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NORTHERN IRELAND: SUBMISSION BY AMNESTY
INTERNATIONAL TO THE
CRIMINAL JUSTICE REVIEW



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Amnesty International

Amnesty International is a world-wide voluntary movement that works to prevent some of the gravest violations by governments of people's fundamental human rights. The main focus of its campaigning is to:

- *free all prisoners of conscience. These are people detained anywhere for their beliefs or because of their ethnic origin, sex, colour, language, national or social origin, economic status, birth or other status- who have not used or advocated violence;*
- *ensure fair and prompt trials for political prisoners;*
- *abolish the death penalty, torture and other cruel treatment of prisoners;*
- *end extrajudicial executions and 'disappearances'.*

Amnesty International also opposes abuses by opposition groups, including hostage taking, torture and killings of prisoners and other deliberate and arbitrary killings.

Amnesty International is impartial. It is independent of any government, political persuasion or religious creed. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect. It is concerned solely with the protection of the human rights involved in each case, regardless of the ideology of the government or opposition forces, or the beliefs of the individual.

**Submission by
Amnesty International
To the Review of the Criminal Justice System in Northern Ireland**

1. Introduction

One of the prime functions of the state is to arbitrate between citizens and dispense justice. This process should be underpinned by respect for the individual's rights, most fundamentally the rights to life and to liberty of person. When these rights are violated, a state has an obligation to bring to justice those responsible for violations. Coupled with this responsibility is an obligation to ensure that when an individual is accused of a crime, the administration of justice is guided by human rights principles, in particular the right to a fair trial. When a state fails to fulfill (or be perceived to fulfill) these obligations, justice may be disputed and the state's very legitimacy be undermined.

Legal justice, that is, the fair and just dispensation of the law, remains one of the most enduring and contentious issues in Northern Ireland. Amnesty International welcomes the human rights aspects of the Multi-Party Agreement and the potential they hold to improve human rights protection and establish an equitable legal justice system in Northern Ireland. Under the terms of the Agreement, a mechanism was established to undertake a "wide ranging review of criminal justice". The Independent Review Group charged with undertaking this task issued a consultation paper on the "Review of the Criminal Justice System in Northern Ireland". Amnesty International has received and reviewed the consultation document.

Amnesty International has a well-known record of investigating and documenting human rights abuses in Northern Ireland since the early 1970s. This work has been conducted in accordance with Amnesty International's mandate and has focussed on three primary issues: ill-treatment and torture; fair trial issues for political prisoners; and political killings. In our submission to the Review of the Criminal Justice System in Northern Ireland we will limit our comments to issues relevant to Amnesty International's mandate.

It is noted that the scope of the review precludes issues related to policing and emergency legislation. It is our belief that any review related to the criminal justice system in Northern Ireland must be holistic and coherent. It is unrealistic to suggest that matters relating to accountability, responsiveness, the prosecution process or criminal investigations can be seriously and thoroughly addressed without considering the current legislation under which the police and courts operate. Nor is it possible to address matters relating to public perception of the justice system without addressing the nature of policing.

For nearly three decades, the criminal justice system in Northern Ireland has operated under emergency legislation, creating the "distinct circumstances" referred to by the Review Group. Whilst the Review Group is correct to note that separate reviews of policing in Northern Ireland and UK-wide emergency legislation are underway, it is clear from a reading of the 1998 Multi-Party Agreement that these reviews must be cooperative.

At all stages--from arrest to imprisonment--emergency legislation has eroded public confidence in the criminal justice system in Northern Ireland. The scope of police powers of arrest and detention are determined by emergency legislation. The role of lawyers, the conduct of judges, and the admissibility of confession evidence are limited or expanded under emergency legislation. Whilst emergency legislation is extraordinary and, ostensibly, temporary in nature, powers related to arrest and detention currently legislated under emergency legislation may be incorporated into impending UK-wide "Legislation Against Terrorism," thereby becoming a permanent feature of the criminal justice system in Northern Ireland.

In Amnesty International's opinion, the role of the police is inextricably linked to issues of justice and accountability. Amnesty International's submission to the Independent Commission on Policing in Northern Ireland clearly lays out our organization's concerns about discriminatory policing in Northern Ireland. As detailed in that document, the investigations process of the criminal justice system has been compromised by the failure of the police to carry out prompt, impartial and thorough investigations.

Against this backdrop, Amnesty International's submission to the Review of the Criminal Justice System in Northern Ireland will, where appropriate, raise matters related to emergency laws and policing in the context of our examination of the criminal investigations and prosecutions processes in Northern Ireland.

