesses to testify, and apply to the High Court for remedies if a witness refuses to cooperate.<sup>125</sup> The Act made it a criminal offense to refuse to cooperate with a tribunal.<sup>126</sup> The tribunal was required to grant public access to its proceedings “unless in the opinion of the tribunal it is in the public interest expedient so to [restrict access] for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given.”<sup>127</sup> When the investigation was complete, the tribunal would present a report of its findings to Parliament and could include in that report recommendations that might stop future incidents.<sup>128</sup> The tribunal did not pass any judgment, and its findings and recommendations were not binding.<sup>129</sup> However, the tribunal’s findings could give rise to criminal or civil proceedings.<sup>130</sup> The cost of the tribunal, including legal costs of the parties involved, is usually paid by the state.<sup>131</sup>

The 1921 Act was adopted to replace parliamentary inquiry committees with a more effective investigative body.<sup>132</sup> The parliamentary committees did not have the authority to make witnesses testify under oath, which was seen as a flaw in the process, and also had resulted in “unhappy experiences . . . essentially as a result of political partisanship.”<sup>133</sup> Senior judges often would conduct inquiries under the 1921 Act.<sup>134</sup> The 1921 Act provided for inquiries into “definite matter[s] . . . of urgent public

122. Inquiries Act 2005, c. 12, § 1(1) (U.K.); *see also* U.K. Parliament, Explanatory Notes to Inquiries Act (2005), *available at* <http://www.opsi.gov.uk/acts/en2005/2005en12.htm>.

123. Tribunals of Inquiry (Evidence) Act, 11 & 12 Geo. 5, c. 7.

124. *Id.*

125. *Id.* § 1(1)-(2).

126. *Id.* § 1(2).

127. *Id.* § 2(a).

128. Geoffrey Lindell, *British Tribunals of Inquiry: Legislative and Judicial Control of the Inquisitorial Process—Relevance to Australian Royal Commissions*, Parliament of Australia, Apr. 15, 2003, <http://www.aph.gov.au/library/pubs/RP/2002-03/03RP05.htm>.

129. Tribunals of Inquiry (Evidence) Act, 11 & 12 Geo. 5, c. 7, § 1 (limiting the tribunal’s powers to those involving forcing witnesses to testify, compelling production of documents, and requesting examination of witnesses abroad).

130. *See id.* § 1(3) (limiting witnesses’ privileges and immunities to those granted in civil proceedings).

131. Inquiries Act 2005, c. 12, § 39 (U.K.).

132. Lindell, *supra* note 128.

133. *Id.*

134. *Id.*

importance.”<sup>135</sup> Such inquiries were conducted into a wide range of alleged offenses, including improper gifts to ministers, improper disclosure of budget secrets, police brutality, and disorders in Northern Ireland.<sup>136</sup>

## 2. Passage of the Inquiries Act 2005

In April 2005, the British Parliament repealed the 1921 Act and replaced it with the Inquiries Act 2005.<sup>137</sup> The new Act was designed to create a single statutory framework to replace a variety of other acts that allowed for the creation of investigative tribunals.<sup>138</sup> The Act lays out the framework for inquiries, including appointing tribunal members, defining the scope of the inquiry, and conducting proceedings.<sup>139</sup> The Inquiries Act 2005 removes the power to establish an inquiry tribunal from Parliament and places it in the hands of government ministers.<sup>140</sup>

During the second reading of the proposed Inquiries Bill in the House of Lords in December 2004, Baroness Ashton of Upholland, the Parliamentary Under-Secretary for State, Department for Constitutional Affairs, said the Bill’s purpose was “to reform the arrangements for conducting such inquiries to make them as effective as possible.”<sup>141</sup> Ashton said the new Bill was designed so that ministers would carefully consider the particular circumstances and alternatives before instituting a public inquiry and “will

135. Tribunals of Inquiry (Evidence) Act, 11 & 12 Geo. 5, c. 7, § 1.

136. Lindell, *supra* note 128. Such an inquiry was conducted into the “Bloody Sunday Affair,” in which British paratroopers shot and killed thirteen unarmed civilians protesting British rule in Derry, Northern Ireland, on January 30, 1972. A controversial inquiry conducted by Lord Widgery concluded that the soldiers had been fired upon first and were not guilty of any crime. In 1997, the Irish government submitted evidence to the United Kingdom supporting its demand for a new inquiry into the Bloody Sunday killings and harshly criticized the Widgery Report. The United Kingdom agreed to open a new inquiry into the killings, which began proceedings in 1998. Chronology: The Widgery Report, BBC News, Mar. 24, 2000, [http://news.bbc.co.uk/1/hi/in\\_depth/northern\\_ireland/2000/bloody\\_sunday\\_inquiry/665100.stm](http://news.bbc.co.uk/1/hi/in_depth/northern_ireland/2000/bloody_sunday_inquiry/665100.stm). As of August 2005, the new tribunal was still preparing its final report. Press Release, The Bloody Sunday Inquiry Final Report (Aug. 12, 2005), available at <http://www.bloody-sunday-inquiry.org/index2.asp?p=2> (click on “Press Notice (Final Report)”). The document states as follows:

The report is currently in preparation.

It has been necessary for the Tribunal to look at a very large quantity of material so that it is not possible at this stage to give any firm estimate of when the report is likely to be finished.

Further information will be posted to the website as soon as is possible.

*Id.*

137. Inquiries Act 2005, c. 12, sched. 3 (U.K.).

138. United Kingdom Parliament Joint Committee on Human Rights, Fourth Report on Inquiries Bill, 2004, H.L. 7, ¶ 2.3 [hereinafter JCHR Report] (stating that “[t]he Bill establishes a new single statutory framework for inquiries, replacing disparate provisions for inquiries spread over a number of Acts” including the 1921 Act, the Police Act 1996, and the National Health Service Act 1977).

139. Inquiries Act 2005, c. 12.

140. *See id.* § 1.