Amnesty International also wishes to raise two other points regarding the scope of the review process. In addition to the omission of policing and emergency legislation from the remit of the review, the consultation document does not specifically address or raise questions regarding the inquest system, or the role of the Attorney General. These issues must, in our view, be part of the review process. Second, Amnesty International has strong reservations regarding the manner in which the current review process has been structured. It is clear from a reading of the Multi-Party Agreement that all reviews undertaken must be "coherent and cooperative". Therefore, reviews of policing, anti-terrorism legislation and the criminal justice system must, necessarily, be consultative. We are not convinced that reviews undertaken separately and exclusively can provide a coherent and holistic approach to the necessary reforms needed in the legal justice system. That said, the establishment of three separate reviews, without a coordinating body, raises an added concern regarding the post-review process. It is inevitable that in undertaking reviews which, in our view, are inextricably linked, reports produced by each process will necessarily inform, complement and at times contradict the recommendations put forth by other review bodies. To our knowledge, no mechanism has been established to provide an overview of the final recommendations of each of the separate processes: policing, criminal justice review and anti-terrorist legislation. It is our view that the establishment of such a mechanism is vital. We do not believe that this role can properly be played by the Human Rights Commission, both because it has been newly established and because it already has a large number of urgent issues and undertakings.

Amnesty International's submission to the Review of the Criminal Justice System in Northern Ireland is presented in five sections. Following the introduction, we examine the criminal

investigations and prosecution procedures in cases of alleged ill-treatment and cruel, inhuman or degrading treatment. In this section we examine the powers of arrest under emergency legislation, ill-treatment during detention and interrogation, the role of the Director of Public Prosecutions (DPP) in investigating allegations of abusive policing practices during arrest and detention, and the harassment and intimidation of defence lawyers. Section 3 examines our fair trial concerns. We examine the right to legal counsel and the right to silence during pre-trial investigations, fair trial concerns under the Diplock Court system, and the composition and ethos of the judiciary. Section 4 outlines what Amnesty International has identified as grave areas of concern regarding disputed political killings in Northern Ireland. We look at the role of the police and DPP in investigating and prosecuting police officers allegedly involved in extra-judicial executions. Also included in this section is a review of the inquest procedure in Northern Ireland. Section 5 will address concerns regarding discriminatory policing practices in Northern Ireland which, we argue, have violated a number of human rights provisions, including the right to life.

2. Torture and Cruel, Inhuman or Degrading Treatment

2.A. Emergency Powers

Amnesty International considers that many provisions in the emergency legislation are in breach of international treaties and standards. Emergency legislation in Northern Ireland was initially embodied in the Civil Authorities (Special Powers) Act (NI) which was introduced in 1922 and remained in effect until 1972. The Act provided the security forces with sweeping powers of search and seizure, arrest and detention. Following a review by a government commission led by Lord Diplock in 1972, a series of recommendations was made culminating in the Northern Ireland (Emergency Provisions) Act (EPA). Many of the provisions of the repealed Special Powers Act were resurrected in the EPA and an infrastructure of 'emergency' was put in place. Under this legislation a system of trial without jury, commonly known as the Diplock Courts, was established. Subsumed under the EPA were sweeping powers of arrest, detention and internment without trial, and the authority to proscribe organizations.

Additional "special powers" were adopted under a series of Prevention of Terrorism Acts (PTA) first instituted in 1974. Current PTA legislation (1996) allows for detention for up to seven days and the proscription of organizations. Unlike the EPA, the PTA applies to all of the United Kingdom. In 1990, the Police and Criminal Evidence (Northern Ireland) Order (1989) was adopted, which addressed police powers. This was followed by the Northern Ireland Emergency Provisions Act 1991 which essentially readopted provisions from earlier PTAs, incorporated PTA provisions and expanded special powers to include provisions for search and seizure, anti-racketeering, and the establishment of an independent assessor of military complaints. Both the EPA and PTA continue to be renewed annually, despite the Committee against Torture's recommendation in 1995 to repeal these laws. In fact, additional emergency powers have been added since the UN Committee's recommendation.

In April 1996 further amendments to the PTA were rushed through giving police in England sweeping powers to stop and search people in the streets. Refusal to co-operate could lead to a

six-month jail sentence.

Again in August 1998, in the wake of a bomb-blast in Omagh which caused the deaths of 29 people, the government rushed to introduce further emergency powers which even it called "draconian". The Criminal Justice (Terrorism and Conspiracy) Act 1998, which was adopted in September 1998, relaxes rules of evidence to facilitate convictions for membership of proscribed organizations by allowing the opinion of a senior police officer to form the basis for prosecutions on such a charge. Amnesty International expressed concern that these provisions infringe the right to be presumed innocent until proven guilty beyond a reasonable doubt. The Act also allows inferences of guilt, drawn from a suspect's silence in the face of questioning about membership, to be used to corroborate the senior officer's opinion. The organization is concerned that this further violates the prohibition of compelling people to testify against themselves and impermissibly shifts the burden of proof onto the accused. In addition, the provisions of the Act which create a new offence of conspiracy to commit offences outside the United Kingdom raise concern about infringement of rights of freedom of expression and association. Amnesty International believes these measures are in violation of international human rights law.

As Amnesty International has documented, such wide-ranging powers afforded to the police under emergency legislation create conditions which are conducive to the abrogation of human rights, which has included ill-treatment during detention and interrogation.

2.B. Ill-treatment during detention and interrogation

Since the 1970s, Amnesty International has investigated and documented allegations of ill-treatment and torture in special police interrogation centres in Northern Ireland, most notably Castlereagh Holding Centre in Belfast. As we have pointed out, there is no statutory basis for these holding centres.