141. 667 Parl. Deb., H.L. (5th ser.) (2004) 984, available at [http://www.publications.parliament.uk/pa/ld200405/ldhansrd/vo041209/text/41209-04.htm#41209-04\\_head5](http://www.publications.parliament.uk/pa/ld200405/ldhansrd/vo041209/text/41209-04.htm#41209-04_head5).

not call an inquiry under the Bill when there are other investigation procedures for dealing with the matter. So the Bill will not lead either to more or to fewer inquiries being called.”<sup>142</sup> Ashton said the Bill was designed to fill gaps in the government’s inquiry framework, such as the lack of power to call an inquiry into deaths in custody or other incidents in English and Welsh prisons.<sup>143</sup> Another concern was that the 1921 Act had never been updated and was not used in a range of important inquiries.<sup>144</sup> Economics also played a role in the new legislation: “The Government are [sic] absolutely clear that inquiries must have all the powers and resources necessary to get at the truth,” Ashton said, “but it is quite proper that the best use is made of public money in doing so.”<sup>145</sup> The Bill was designed to improve the “conduct and effectiveness of inquiries” and to codify methods developed since the 1921 Act was adopted.<sup>146</sup>

In brief, some of the new powers granted a minister under the Inquiries Act 2005 include:

- choosing the inquiry chairman and all other members of the panel (including the power to determine the number of panel members);<sup>147</sup>
- restricting attendance at the inquiry, disclosure or publication of any evidence or documents produced, and other public access;<sup>148</sup>
- terminating any panel members for various causes;<sup>149</sup>
- suspending the inquiry or ending it before it is completed;<sup>150</sup>
- deciding whether the inquiry report will be published for the public.<sup>151</sup>

The new Act also allows for ongoing inquiries begun under other authority to be “converted” to inquiries under the 2005 Act, thereby altering the methods for conducting such inquiries.<sup>152</sup> Already, tribunal chairs investigating other murders in Northern Ireland have considered transforming those proceedings into 2005 Act inquiries.<sup>153</sup>

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142. *Id.*

143. *Id.* at 985.

144. *Id.*

145. *Id.*

146. *Id.* at 986.

147. Inquiries Act 2005, c. 12, § 4 (U.K.).

148. *Id.* § 18.

149. *Id.* § 12(3).

150. *Id.* §§ 13, 14.

151. *Id.* § 25.

152. *Id.* §§ 15, 16.

153. *Wright Inquiry Seeks Conversion to Inquiries Act*, Director’s Rep. (British Irish Rights Watch, London), July 2005, <http://www.birw.org/report%202005/July%2005.html> (reporting a request from the Chair of the Billy Wright Inquiry to convert the statutory basis for the inquiry from the Prison Act to the Inquiries Act 2005).

The Inquiries Act 2005 has created a backlash from human rights groups that claim the Act violates the European Convention on Human Rights, a controversy that has focused specifically on the much-anticipated inquiry into Patrick Finucane's murder.

## II. CONFLICTS BETWEEN THE EUROPEAN CONVENTION AND BRITISH LAW

This part compares the European Convention on Human Rights obligations with the Inquiries Act 2005 provisions as well as the consequences the new Act might have on the peace process in Northern Ireland. Part II.A considers charges that the 2005 Act violates the United Kingdom's obligations under the European Convention. Part II.B reviews the British government's defense of the 2005 Act and the validity of the Act. Part II.C considers the potential consequences an inquiry into Finucane's murder might have on the Northern Ireland peace process if it were conducted under the 2005 Act.

### A. *Violating Convention Obligations*

This section presents claims that the Inquiries Act 2005 violates Britain's obligations under the European Convention on Human Rights. Part II.A.1 contrasts the Convention's right to life provision with the 2005 Act. Part II.A.2 considers the impact the 2005 Act might have on the accountability and transparency deemed necessary to public inquiries.

The European Convention's protection of an individual's right to life creates an obligation for governments to fully investigate any killing not sanctioned by law, especially where state agents may be involved.<sup>154</sup> This obligation fosters accountability and transparency of government actions, both of which are undermined if inquiries are not conducted according to the European Convention's implicit framework. Critics claim the Inquiries Act 2005 will undermine such accountability and transparency by allowing the British government to keep the findings of a public inquiry from the public.<sup>155</sup>

#### 1. Protecting the Right to Life

Human rights groups and legal organizations have criticized the Inquiries Act 2005 for violating Britain's obligations under the European Convention on Human Rights, especially article 2's right to life.<sup>156</sup> The Association of the Bar of the City of New York says that ministers' powers to direct and control an inquiry would result in inquiries that "would lack the requisite independence from the forces under investigation and would not allow for

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154. European Convention, *supra* note 89, at 2, 6.

155. Press Release, Amnesty Int'l et al., *supra* note 34.

156. *Id.* (stating that an inquiry under the Inquiries Act 2005 "would fall far short of the requirement of international human rights law that an effective remedy be provided to the victims of human rights violations").

sufficient public scrutiny in violation of Article 2 of the European Convention.”<sup>157</sup> A human rights committee of the New York Bar has determined that the 2005 Act “could have serious implications for human rights where government actors may perpetrate abuses, or fail to investigate them, unrestrained by fear of public exposure.”<sup>158</sup> The committee said the new Act was “surprising and unsettling” because it “was written to allow for ministerial control at every conceivable stage of the inquiry process.”<sup>159</sup>

International human rights organizations have harshly criticized the Inquiries Act 2005. Amnesty International has attacked the Act since its inception,<sup>160</sup> stating that any inquiry under the new legislation “would automatically fall far short of the requirements in international human rights law and standards for effective remedies for victims of human rights violations and their families.”<sup>161</sup> Amnesty accused British Prime Minister Tony Blair of railroading the Inquiries Act 2005 through Parliament on the last day of its 2004-2005 session, and said the new law would have a negative impact on investigations into major incidents such as rail disasters, deaths in prisons, and disputed army deaths.<sup>162</sup> “The Inquiries Act 2005 undermines the rule of law, the separation of powers and human rights protection,” Amnesty International stated. “It cannot be the foundation for an effective, independent, impartial or thorough judicial inquiry in serious allegations of human rights violations.”<sup>163</sup> The Committee on the Administration of Justice (“CAJ”), a Belfast human rights organization, also has criticized the Inquiries Act 2005.<sup>164</sup> The CAJ questioned whether “in cases where an inquiry is to be held into alleged governmental breaches of fundamental rights under the [European Convention on Human Rights] (most particularly the right to life and the right not to be tortured), this . . .

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157. Letter from Bettina B. Plevin, President, Ass’n of the Bar of the City of N.Y., to British Prime Minister Tony Blair 2 (July 14, 2005), *available at* [http://www.abcny.org/pdf/report/Prime\\_Minister07142005.pdf](http://www.abcny.org/pdf/report/Prime_Minister07142005.pdf) [hereinafter Letter from Bettina B. Plevin].

158. NY Bar Analysis, *supra* note 25, at 12.

159. *Id.* at 16.

160. Press Release, Amnesty International, UK: Suspicion over Finucane Announcement (Sept. 23, 2004), *available at* <http://www.amnesty.org.uk/news/press/15609.shtml> (“Amnesty International strongly suspects that the UK authorities are using ‘national security’ to curtail the ability of the inquiry to shed light on state collusion in the killing of Patrick Finucane; on allegations that his killing was the result of an official policy and that different government authorities played a part in the subsequent cover-up of collusion in his killing.”); *see also* Press Release, Amnesty International, UK: The Government Must Withdraw the Inquiries Bill and Act on Its Promise (Feb. 11, 2005), *available at* <http://news.amnesty.org/index/ENGEUR450032005> [hereinafter Amnesty Withdrawal Release].

161. Press Release, Amnesty International, UK: Amnesty International Urges Judiciary Not to Partake in Inquiry Sham (Apr. 20, 2005), *available at* <http://web.amnesty.org/library/Index/ENGEUR450102005?open&of=ENG-GBR> [hereinafter Amnesty Boycott Release].

162. *Id.*

163. *Id.*

164. Comm. on the Admin. of Justice, Preliminary Commentary on Proposals in the Inquiries Bill (2004), *available at* <http://patfinucanecentre.org/pf/inquibill/cajcomm.pdf>.

legislation can be said to comply with the European Court requirements for independent investigation.”<sup>165</sup> The CAJ said that the British Government should ensure that inquiries comply with the European Convention on Human Rights right to life requirements to avoid further censure by the European Court of Human Rights.<sup>166</sup> “This legislation is very worrying because it seeks to reduce transparency and accountability of government,” said CAJ Director Maggie Beirne. “In Northern Ireland, allegations of official collusion must be addressed in a public forum, yet this legislation is intended to prevent the public ever hearing the truth about official involvement in the murder and cover-up around the murder of Pat Finucane.”<sup>167</sup>

The British Parliament’s own Joint Committee on Human Rights (“JCHR”) has said several provisions of the 2005 Act violate article 2 because granting ministers the power to stop funding and otherwise control tribunals undermines the effective investigation of deaths, especially where state actors might be implicated.<sup>168</sup> The JCHR said, “A number of aspects of the [Inquiries Act 2005] appear to us, on initial assessment, to risk compromising the independence of an inquiry, potentially breaching Article 2 [European Convention on Human Rights] where the subject-matter of the inquiry concerns the right to life.”<sup>169</sup> Such aspects included the power of the minister to conclude an inquiry without publishing a report, to restrict public access to the inquiry proceedings, and the power to withdraw funding, among others.<sup>170</sup>

## 2. Undermining Accountability and Transparency

Underlying the right to life is the need for accountability and transparency when the state investigates untimely deaths:

Article 2 requires that, where the right to life is engaged, an inquiry must not only be independent, but also effective, in providing a sufficient explanation for the circumstances of the death, which is subject to sufficient public scrutiny to secure accountability, and provides the basis for the attribution of responsibility and the initiation of criminal proceedings where this is appropriate.<sup>171</sup>

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165. *Id.* at 4.

166. *Northern Ireland Human Rights: Update on the Cory Collusion Inquiry Reports: Hearing Before the Subcomm. on Africa, Global Human Rights and International Operations of the Comm on International Relations*, 109th Cong. 41-45 (2005) (statement of Maggie Beirne, Director, Comm. on the Administration of Justice), available at [http://www.house.gov/international\\_relations/109/bei031605.htm](http://www.house.gov/international_relations/109/bei031605.htm).

167. Press Release, Comm. on the Admin. of Justice, *The End of ‘Public’ Inquiries as We Know Them?* (Dec. 9, 2004), available at <http://www.caj.org.uk/press.html> (click on “9th Dezember [sic] 2004”).

168. JCHR Report, *supra* note 138.

169. *Id.* ¶ 2.14.

170. *Id.* ¶¶ 2.15-.21.

171. *Id.* ¶ 2.23.

The independence of an inquiry panel is considered essential to effective public inquiries when state actors are implicated in the death.<sup>172</sup> Accountability and transparency are similarly essential, because “there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.”<sup>173</sup>

Arguing—futilely, it turned out—against passage of the Inquiries Bill, the human rights organizations who signed a joint statement criticizing the Inquiries Act 2005 said it “would . . . alter fundamentally the system for establishing and running inquiries into issues of great public importance in the UK, including allegations of serious human rights violations.”<sup>174</sup> The fundamental problem with the new Act, according to these opponents, was that it shifted power to create and control inquiries from Parliament to individual government ministers.<sup>175</sup> The Act’s

clauses grant broad powers to the Minister establishing an inquiry on issues such as the setting of the terms of reference, restrictions on funding for an inquiry, suspension or termination of an inquiry, restrictions on public access to inquiry proceedings and to evidence submitted to an inquiry, and restrictions on public access to the final report of an inquiry.<sup>176</sup>

The statement also criticized the legislation for failing to grant the inquiry chairs and panels the independence they would need to conduct effective inquiries.<sup>177</sup> British Irish Rights Watch has said that conducting an inquiry under the new Act would remove a tribunal’s “control over key aspects of the inquiry, such as the publication of the final report, the choice of witnesses, and the publication of evidence.”<sup>178</sup> The Rights Watch said that, rather than improving the public inquiry capabilities of the British government, the new Act brought “an end to the public inquiry as we know it.”<sup>179</sup>

Human Rights First spoke out against the Inquiries Act 2005 before the U.S. House of Representatives Committee on International Relations during its March 2006 hearing on the Northern Ireland peace process. Human Rights First Senior Associate Archana Pyati testified,

The Inquiries Act brings about a fundamental shift in the manner in which the actions of government and public bodies can be subjected to scrutiny in the United Kingdom. The powers of independent chairs to control

172. *Finucane v. United Kingdom*, 2003-VIII Eur. Ct. H.R. 7, 23 (“For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events . . .”).

173. *Id.* at 24.

174. Press Release, Amnesty Int’l et al., *supra* note 34.

175. *Id.*

176. *Id.*

177. *Id.*

178. British Irish Rights Watch, *supra* note 153.

179. *Wright Inquiry Seeks Conversion to Inquiries Act*, Director’s Rep. (British Irish Rights Watch, London), June 2005, <http://www.birw.org/report%202005/June%2005.html>.

inquiries has been usurped and those powers have been placed in the hands of government ministers. . . .

. . . Under the new law, not only is there no guarantee that inquiries will be public, but because of the near complete control of inquiries by government ministers, it is hard to see how such inquiries can be viewed in any way as “independent.” This is particularly troubling where the actions of a government minister or those of his or her department, or those of the government, are in question. In effect, this creates a situation in which the state will be investigating itself.