Under emergency powers, detainees can be held up to seven days without judicial review of their detention and can be denied access to legal counsel for up to the first 48 hours of detention and for intervals of 48 hours thereafter. There is no doubt that during periods in which detainees are held virtually incommunicado, an atmosphere conducive to ill-treatment exists. Such prolonged detention without access to a lawyer is contrary to Principle 18 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 7 of the UN Basic Principles on the Role of Lawyers and Article 14(3) of the International Covenant on Civil and Political Rights (ICCPR). An individual is held in isolation in conditions that have been accurately described as "harsh" in a recent report by the UN Special Rapporteur on the Independence of Judges and Lawyers, Param Cumaraswamy. Interrogations can happen over protracted periods of time during which the individual has no right to the presence of a solicitor (see Section 3 of this report) nor access to family members. Additionally, transport vehicles and the Scenes of Crime room do not have video or audio recording equipment.¹ Amnesty International has documented cases of police abuse that have allegedly occurred during transport and in the Scenes of Crime room.

¹Prior to 1997, holding centres were equipped only with silent, non-recording monitors. The Northern Ireland (Emergency Provisions) Bill 1997 (Clause 4 and 5) required the installation of video/audio recordings at interrogation centres. The government has reported that video and audio recording has been installed in interrogation rooms.

The risk of human rights abuse posed by these emergency law practices are clear. Amnesty International has documented alleged physical, as well as verbal and psychological abuse, during detention and interrogation. Additionally, it is during the interrogation process that detainees have complained that threats against their solicitors by detectives were made. Of the 108 cases in 1997 resulting from complaints made by persons arrested under emergency legislation, *none led to disciplinary charges.*² As noted in our recent Amnesty International report on emergency law practices in the United Kingdom:

“Amnesty International also continued to receive complaints of verbal and psychological abuse and of threats of violence, as well as complaints that detectives made comments about the suspects' lawyers which amount to harassment and intimidation, including death threats. Despite the allegations, there continue to be inadequate safeguards for the protection of suspects detained in these special centres.”³

Amnesty International believes that the first course of action must be to close all interrogation/holding centres and to detain suspects arrested under emergency legislation in designated police stations. Secondly, *Amnesty International has called on the government to allow those held under emergency legislation to have the right to immediate access to legal advice and to the presence of their lawyer during interrogation.*

2.C. International Standards and the Role of Prosecutors

In cases of alleged abusive policing practices, Amnesty International considers that the current prosecutions process, specifically the role of the Director of Public Prosecutions (DPP), has failed to ensure full and impartial investigations in cases where members of the police force are involved and has failed to bring prosecutions for ill-treatment, even in cases where there has been strong corroborative medical evidence.

The Multi-Party Agreement, under which the Criminal Justice Review was created, is underpinned by a commitment to international human rights law and standards. It is, therefore, necessary for all bodies established under the Agreement to bear in mind their obligation to ensure that whatever mechanism is instituted as a result of the review process is in compliance with the relevant international human rights instruments. To this end, and as noted in the Review Group's consultation paper, the criminal justice system must “conform” to international human rights standards. It is a useful starting point, therefore, to review the UN Guidelines on the Role of

²Of the 108 cases, 8 were withdrawn, 62 were granted dispensation, and the rest were dismissed as there was insufficient evidence to proceed. Statistics obtained from the 1997 Annual Report of the Independent Commission for Police Complaints for Northern Ireland, pp. 59, 61.

³See Amnesty International, *United Kingdom: UN report criticizes emergency law practices in Northern Ireland*, EUR 45/06/98, April 1998, p.2.

Prosecutors,⁴ which were “formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings”. In particular, we refer to the following guidelines:

- Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system (Article 12).

In the performance of their duties, prosecutors shall:

- Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination (Article 13a);
- Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences (Article 15);
- When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice (Article 16).

The Review Group’s statement that the independence of the prosecution process is of “critical importance” is thus echoed in international standards. Effective and independent prosecutors are essential components of the judicial system. However, Amnesty International does not share the view, expressed in the Review Group’s consultation paper, that the Prosecutions of Offences (Northern Ireland) Order 1972 “ensure[s] that the Director of Public Prosecutions for Northern Ireland, in the exercise of his functions, is independent of the Government, independent of those who carry out the investigation into alleged crime or crimes, and of those to whom the investigative authorities are responsible”.

Amnesty International has been concerned that the prosecution process may not be independent of either the government or of the police. This concern is based on three factors. First, an examination of the role of the DPP in cases of alleged abusive policing practices strongly suggests that it has failed to carry out its functions “impartially” and failed to “give due attention to the prosecution of crimes committed by public officials” including violations of human rights. Second, the organizational structure of the criminal justice system places the Attorney General, a government appointee, as the chief law officer. The Attorney General’s chief role as minister is to provide legal advice to the government; the Attorney General also appoints the DPP and can relieve him or her of duties. This command structure is inconsistent with the functional

⁴ Adopted by consensus by the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders on 7 September 1990. A copy of the Guidelines is attached to this document.

independence of the DPP. Third, as the case studies presented in this submission show, some decisions of the DPP are subject to review and, indeed, interference by the Attorney General, whose stated role is -- as the Review Group has noted -- to represent the "government's interest in important legal disputes". The result is that in both its structure and in its function, the DPP has proved unable or reluctant to prosecute members of the police. A review of the prosecution rate lends weight to this conclusion. In 1997, there were 835 cases (containing 1013 allegations) of misconduct by police that had been referred to the Director of Public Prosecutions. Of these cases, the DPP directed only three criminal charges. And fourth, the prosecution authorities are completely dependent on the police for providing the evidential basis for prosecutions; the DPP's office does not have independent investigatory powers.