Simply put, an inquiry held under the Inquiries Act will not meet the standard set for independent public inquiries by Judge Cory in October 2003. Inquiries held under this law will therefore not satisfy the Weston Park Agreement between the British and Irish governments in 2001.<sup>180</sup>

The international judiciary also has weighed in on the criticisms of the Inquiries Act 2005. Judge Cory, whose report called for a public inquiry into Finucane’s murder,<sup>181</sup> urged fellow Canadian judges to boycott any inquiry conducted under the new Act.<sup>182</sup> Cory wrote,

[I]t seems to me that the proposed new Act would make a meaningful inquiry impossible. The commissions would be working in an impossible situation. For example, the Minister, the actions of whose ministry was to be reviewed by the public inquiry would have the authority to thwart the efforts of the inquiry at every step. It really creates an intolerable Alice in Wonderland situation. . . . I cannot contemplate any self respecting Canadian judge accepting an appointment to an inquiry constituted under the new proposed act.<sup>183</sup>

Lord Saville, who chairs a new Bloody Sunday Inquiry constituted under the 1921 Act,<sup>184</sup> reportedly has similar misgivings, writing in a letter to Baroness Ashton that the Inquiries Act 2005 “makes a very serious inroad into the independence of any inquiry . . . and its findings, especially in cases where the conduct of the authorities may be in question.”<sup>185</sup> Amnesty International has called on all judges to boycott appointment to any tribunal established under the new Act.<sup>186</sup> “The Inquiries Act 2005 deals a fatal blow to any possibility of public scrutiny of and accountability for state abuses,” Amnesty stated.<sup>187</sup>

180. *The Northern Ireland Peace Process: Policing Advances and Remaining Challenges: Hearing Before the H. Comm. on International Relations*, 109th Cong. (2006) (statement of Archana Pyati, Senior Associate, Human Rights First), available at <http://www.humanrightsfirst.info/pdf/06315-hrd-pyati-test.pdf> [hereinafter Pyati Testimony].

181. See *supra* notes 71-73 and accompanying text.

182. Letter from Honourable Peter Cory to U.S. Congressional Committee Chairman Chris Smith (March 15, 2005), available at <http://www.serve.com/pfc/cory/pr050315.html>.

183. *Id.*

184. See *supra* note 136.

185. Press Release, Amnesty Int’l et al., *supra* note 34.

186. Amnesty Boycott Release, *supra* note 161.

187. *Id.*

The Joint Committee on Human Rights concluded after studying the Inquiries Act provisions that the degree of control given to ministers would “risk both the independence and the appearance of independence of the inquiry, and may fall short of [European Convention on Human Rights] Article 2 rights in inquiries where those rights are engaged.”<sup>188</sup> The committee also questioned the ability to conduct an effective inquiry under the new legislation:

Provision for Ministerial control, through the issue of restriction notices and the conclusion of an inquiry before the issue of a report, may raise issues of the inquiry’s effectiveness in accordance with Article 2. In particular, powers to issue restriction notices which limit attendance of the inquiry, or the disclosure of evidence or documents, in order to protect widely drawn categories of general interests such as economic welfare, national security or international relations, may impair the effectiveness of an inquiry.<sup>189</sup>

The British government takes a very different view of its new legislation, as explained below, claiming that the Inquiries Act 2005 provides a better inquiry framework than previously existed in the United Kingdom and will allow for inquiries that completely satisfy the European Convention obligations—obligations with which, in any case, Britain is not bound to comply.

### B. *The British Government’s Defense of the Inquiries Act 2005*

This section provides the British government’s rebuttal of criticism of the Inquiries Act 2005. Part II.B.1 offers the government’s defense of the new Act in relation to Convention obligations. Part II.B.2 explains why the 2005 Act remains valid even if it does violate the Convention.

Members of Parliament and other British government officials who supported the Inquiries Act 2005 argued that it complied with Britain’s obligations under the European Convention, in that it would allow for public inquiries that were efficient and sufficient, while also protecting the nation’s security interests where necessary.<sup>190</sup> Even if such a defense were faulty, the fact is that Britain does not have to comply with the Convention, as Parliament can supercede such international obligations at will.<sup>191</sup>

#### 1. Complying with the European Convention

The British government’s defense of the Inquiries Act 2005 began with the first mention of new legislation, when Secretary of State Murphy said, “In order that the inquiry can take place speedily and effectively and in a way that takes into account the public interest, including the requirements of national security, it will be necessary to hold the inquiry on the basis of

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188. JCHR Report, *supra* note 138, ¶ 2.20.

189. *Id.* ¶ 2.24.

190. *See infra* notes 192-201 and accompanying text.

191. *See infra* notes 202-10 and accompanying text.

new legislation which will be introduced shortly.”<sup>192</sup> The defense may have reached its pinnacle when Lord Falconer of Thoroton told the House of Lords that “the provisions of the Inquiries Bill are compatible with the [European] Convention rights.”<sup>193</sup> Such a statement complies with the Human Rights Act 1998, which requires ministers to make a statement before the second reading of any parliamentary bill either that the bill is compatible with Convention rights or that the minister is unable to make a compatibility statement but still wishes the bill to go forward.<sup>194</sup>

The Inquiries Bill Standing Committee B, tasked with considering amendments to the proposed legislation before passage, also provided some governmental defensive comments.<sup>195</sup> Labour Party proponents of the Bill, in response to Conservative Party criticism that the Inquiries Act 2005 removed all Parliamentary involvement in inquiries, dismissed the importance of such involvement.<sup>196</sup> Parliamentary Under-Secretary of State for Constitutional Affairs Christopher Leslie pointed out that of thirty substantial inquiries conducted since 1991, only four were conducted under the 1921 Inquiries Act and thereby involved Parliament.<sup>197</sup> Leslie also pointed out that the 1921 Inquiries Act also empowered ministers to set up inquiries, requiring only that Parliament pass a resolution after the minister had requested an inquiry.<sup>198</sup> Leslie said that the new Act would in no way impair Parliament’s ability to play a role in inquiries: “If Parliament wants to express its will on any matter, including an inquiry that has been set up, in theory it can generate, debate and agree to such a motion.”<sup>199</sup> Finally, the new Act includes a requirement that a statement be made to Parliament regarding any inquiry, “which can be oral and followed by debate where appropriate.”<sup>200</sup> The parliamentary debates concerning the Inquiries Bill also offer support for the Act’s compliance with the European Convention. Proponents described the Act as “strengthening the inquiry tradition” in the United Kingdom and said the Act was “about giving more inquiries the full statutory powers that they need to gather all the evidence and get to the truth.”<sup>201</sup>

192. Murphy Statement, *supra* note 26.

193. Lord Falconer of Thoroton, Statement on the European Convention of Human Rights, Inquiries Bill (2005), available at <http://www.dca.gov.uk/legist/inquiriesbill.pdf>.

194. Human Rights Act 1998, c. 42, § 19 (U.K.).

195. Standing Committee B Debates, House of Commons, Inquiries Bill [Lords] (March 22, 2005—Morning), <http://www.publications.parliament.uk/pa/cm200405/cmstand/b/st050322/am/50322s01.htm> [hereinafter Morning Debate]; Standing Committee B Debates, House of Commons, Inquiries Bill [Lords] (March 22, 2005—Afternoon), <http://www.publications.parliament.uk/pa/cm200405/cmstand/b/st050322/pm/50322s01.htm>.

196. Morning Debate, *supra* note 195, at 9 (comments of Parliamentary Under-Secretary of State for Constitutional Affairs Christopher Leslie).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 10.

201. 671 Parl. Deb., H.L. (5th ser.) (2005) 891 (comments of baroness Ashton of Upholland), available at <http://www.publications.parliament.uk/pa/ld200405/ldhansrd/vo050407/text/50407-04.htm>.