To underline Amnesty International's concern regarding the investigations and prosecutions process, we refer the Review Group to the case of David Adams.

The Case of David Adams

On 18 February 1998 David Adams was awarded £30,000 by the Northern Ireland High Court in damages for the assaults and injuries he received by police officers in February 1994, both during arrest and in the Scenes of Crime room at Castlereagh.

The duty sergeant stated that when David Adams first came into Castlereagh, the sergeant did not see the injuries to his face because Adams had his head down. Yet the doctor, who examined him at that time, stated that he noticed blood on his face and head. Normally injuries should have been recorded on the custody form but this was not done. The duty sergeant also stated that he was in the vicinity of the Scenes of Crime room for 99 percent of the time, and that he had not noticed or heard anything untoward happening. He denied that the doctor had implied that Adams should have been taken to a hospital immediately.

David Adams was in hospital for three weeks, receiving treatment for his injuries. The more serious injuries included: a punctured right lung due to fractured ribs; a fracture of the left leg; and a wound at the back of the head which required stitches. In addition he had bruising on his face and body; injuries to the forehead, temple and nose; grazing of the cheek, lower lip and chin; and an injury to the right eye.

The police officers denied that David Adams had been assaulted or subjected to verbal abuse. However, the High Court judge stated that the medical evidence was consistent with the plaintiff's account and could not be explained by the police account. The judge concluded "at least most of the injuries suffered by the plaintiff were more likely to be the result of direct, deliberate blows," which he referred to as "illegal behaviour"; and that he had been subjected to sectarian verbal abuse.

The judge's conclusions led him to question the truth and accuracy of the evidence of police officers at the scene; he stated that one officer's evidence was unconvincing and unworthy of belief and that his claim to have come down on Adams' back with his knee was made in a futile attempt to explain injuries inflicted by himself and other officers. The judge also stated that the duty sergeant's claim that he was unaware of the injuries was impossible to accept, especially in view of his duty to record the condition of a detainee on arrival. He also criticized the duty sergeant for not transferring David Adams to a hospital promptly.

Amnesty International believes that the ill-treatment of David Adams raises serious questions about the accountability of the police force and about decisions taken by the prosecuting authorities. The court judgment raises several issues that are not only specific to the case of David Adams, but illustrate our concerns regarding the criminal investigations and prosecutions process in cases where there is alleged police abuse.

Reference for Amnesty International's other concerns about the process are set out in Section 4 of this document.

2.D.Intimidation and Harassment of Lawyers

Amnesty International's concerns related to police accountability and the independence of the prosecuting authorities have been consistently raised not only in relation to threats and intimidation of those detained under emergency legislation, but also to the intimidation and harassment of defence lawyers in Northern Ireland. Independent and effective defence lawyers are essential components of the rule of law. Defence lawyers are most effective when they are allowed to work in an environment free from threat and intimidation. Where such conditions are not present and personal security is an issue, the effectiveness and the integrity of work are potentially compromised. Amnesty International argues that it is the obligation of the state to undertake all measures possible to ensure that defence lawyers can perform their functions without fear for personal safety. As recent events reveal, such an environment does not exist in Northern Ireland.

Members of the legal community have reportedly been subjected to varying forms of intimidation and harassment by the RUC including: death threats; false propaganda campaigns alleging paramilitary connections; interference with lawyer/client relationships; and interference with suspects' right to choose legal counsel.

The murder of Lurgan solicitor Rosemary Nelson by a loyalist paramilitary group in March 1999 is the second killing of a human rights lawyer in Northern Ireland. Both Rosemary Nelson and Patrick Finucane were the subject of intimidation and harassment by the RUC. Rosemary Nelson gained prominence for her defence of individuals detained under emergency legislation and was a passionate advocate of the principle of the rule of law. She was recently involved in a number of high profile cases. She represented residents of the predominantly Catholic Garvaghy Road neighbourhood in Portadown who have been subjected to systematic intimidation and violence since a Protestant Orange Order march was re-routed away from this neighbourhood last summer. She also represented the family of Robert Hamill who was killed by a loyalist mob in 1997 during which RUC officers reportedly positioned nearby failed to intervene (see Section 5 of this report).

Noting the killing of Patrick Finucane and complaints by Rosemary Nelson and other lawyers of intimidation, harassment and threats by the security forces, the UN Special Rapporteur on the Independence of Judges and Lawyers conducted a fact-finding mission in 1997. In his report, published in April 1998, he concluded that the RUC had engaged in activities which constituted "intimidation, hindrance, harassment or improper interference" with lawyers.

The UN Special Rapporteur recommended that the authorities conduct an independent and impartial investigation of the threats received by lawyers and called on the government to initiate an independent judicial inquiry into the killing of Patrick Finucane. To date, none of these recommendations have been implemented.

During her contact with Amnesty International, Rosemary Nelson alleged that the RUC issued death threats and used propaganda against her during interrogations with her clients, and had stated that she was verbally and physically assaulted by the RUC. These allegations were the subject of a report by the Independent Commission on Police Complaints (ICPC) disclosed on 24 March 1999. This report detailed the progress made in the investigation of complaints made by Rosemary Nelson against the RUC for harassment, intimidation and death threats. The ICPC had serious concerns about the RUC's initial investigation into the complaints. These concerns

included “general hostility, evasiveness and disinterest on the part of the police officers involved in this investigation” as well as the way investigating officers viewed and treated Rosemary Nelson. At the recommendation of the ICPC, the investigation was taken over by a senior officer from the London Metropolitan Police in July 1998. The investigation was completed in March 1999.

Amnesty International, together with other international and locally based human rights organizations, expressed concern that -- despite being aware of the allegations of threats against them -- the government failed to protect the lives of Patrick Finucane and Rosemary Nelson.

In cases where there have been credible allegations of threats and intimidation made by defence lawyers in Northern Ireland, the response from state authorities has been unacceptable. Amnesty International and other human rights organizations have consistently raised concerns regarding the conduct of police during interrogations. In a number of reports we have provided to the UK Government, and other relevant authorities, we have reported that a pattern of policemen issuing threats to lawyers through their clients has occurred during interrogations carried out at interrogation centres. The state has been slow or reluctant to implement safeguards to protect both detainees and their lawyers.

International human rights groups have consistently called for the immediate closure of police holding centres, as have done international human rights treaty bodies. This has yet to occur. Video/audio recordings of interrogations have only recently been implemented. Transport vehicles and Scenes of Crime room still do not have video or audio equipment. The organization has also called for access to lawyers during interrogation. As threats are often lodged to lawyers through their clients during interrogations, this would effectively prevent such threats from being issued.

Lastly, where credible evidence exists that members of the police have made threats or harassed lawyers, investigations have not been conducted in a timely or sufficiently independent manner. In the case of Rosemary Nelson, the disclosure of the report by the ICPC into the initial RUC investigation of her complaints confirms the concerns expressed by human rights organizations. Amnesty International argues that, given the lack of public confidence in RUC investigations in these cases, there is an urgent need for the establishment of truly independent and impartial mechanisms to assess protection needs and methods.

The effectiveness and independence of defence lawyers and prosecuting authorities are essential components of a judicial system and underpin principles related to fair trial. As we have detailed, Amnesty International has serious concerns regarding the pre-trial investigations process in relation to the protection of detainees and their defence lawyers. In the following section, we examine additional issues related to fair trial rights, including various emergency provisions, which, in our view, have contributed to a lack of public confidence in the fair and just dispensation of the law. These include: the lack of legal access or judicial scrutiny during the initial detention period; the right of silence; the composition and role of the judiciary and the use of ‘juryless’ Diplock Courts.

3. Right to Fair Trial

Under international human rights law, as recognized in the relevant international human rights instruments and the statutes and rules of international criminal courts, the right to fair trial is guaranteed. Domestic law within the United Kingdom recognizes the right to fair trial. Indeed, criminal law in England and Wales is underpinned by two basic principles. First, is the idea that an individual is innocent until proven guilty. Implicit in this notion is that the prosecution carries the burden of proof in establishing the guilt of the accused. Second, is the right not to incriminate oneself. These rights are inextricably linked. The abrogation of one right is likely to impact the other. Fair trial guarantees under international law also include the right to legal representation, and the right to be heard by a competent, independent and impartial tribunal. Together these rights and obligations underpin the principle of the right to fair trial.

The 1998 Human Rights Act, which will operate throughout the United Kingdom, will come into effect in the next year or so. The Act incorporates a majority of provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) into law. It is significant then, to also examine the views of the European Court regarding the compatibility of current legislation with the European Convention on Human Rights.

3.A. Rights During Interrogation

Access to Legal Advice

Amnesty International's fair trial concerns in Northern Ireland include access to a lawyer during pre-trial investigations. Under emergency powers, detainees can be held up to seven days without judicial review of their detention and can be denied access to legal counsel for up to the first 48 hours of detention and for intervals of 48 hours thereafter. The denial of legal assistance during interrogation contravenes both Article 14(3) of the ICCPR and Principle 8 of the UN Basic Principles on the Role of Lawyers.

As previously noted, in *Murray v. UK*, the European Court of Human Rights found that the denial to immediate legal assistance violated a right to fair trial under Article 6 of the European Convention.⁵ In *Murray* the Court ruled that:

“To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is - whatever the justification for such denial - incompatible with the rights of the accused under Article 6.”

The Court held that it was of ‘paramount importance’ for the accused to have access to a solicitor during the ‘early stages’ of a police inquiry. In the *Murray* case, the Court, applying

⁵See *Murray v. UK*, decision by the ECHR, 27 June 1994.

its established case-specific approach, weighed the ‘entirety of proceedings’. It held that the conditions in which Murray was held -- incommunicado detention for 48 hours coupled with the provisions contained in the Order -- deprived the accused of a fair procedure.