## 2. Changing the Rules at Parliament's Will

Regardless of the proponents' claims that the Inquiry Act 2005 comports with the European Convention on Human Rights obligations, the government need not prove the Act is compatible with the Convention. Statutory interpretation in the United Kingdom generally seeks consistency with international law: "[T]here is the principle of statutory interpretation that where there is legislative ambiguity or uncertainty over a point which could bear on the United Kingdom's international obligations, such ambiguity or uncertainty should be resolved in a manner consistent with those obligations rather than in violation of them."<sup>202</sup> However, a footnote to that statement specifically excluded the European Convention on Human Rights from such analysis, as it had not been incorporated into domestic law.<sup>203</sup> As explained in Part I, the Human Rights Act 1998 eliminated that problem, so that the Convention is now part of British domestic law.<sup>204</sup> That does not mean, though, that British courts are constrained by the European Court's interpretation of article 2's requirements regarding inquiries—they are free to interpret the treaty obligations for themselves.<sup>205</sup> A British court, therefore, can concur with the Inquiries Act 2005 proponents and declare it is compatible with the Convention obligations.

More importantly, Parliament is under no obligation to comply with the Convention, even though the Human Rights Act 1998 raises an expectation of compliance.<sup>206</sup> Under the Human Rights Act 1998, "it is, in general, unlawful for a public authority (which includes a court or tribunal and any person with some functions of a public nature, but does not include Parliament) to act in a way which is incompatible with the Convention rights."<sup>207</sup> This exemption extends also to anyone acting in accordance with legislation,<sup>208</sup> which presumably would include any tribunal established under the Inquiries Act 2005. Furthermore, courts in the United Kingdom do not have the power to strike down the Inquiries Act 2005 as incompatible with the European Convention—all they can do is declare the

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202. Richard Gardiner, *Interpreting Treaties in the United Kingdom, in Legislation and the Courts* 115, 119 (Michael Freeman ed., 1997).

203. *Id.* at 128 n.16.

204. *See supra* notes 113-20 and accompanying text.

205. Margot Horspool, *Statutory Interpretation of European Community Law by English Courts, in Legislation and the Courts, supra* note 202, at 95 (stating that English courts can refer to the European Court of Justice for how to interpret a treaty, but are not required to do so).

206. Ingman, *supra* note 114, at 379 ("[A]lthough not expressly stated, it is clearly the expectation that Parliament will not pass legislation which interferes with the Convention rights (but it can still do so if it wishes).").

207. *Id.*; *see also* Human Rights Act 1998, c. 42, § 6(1) (U.K.).

208. Human Rights Act 1998, c. 42, § 6(2) (stating that an authority is not acting unlawfully under this Act if it is giving effect to provisions of primary legislation, even if that legislation is incompatible with Convention rights).

Act incompatible, but the Act remains valid and must be enforced.<sup>209</sup> In fact, the Human Rights Act seems to place the courts under a greater obligation to find that legislation is compatible with the Convention than Parliament is under to assure the same: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”<sup>210</sup>

### C. *Consequences of the Anticipated Finucane Inquiry*

This section considers the potential consequences of an inquiry into Patrick Finucane’s murder conducted under the Inquiries Act 2005. Part II.C.1 reviews concerns that such an inquiry would not bring all the facts to light. Part II.C.2 considers fears that such an inquiry would be detrimental to ongoing efforts to establish peace in Northern Ireland.

The consequences the controversy over the Inquiries Act 2005 and its application to the Finucane murder will have on the Northern Ireland peace process are unclear. The new legislation may mean that the complete truth behind government agents’ collusion in Finucane’s murder may never be revealed to the public. This, in turn, could affect the peace process by undermining many Northern Irish residents’ trust in the British government and its willingness to take responsibility for the crimes it has committed, or at least allowed, in Northern Ireland during the Troubles.

#### 1. Bringing the Truth to Light

The tension between the implicit European Convention obligations and the explicit Inquiries Act 2005 authority is particularly acute when considering the anticipated inquiry into Pat Finucane’s murder.<sup>211</sup> In expressing its concerns about the new Act, Parliament’s Joint Committee specifically referenced the Finucane murder, addressing the Act’s provisions “on the basis that they are likely to form the basis for inquiries into this and other deaths which engage Article 2.”<sup>212</sup> In doing so, the Joint Committee expressed concern regarding ministerial control of such inquiries and a lack of public access to findings:

Provisions for Ministerial control . . . may impair the effectiveness of an inquiry. The European Court of Human Rights has found that a sufficient element of public scrutiny is an essential element of an effective inquiry capable of securing accountability in practice as well as in theory . . .<sup>213</sup>

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209. *Id.* § 4 (stating a declaration of incompatibility does not affect the validity of the law and is not binding on the parties to the proceedings before the court); see also Ingman, *supra* note 114, at 379.

210. Human Rights Act 1998, c. 42, § 3.

211. Letter from Bettina B. Plevin, *supra* note 157 (“[W]e believe that an inquiry [into Finucane’s murder] conducted pursuant to the Inquiries Act 2005 would violate Article 2 of the European Convention.”).

212. JCHR Report, *supra* note 138, ¶ 2.8.

213. *Id.* ¶ 2.24.

The British government has promised to perform a public inquiry into the Finucane slaying under the Inquiries Act 2005,<sup>214</sup> and human rights organizations seem to be speaking with one voice against that plan.<sup>215</sup> The British Irish Rights Watch reported that British ministers were saying privately that, under the new Act, the Finucane inquiry would look into who murdered him but “will not put the policies and systems which led to the murder under scrutiny.”<sup>216</sup> Amnesty International said that “any inquiry under this legislation would fall far short of the requirements in international human rights law and standards for effective remedies for victims of human rights violations and their families.”<sup>217</sup> The organization charged that conducting a Finucane inquiry under the Inquiries Act 2005 “would eliminate independent, impartial and public scrutiny of the authorities’ alleged involvement in the killing.”<sup>218</sup> Human Rights First warned Prime Minister Tony Blair before the new Act was passed that conducting a Finucane inquiry under new legislation, particularly when evidence strongly suggests official collusion, would “fuel suspicion that your government is seeking to avoid an independent inquiry into the evidence of official collusion in this crime.”<sup>219</sup> The group requested “that a full and fair public inquiry into the murder of Patrick Finucane commence promptly.”<sup>220</sup>

In his June 2005 report on human rights in the United Kingdom, Alvaro Gil-Robles, the Council for Europe’s Commissioner for Human Rights, said of the Finucane murder,

I can only stress the need for a full, independent, public inquiry capable of arriving at the truth. Anything short of this would, indeed, lead to a violation of Article 2 of the [European Convention on Human Rights], a sorry breach of longstanding commitments and, most importantly, the continuing disappointment of relatives who desire only the truth to put their personal tragedy behind them.<sup>221</sup>

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214. See *supra* note 192 and accompanying text.