Amnesty International has repeatedly called on the government to allow those held to have *immediate* access to legal advice and to be interrogated only in the presence of their lawyer. This view was reiterated in a report by the UN Special Rapporteur on the Independence of Judges and Lawyers, Param Cumaraswamy. The UN Special Rapporteur undertook a fact-finding mission to Northern Ireland in October 1997 to investigate allegations of intimidation and harassment of defence lawyers. In a review of the emergency legislation in the United Kingdom, he stated:

“In the view of the Special Rapporteur, it is desirable to have the presence of an attorney during police investigations as an important safeguard to protect the rights of the accused. The absence of legal counsel gives rise to the potential for abuse, particularly in a state of emergency where more serious criminal acts are involved. In the case at hand, the harsh conditions found in the holding centres of Northern Ireland and the pressure exerted to extract confessions further dictate that the presence of a solicitor is imperative.”⁶

Under emergency legislation, statements, even those that are involuntary in nature, can be admitted as evidence unless the defence meets its burden to produce *prima facie* evidence which shows that a statement was obtained by torture or inhumane or degrading treatment or by using violence or threatening violence. This standard suggests, as noted by the UN Special Rapporteur on the Independence of Judges and Lawyers, “that physical deprivation or psychological pressure short of outright violence is permissible”.⁷ As was compellingly argued by the United States Supreme Court in *Miranda*:

“Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, Since *Chambers v. Florida*, 309 U.S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960). Interrogation still takes place in privacy.

Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.”

Right of Silence

⁶ Report on the mission of the UN Special Rapporteur on the Independence of Judges and Lawyers, para. 47.

⁷ Report on the mission of the UN Special Rapporteur on the Independence of Judges and Lawyers, para 82.

There are two primary elements which constitute the right of silence under international law. The first, and most basic, is that an individual may not be compelled, during pre-trial investigations or trial, to answer questions put before him or her. Specifically, in pre-trial investigations an accused may, when questioned by police, decline to answer all queries, may decline to answer some queries or may wish to remain silent when asked about specific pieces of information. During trial, an accused may choose to remain silent under questioning or may refuse to testify in his or her defence. The second component follows; the exercise of this right does not establish evidence against the defendant.⁸

The right for an accused to remain silent flows from basic principles which had underpinned the system of criminal law in the United Kingdom.⁹ These principles include the presumption of innocence until proven guilty beyond a reasonable doubt (burden of proof resting with the prosecution) and the protection against self-incrimination. The Royal Commission on Criminal Procedure addressed the link between the system and these two principles in a 1981 report:

“In the accusatorial system of trial the prosecution sets out its case first. It is not enough to say merely ‘I accuse.’ The prosecution must prove that the defendant is guilty of a specific offence. If it appears that the prosecution has failed to prove an essential element of the offence, or if its evidence has been discredited in cross-examination, there is no case to answer and the defence does not respond. There is no need for it to do so. To require it to rebut unspecific and unsubstantiated allegations, to respond to a mere accusation, would reverse the onus of proof and would require the defendant to prove a negative--that he is not guilty. Accordingly it is the duty of the prosecution to prove the prisoner guilty which is, in Lord Sankey’s words, the golden thread running through English criminal justice.”¹⁰

In addressing the accused’s right of silence as a protection against self-incrimination, the Royal Commission stated:

⁸ In the 1977 case of *R v. Gilbert* the Court of Appeal held:

It is our opinion now clearly established by the decisions of the Court of Appeal and the House of Lords that to invite an jury to form an adverse opinion against an accused on account of his exercise of his right to silence is a misdirection (66 Cr. App R 237).

⁹ These principles were effectively abrogated in Northern Ireland under the Criminal Evidence (Northern Ireland) Order 1988, and in England and Wales through the passage of the 1994 Criminal Justice and Public Order Act which came into force in 1995.

¹⁰ Royal Commission on Criminal Justice report, Cm 8092, 1981.

“The second element in the right of silence is that no-one should be compelled to betray themselves. It is not only that those extreme means of attempting to extort confessions, for example the rack and thumbscrew, which have sometimes disfigured the system of criminal justice in this country, are abhorrent to any civilised society, but that they and other less awful, though not necessarily less potent, means of applying the pressure to an accused person to speak, do not necessarily produce speech or truth. This is reflected in the rule that statements by the accused to be admissible must have been made voluntarily.”¹¹

When the right of silence is removed, these two essential components -- the presumption of innocence and the right not to be compelled to testify against oneself -- are abrogated. If an accused is required to testify or if negative inferences are allowed to be drawn when the right of silence is invoked, the burden of proof which under international law lies squarely with the prosecution to prove guilt beyond a reasonable doubt, is shifted from the prosecution to the defendant. The ability for a judge or jury to draw adverse inferences from an accused's exercise of the right of silence lowers the standard of proof needed by the prosecution to establish guilt. No longer is the prosecution required to establish guilt beyond a reasonable doubt, but rather to bring evidence which allows the court, when weighed together with the negative inference when an accused exercises his or her right of silence, to determine guilt. It is not just that adverse inferences are considered alongside other evidence which, taken alone, might be sufficient to conclude guilt. Rather, that the court can, when factoring adverse inferences, arrive at a guilty verdict on the basis of evidence which might otherwise be insufficient.