215. See Press Release, Amnesty Int’l et al., *supra* note 34.

216. *Inquiries Act Comes into Force*, Director’s Rep. (British Irish Rights Watch, London), June 2005, <http://www.birw.org/report%202005/June%2005.html>.

217. Amnesty Withdrawal Release, *supra* note 160.

218. Press Release, Amnesty Int’l, UK: ‘Official Collusion’ in Killing of Human Rights Lawyer (Apr. 1, 2005), available at <http://web.amnesty.org/appeals/index/gbr-011199-wwa-eng>.

219. Letter from Michael Posner, Executive Dir., Human Rights First, to Prime Minister Tony Blair (Sept. 23, 2004) (on file with the Fordham Law Review) [hereinafter Letter from Michael Posner]. But see Ministerial Statement, *supra* note 26, ¶ 23 (“This Government has shown repeatedly that the state is open to scrutiny for its actions. We established the Bloody Sunday Inquiry. The investigation by Sir John Stevens continues and has yielded prosecutions. We appointed Justice Cory, with the Irish Government. Wrongdoers will be brought to justice.”).

220. Letter from Michael Posner, *supra* note 219.

221. Alvaro Gil-Robles, Comm’r for Human Rights, Council of Europe, Report on his Visit to the United Kingdom ¶ 182 (2005), available at [www.statewatch.org/news/2005/jun/coe-uk-report.pdf](http://www.statewatch.org/news/2005/jun/coe-uk-report.pdf).

Amnesty International has called for a judicial boycott of any Finucane inquiry instituted under the Act.<sup>222</sup> Amnesty International accused the British government of “trying to eliminate independent scrutiny of the actions of its agents,” and said “[a]ny judge sitting on such an inquiry would be presiding over a sham.”<sup>223</sup> The Pat Finucane Centre for Human Rights and Social Change (“PFC”) said the Act “is widely perceived as a legislative attempt to deny the Finucane family access to vital information surrounding the 1989 murder.”<sup>224</sup> The family itself may refuse to participate in any inquiry conducted under the new legislation.<sup>225</sup>

The Republic of Ireland Parliament (known as the Dail) also weighed in on the debate recently, passing an all-party motion in March 2006 calling upon the British government to conduct an independent inquiry into Finucane’s murder.<sup>226</sup> Irish Foreign Affairs Minister Dermot Ahearn said, “The position of the Irish government remains firm and emphatic. We ask the British government to establish a full, independent, public, judicial inquiry into the murder and nothing less.”<sup>227</sup> Irish Labour Party President Michael D. Higgins accused the British government of purposely trying to withhold the truth about Finucane’s murder for strategic reasons, stating, “One can only conclude that the British government want [sic] to indulge in a major cover-up in order to prevent the true nature of the collusion between the Royal Ulster Constabulary and the loyalist paramilitaries who murdered Pat Finucane coming into the public domain.”<sup>228</sup>

## 2. Effect on the Peace Process

The impact of a potential Finucane inquiry under the Inquiries Act 2005 reaches beyond the family’s need for closure and the human rights organizations’ desire to hold the British government accountable for its actions. The Finucane murder was one of six killings designated for public inquiries under the Good Friday Agreement, which sought to broker a peace in Northern Ireland.<sup>229</sup> “The case is about more than one man’s murder. In the eyes of rights activists, a policy of the British security services fostered the killings of scores of people, civilians as well as militants, in what came to be known as the ‘Dirty War.’”<sup>230</sup> Michael Finucane, Patrick’s son, said a proper inquiry into his father’s death that held the British security forces accountable “will be an important step toward the truth and finally justice, . . . and without truth and justice, you can’t have a lasting peace.”<sup>231</sup>

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222. Amnesty Boycott Release, *supra* note 161.

223. *Id.*

224. Press Statement, Patrick Finucane Centre, Inquiries Bill Passed (Apr. 7, 2005), available at <http://www.serve.com/pfc/pf/inquibill/050407pfc.html>.

225. *Id.*

226. *Dail Pass Finucane Inquiry Motion*, *supra* note 80.

227. *Id.*

228. *Id.*

229. See Agreement, *supra* note 20.

230. Charles M. Sennott, *Reconciling a Dark Past*, Boston Globe, July 7, 2003, at A1.

231. *Id.*

Judge Cory noted the importance of government accountability for Finucane's murder in his Cory Report:

[A]part from the necessary exceptions that must exist during times of war, it is the paramount duty of any Government to establish and maintain the rule of law and to ensure that no one is above the law. This is a fundamental and requisite principle of democratic Government. Accordingly, the need to gather intelligence cannot justify providing a mantle of protection to those who are parties to murder.<sup>232</sup>

Not only the outcome of the inquiry, but the process by which that outcome is reached, will determine whether the inquiry is respected or condemned by the people—at least half of the people—of Northern Ireland. Amnesty International said the Inquiries Act 2005 could “represent the death knell of any possibility of public scrutiny of an accountability for state abuses.”<sup>233</sup> An independent public inquiry into Finucane's murder is considered an essential element in fostering peace in Northern Ireland by giving the Northern Irish people confidence in the integrity of the British government and its institutions.<sup>234</sup> “Any inquiry that is closely administered by the entity whose alleged misconduct is the subject of the inquiry will do little to restore public confidence, and its investigations and findings are likely to be viewed with skepticism.”<sup>235</sup>

### III. JUSTICE—AND PEACE—DEMAND TRANSPARENCY AND ACCOUNTABILITY

This part explains why it is essential to conduct an effective inquiry into Patrick Finucane's murder and offers options for doing so. Part III.A outlines the need for a Finucane inquiry that is transparent and complete. Part III.B outlines a three-step process that British officials can follow in resolving the controversy surrounding the Inquiries Act 2005 and the Finucane inquiry.

#### A. *Conducting an Effective Inquiry into Patrick Finucane's Murder Is Essential*

This section outlines the importance of an inquiry into Patrick Finucane's murder that is transparent and complete. Part III.A.1 considers the impact such an inquiry can have on the level of trust with which the people of Northern Ireland view the British government. Part III.A.2 calls upon the British government to hold itself accountable for any collusion between its agents and Finucane's killers.

If the British government is to regain the public trust in Northern Ireland from those who have opposed its rule there, it must conduct an effective and completely public inquiry into Finucane's murder. It must then accept

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232. Cory, *supra* note 1, ¶ 1.30.

233. Amnesty Withdrawal Release, *supra* note 160.

234. NY Bar Analysis, *supra* note 25, at 13.

235. *Id.*

responsibility for any findings of such an inquiry that point to government agents' involvement in the killing.

### 1. The Public's Trust in the British Government

To develop trust in British rule among the Republican factions in Northern Ireland and the mainstream residents who question the government's role in decades of violence, that government must conduct an effective inquiry into Patrick Finucane's murder.<sup>236</sup> While several other high-profile killings also were slated for inquiries as part of the Good Friday Agreement,<sup>237</sup> the Finucane murder may be the most important among them. While Loyalist and Republican paramilitaries committing murder was common during the Troubles,<sup>238</sup> Finucane's assassination is the only high-profile killing in which the British authorities are so clearly implicated. Almost two decades of investigations have produced undeniable evidence that the RUC and the British Army's FRU played a role in the killing, from instigating Loyalist terrorists by accusing Finucane of serving the IRA, to aiding their own agents in planning and carrying out the killing.<sup>239</sup> Such findings have only strengthened the Republican-leaning Northern Ireland residents' distrust of the British government.<sup>240</sup> This distrust is one of the greatest obstacles to a lasting peace, and efforts must be made to dispel the grave doubts half the populace has in Britain's willingness to protect their interests and safeguard their rights.<sup>241</sup>

Conducting a full, transparent inquiry into Finucane's killing can provide an important foundation for improving the relationship between the government and those who doubt its motives. The involvement of state agents in this killing—already well-known to the public—creates both a threat and an opportunity that will test the British government's true allegiance, whether to peace in Northern Ireland or to its own protection from blame. The threat is that an inquiry the public considers secretive, incomplete, or biased will further entrench much of the public's innate

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236. See Pyati Testimony, *supra* note 180, at 5 (“The UK government has fought for seventeen years to escape accountability and keep the truth about its role in Finucane’s murder from his family and from the public. Worse than inaction, the UK government is poised to foreclose the possibility of a credible inquiry in this case altogether. This would be devastating, not only for the Finucane family, but for the cause of peace and reconciliation in Northern Ireland for years to come.”); see also Ministerial Statement, *supra* note 26, ¶ 24 (“I firmly believe that the only way we can put the past behind us in Northern Ireland is by seeking to establish the truth. But that must be the truth about the actions of all those who have been involved in the tragedy of the past thirty years.”).

237. See *supra* note 25.

238. See *supra* notes 42, 55 and accompanying text.

239. See Cory, *supra* note 1, ¶¶ 1.282-1.292 (Part C, Summary of collusive acts)

240. See *supra* Part II.C.2.

241. See Cory, *supra* note 1, ¶ 1.297 (“[Resolving the Finucane issue] is essential if the public confidence in the police, the army and the administration of justice is to be restored.”).

opposition to British rule.<sup>242</sup> The opportunity is that an open, transparent, and complete inquiry that holds state agents and the government accountable for Finucane's murder can help erode those preconceptions and allow Northern Ireland to take a step closer to a lasting peace.

## 2. Accountability for Murder

More important than the regional concerns focused around Belfast are the international implications of Britain's handling of a Finucane inquiry. More is at stake than the future peace of Northern Ireland and the survival of the Good Friday Agreement. At stake is the willingness of one of Europe's greatest powers—and an important United States ally—to set an example for the rest of the world by insisting on accountability for state-instigated murders.<sup>243</sup> If the allegations of state involvement in Finucane's murder are true—and both the Stevens Enquiry and the Cory Report clearly indicate that they are—then British authorities, in the persons of police officers and army officials, assisted Loyalist terrorists in murdering a civil rights attorney who was performing his job by defending both Republican and Loyalist suspects.<sup>244</sup> In effect, in 1989, the British government committed murder through its agents in Northern Ireland. Given such acts, it is unsurprising that peace has remained out of reach in that region.

The Finucane inquiry would provide Britain with a necessary opportunity to accept responsibility for its agents' bad acts and set an example of accountability that could have repercussions across the globe, especially considering the current allegations of both United Kingdom and United States agents torturing and killing suspects in their custody.<sup>245</sup> Only through an inquiry that is unquestionably thorough and that results in the British government accepting responsibility for its agents' illegal acts can Britain prove not only that such activities are no longer ongoing in Northern Ireland, but also that no civilized government should abide such criminal operations within its agencies.<sup>246</sup>

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242. See *id.* ¶ 1.297 (“Without public scrutiny doubts based solely on myth and suspicion will linger long, fester and spread their malignant infection throughout the Northern Ireland community.”).

243. See NY Bar Analysis, *supra* note 25, at 12 (“The [Inquiries Act 2005] could have serious implications for human rights where government actors may perpetrate abuses, or fail to investigate them, unrestrained by fear of public exposure.”).

244. See *supra* Part I.A.

245. See Human Rights Watch: United States, Recent Human Rights Watch Work on the Torture and Abuse of U.S. Detainees, [http://www.hrw.org/doc/?t=usa\\_torture](http://www.hrw.org/doc/?t=usa_torture) (last visited Apr. 4, 2006) (compiling articles discussing accusations of torture of terrorist suspects by U.S. and U.K. officials).

246. See NY Bar Analysis, *supra* note 25, at 13 (“Independent public inquiry into [Finucane's murder] is essential so that the people of Northern Ireland may move forward with confidence in the integrity of the government and its institutions.”).

### B. *Options for Promoting Justice and Peace*

This section outlines three steps that can be taken to resolve the controversy created by the Inquiries Act 2005. Part III.B.1 recommends the British government conduct an inquiry into Patrick Finucane's murder that is fully transparent and independent. Part III.B.2 recommends the British courts declare that the 2005 Act is incompatible with European Convention on Human Rights obligations. Finally, Part III.B.3 calls upon the British Parliament to repeal the 2005 Act and replace it with less controversial legislation that provides for independent and fully public inquiries.

Three options exist for dealing with the controversy surrounding the Inquiries Act 2005 and its impact on the Finucane inquiry. The British government can conduct an inquiry under the new legislative framework but do so in a way that fully respects its obligations under the European Convention, refusing to exercise the controversial Inquiries Act 2005 powers that allow for secrecy and governmental control of the inquiry's conduct. The British courts also can declare the Inquiries Act 2005 incompatible with the Convention obligations, though this will not invalidate the Act. Finally, perhaps in the wake of such a court declaration, Parliament can repeal or reform the Act to better comport with the European Convention and address the criticisms leveled against the new law.

#### 1. *Complying with the European Convention*

That the Inquiries Act 2005 conflicts with obligations under the European Convention is not as obvious as the human rights organizations claim.<sup>247</sup> The Act does remove power from Parliament to authorize inquiries and gives ministers a great deal of control over inquiries, including power to end the inquiry before it is completed and to ensure that its findings are not made public.<sup>248</sup> Exercise of either power would clearly violate Convention rights under article 2 by failing to provide a transparent inquiry that leads to accountability for an unnatural death.<sup>249</sup> That such powers will be exercised is not a given, however, despite the assumption upon which opposition seems based. A minister instituting an inquiry could clearly adopt a hands-off policy and allow the tribunal chair to conduct a full, impartial, and public investigation. Nothing in the Inquiries Act 2005 requires ministers to exercise powers that would violate Convention rights,<sup>250</sup> and though some may consider governments incapable of ignoring power once they are granted it, an inquiry fully compliant with Convention rights could be conducted under the new Act.