¹¹ *Id.*

Concomitantly, a system which permits compulsion is inconsistent with the right not to incriminate oneself. Permitting adverse inferences drawn from an individual exercising a right of silence is one method of compulsion as it allows law enforcement officials, “undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to incriminate himself, or to force him to testify against another person”.¹² In such a system, there is a shift from the presumption of innocence to one of guilt. Under this system the accused must decide whether to remain silent, thereby be taken as a testimony against oneself, or to testify, which may lead to self-incrimination.

Legislation in operation in Northern Ireland, and in England and Wales¹³ does not protect the right of silence in either the pre-trial or trial stage and, *inter alia*, permits silence to be corroborative of other evidence against an accused. Note the caution given to an accused in circumstances delineated under Article 3 of the Criminal Evidence (NI) Order 1988:

“You do not have to say anything, but I must caution you that if you do not mention when questioned something which you later rely on in Court, it may harm your defence. If you do say anything, it may be given in evidence.”

The implementation of this legislation has denied right to fair trial guarantees -- namely the presumption of innocence beyond a reasonable doubt (burden of proof resting with the State) and the right against self-incrimination. These principles, as previously noted, are not only the “golden thread” which runs through the British criminal justice system, but are either explicitly or tacitly expressed in all major international human rights instruments and statutes and rules of international criminal courts.

The relevant international human rights instruments which provide fair trial guarantees include the Universal Declaration of Human Rights, the ICCPR and the European Convention on Human Rights. The Order is incompatible with the fair trial provisions found in these human rights instruments.

In their General Comment on Article 14, the Human Rights Committee, the body responsible for oversight of states parties’ implementation of the ICCPR, clearly stated:

¹² *The Concluding Document of the 1991 Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe*, Paragraph 23. This document was signed by the United Kingdom.

¹³ In England and Wales, the relevant legislation for examination is the Criminal Justice and Public Order Act 1994. See note 5.

“By reason of the presumption of innocence, the burden of proof of charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proven *beyond reasonable doubt*. Further *the presumption of innocence implies a right to be treated in accordance with this principle* [our emphasis]. It is therefore a duty for all public authorities to refrain from prejudging the outcome of a trial.”¹⁴

In the case of *Barberá, Messegué and Jabardo v. Spain*¹⁵ the European Court of Human Rights held that underpinning the presumption of innocence was:

“...inter alia, that when carrying out their duties, the members of the Court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, *and any doubt should benefit the accused* [our emphasis]”.¹⁶

In *Murray v. United Kingdom*,¹⁷ the European Court of Human Rights found that the denial of access to a solicitor coupled with the power under the Order to draw negative inferences from silence constituted a violation of fair trial provisions enumerated under Article 6 of the European Convention on Human Rights. A review of European Court jurisprudence reveals that challenges to national laws which may not be compatible with the provisions of the Convention will not be undertaken by the Court in the abstract, but rather must be argued through the particulars of a case. Whilst in the unique circumstances of this case,¹⁸ the Court did not find a violation under either 6(1) or 6(2) arising out of the drawing of negative inferences, it is worth examining general comments made by the Court in relation to the right of silence. The Court stated:

¹⁴ Human Rights Committee, General Comment 13/21, para 7 (12 April 1984).

¹⁵ See ECHR ruling in *Barberá, Messegué, and Jabardo v. Spain*, 6 December 1988.

¹⁶ *Id.* para 7.

¹⁷ See *John Murray v. UK*, Judgment of Court, 22 E.H.R.R. 29, 1996.

¹⁸ The *prima facie* case against the defendant was strong which allowed the Court to adopt the national court's common sense reasoning and argue that in the “particular circumstances of this case”, the seeking of an explanation by the defendant was “reasonable” and that therefore the drawing of negative inferences as a result of his decision to remain silent was not “unfair” (para 54).

“Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair trial under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aim of Article 6”.¹⁹

The reasoning adopted in *Murray* strongly suggests that the Court was content to accept the Court of Appeal’s conclusion that the evidence against Murray “...constitute[d] a formidable case against him”.²⁰ The Court then focussed solely upon “the role played by the inferences in the proceedings against the applicant and especially in his conviction”.²¹ This suggests that in a case where the threshold of proof establishing guilt were lower and greater weight given to the drawing of negative inferences, the Court would be open to finding such a role incompatible with Article 6. Indeed some members of the Court, in their partly dissenting opinion on *Murray*, clearly challenged the compatibility of the Order with European Court of Human Rights fair trial provisions. Judge Walsh argued:

“To rely upon it afterwards appears to me to negative [sic] the whole intent of Article 6(2). To permit such a procedure is to permit a penalty to be imposed by a criminal court on an accused because he relies upon a procedural right guaranteed by the Convention.”²²

Whilst no explicit provision is provided in the European Convention on Human Rights, the European Court has accepted that the right not to incriminate oneself is a generally recognized international right which “lies at the heart of a fair procedure and applies to all types of criminal proceedings”.²³ In the Commission’s and later the Court’s opinion in *Saunders v. United Kingdom*²⁴ and the Court’s decision in *Funke v. France*²⁵, it was determined that the right to remain silent during police questioning and the right not to testify

¹⁹ *Op Cit.*, para 45.