Conducting such an inquiry is an option the British government should seriously consider in the Finucane case. Considering the support the

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247. The organizations' criticisms of the 2005 Act are discussed in Part II.A.

248. *See supra* Part II.C.2.

249. *See supra* Part II.B.2.

250. *See generally supra* Part II.C.

Labour Party gave the new legislation and the speed with which it passed through Parliament,<sup>251</sup> this government seems particularly attached to the Inquiries Act 2005 and unlikely to repeal it. Given that presumption, perhaps the government's best course is to open an inquiry into Finucane's killing as soon as possible and let it run its natural course as if the new powers granted by the Act did not exist. Allow a tribunal complete independence, allow full public access, and accept accountability for the findings no matter how critical of the government they are. In other words, despite legislation that might allow it to do otherwise, the British government can ensure that the Finucane inquiry complies with the obligations created by the European Convention, and by doing so can both silence its critics (at least until the next inquiry arises) and advance the cause of peace in Northern Ireland.<sup>252</sup>

## 2. Declaring the Inquiries Act 2005 Incompatible

Another option in responding to the Inquiries Act 2005 controversy lies in the hands of Britain's courts. The Human Rights Act 1998 empowers the courts to declare the Act incompatible with the European Convention.<sup>253</sup> Before this can occur, of course, a case must come before the courts that implicates the Inquiries Act 2005. This should not be a difficult obstacle to hurdle, as the Finucane family and at least a dozen human rights organizations seem more than willing to bring suit to challenge the Act.<sup>254</sup> Given such an opportunity, the British courts should adopt an interpretation of the Convention rights that is compatible with the European Court's reading and declare the Inquiries Act 2005 incompatible.

Such a declaration by the British courts will not invalidate the Act.<sup>255</sup> If a Finucane inquiry instituted under the Act eventually leads to such a court ruling, the inquiry itself will continue despite the declaration of incompatibility. This inability of the courts to invalidate the Act heightens the need for the government to create a wholly independent Finucane inquiry tribunal under the Act, because no lawsuit, however merited, will alter the course of the inquiry. A declaration of incompatibility can nevertheless achieve important results. The 2005 Act was passed in Parliament under a declaration that it complied with Convention rights.<sup>256</sup> A court's ruling that that assumption is mistaken—especially a declaration

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251. See *supra* Part II.C.2. The Act was introduced in November 2004 and passed in April 2005.

252. See Cory, *supra* note 1, ¶ 1.296 (“[T]he failure to hold a public inquiry as quickly as it is reasonably possible to do so could be seen as a denial of [the Good Friday Agreement], which appears to have been an important and integral part of the peace process. The failure to do so could be seen as a cynical breach of faith which could have unfortunate consequences for the peace accord.”).

253. See *supra* notes 204-10 and accompanying text.

254. See generally *supra* Part II.A.

255. See *supra* Part II.B.2.

256. See *supra* note 193 and accompanying text.

of incompatibility made public—may undermine parliamentary support for the Act and instigate reconsideration in the Houses of Parliament.

### 3. Repealing or Amending the Inquiries Act 2005

A judicial declaration of incompatibility could lay the groundwork for the most desirable response to criticism of the Inquiries Act 2005—its repeal or substantial amendment. Some of the concerns that Members of Parliament expressed in supporting the legislation are valid—such as the need for occasionally limiting public access to sensitive material implicating national security interests and the efficiency of creating a single act that governs the broad range of potential inquiries<sup>257</sup>—but these concerns can be addressed without violating the obligations of the European Convention on Human Rights. Human rights groups have consistently supported the Tribunal of Inquiry (Evidence) Act 1921, and that Act also provided for maintaining confidentiality of some of a tribunal’s findings,<sup>258</sup> so the power to keep certain findings secret cannot be the critics’ chief concern. Rather, the greatest concern seems to be the strong potential for a lack of independence of tribunal panels because of the expanded powers of ministers to control the membership, focus, and scope of inquiries. Such control, potentially by those who are the focus of the investigation, is utterly unacceptable in any inquiry expected to be effective in investigating “definite matter[s] . . . of urgent public importance.”<sup>259</sup>

These concerns are valid and should be addressed either through the repeal of the Inquiries Act 2005 or a substantial amendment that scales back ministers’ control and creates an inquiry framework that is necessarily—as opposed to merely potentially, depending on a minister’s willingness to forego his or her powers of control—independent and transparent. Parliamentary involvement in the inquiry framework is not an essential element to independence and transparency, as inquiries have been conducted without Parliament’s oversight and have been considered independent and sufficiently transparent.<sup>260</sup> However, given Parliament’s greater accountability to the British public, reintroducing some level of parliamentary oversight over inquiries might further improve the perception of those inquiries as reliable and thorough.<sup>261</sup>

Repealing the Act may be too much to expect from Parliament, especially since some provisions represent valuable improvements in Britain’s inquiry framework. However, repeal followed by introduction of replacement legislation that includes these desirable provisions and

257. *See supra* Part II.B.1.

258. *See supra* Part I.C.1.

259. Tribunals of Inquiry (Evidence) Act, 1921, 11 & 12 Geo. 5, c. 7, § 1(1) (Eng.).

260. *See supra* notes 132-36 and accompanying text.

261. *See NY Bar Analysis, supra* note 25, at 13 (“An important restraint on government misconduct will be lost if the inquiry process is administered by the government without a significant role by members of Parliament. . . . Indeed, legislatures and parliaments play a crucial role in promoting transparency and accountability in government.”).

excludes those likely to lead to violations of Convention rights would most thoroughly cleanse future inquiries of presumptions of government control, and allow Britain to move forward without lingering doubts regarding its compliance with Convention rights.

#### CONCLUSION

Belfast civil rights lawyer Patrick Finucane was murdered by Loyalist paramilitaries acting in concert with British officials. The collusion of state agents in his killing demands accountability on the part of the British government, and an inquiry into his killing can play a pivotal role in the ongoing peace process in Northern Ireland. If the peace process is to succeed, an essential element is the British government's willingness to take responsibility for its actions during the last thirty years, just as Republican groups such as the IRA must take responsibility. One important step in that process is conducting an inquiry into Patrick Finucane's murder that is complete and transparent, and through which the British government accepts full accountability for any role its agents played in his killing. Such an inquiry, whether conducted under the Inquiries Act 2005 or under the original 1921 Act, must comply with the obligations of the European Convention. The British government should institute an inquiry that is fully independent and ensure that all findings are made public. Meanwhile, the British courts should take the first opportunity to declare the Inquiries Act 2005 incompatible with Britain's obligations under the European Convention, and Parliament should repeal the 2005 Act and replace it with legislation that ensures all future inquiries will be independent, transparent, and effective.