²⁰ *Op Cit.*, para 52.

²¹ *Op Cit.*, para 50.

²² Partly dissenting opinion of Judge Walsh in *Murray v. UK*.

²³ See Judgment in *Saunders v. The United Kingdom*, 43/1994/490/572, 17 December 1996, Section A.

²⁴ *Id.*

²⁵ See *Funke v. France*, A/256-A, 16 E.H.R.R. 297, 1993.

against oneself is an “inherent part of the right to a fair hearing under Article 6”.²⁶ In the case of *Funke*, an applicant had refused to disclose incriminating documents to customs authorities. The applicant stated that his right to withhold these documents was protected under Article 6 as he had the right, guaranteed under fair trial provisions, not to incriminate himself. The Court concurred. It held that the “...special features of customs law ... cannot justify such an infringement of the right of anyone ‘charged with a criminal offence’, within the meaning of this expression in Article 6, to remain silent and not to contribute to incriminating himself”.²⁷

In the case of *Saunders v. United Kingdom*, a corporate case involving an illegal trading and share operation, an applicant to the European Commission of Human Rights had been legally compelled under the threat of penalty to make incriminating statements to the Department of Trade and Industry (DTI) Inspectors that, in turn, were used against him in subsequent criminal proceedings. The applicant in this case claimed that his right to a fair trial was violated. The European Commission concurred with the applicant finding that:

²⁶ See Judgment in *Murray v. United Kingdom*, para 41.

²⁷ *Funke*, para 44.

“...the incriminating material, which the applicant was compelled to provide, furnished a not insignificant part of the evidence against him at trial, since it contained admissions which must have exerted additional pressure on him to take to the witness stand. The use of this evidence was therefore oppressive and substantially impaired Mr. Saunder’s ability to defend himself against the criminal charges he faced, thereby depriving him of a fair trial”.²⁸

In its review of the case, the European Court of Human Rights stated:

“The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 (2) of the Convention.”²⁹

“The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent”.³⁰

In finding for the applicant, the Court stated, “ Prosecution made extensive use of statements in a way which sought to incriminate the applicant ... Accordingly, there was an infringement of the applicant’s right not to incriminate himself”.³¹ In this case, the Court determined that statements provided to the Inspectors, given under verbal compulsion, violated fair trial provisions, specifically the right not to incriminate oneself.

²⁸ *Saunders, findings of the Commission, para 65.*

²⁹ *Saunders, findings of the Court, para 68.*

³⁰ *Saunders, para 69.*

³¹ *Saunders, Section A.*

During the pre-trial stage the dangers of fair trial violations are greatest when an accused may be subject to coercive methods of interrogation and, particularly in Northern Ireland, may be without legal counsel (a point we will return to in the next section). Nonetheless, the danger that the use of silence may be given undue weight and consideration during the trial stage remains. As the Royal Commission has accurately observed, a jury (and indeed a judge) is already likely - without instruction - to factor a defendant's use of silence into its deliberation.³² That said, allowing further instruction to be given which directs a jury (or, under Diplock, allows a judge) to weigh such silence in determining guilt does shift the burden of proof. Court decisions have shown that the judiciary is now willing to convict on the basis of a *prima facie* case coupled with the use of silence.³³

The EPA provision, together with curtailment of the right of silence by the Criminal Evidence (Northern Ireland) Order violates the right to fair trial as recognized in provisions of international treaties which prohibit the use of compulsion to obtain evidence from an accused. The power to draw negative or adverse inference from silence is a form of compulsion as it “exert[s] undue influence upon a detainee to compel a confession of guilt”³⁴ or to provide evidence which then may be used to incriminate. This power violates Article 6 fair trial provisions of the European Convention as well as provisions in Article 14 of the ICCPR.

Right of silence - International Criminal Court

Amnesty International is deeply disappointed that the Government has not proposed to amend or repeal legislation which, in effect, abolishes the right of silence by penalizing its exercise, in view of the fact that it has signed the Statute of the International Criminal Court (Statute[ICC]).

This Statute, which establishes a permanent International Criminal Court with jurisdiction to try people accused of the worst possible crimes :genocide, other crimes against humanity and war crimes, expressly provides that the accused has the right to remain silent, without such silence being a consideration in the determination of guilt or innocence. (Article 67 of

³² In its 1993 report, the Royal Commission on Criminal Justice noted:

“There is nothing to stop a bench of magistrates or jury from treating silence as indicative of guilt, but a jury cannot be directly invited to reach this conclusion by prosecuting counsel or the judge” (Royal Commission on Criminal Justice report, 1993, p. 2).

³³ *New emergency legislation introduced in Parliament in September 1998, following the Omagh bombing, allow an individual to be convicted of paramilitary membership solely on the word of a senior RUC officer with the only necessary corroboration to be the accused's exercise of the right to silence.*

³⁴ *See Report on the mission of the UN Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy, to the United Kingdom, E/CN.4/1998/39/Add.4, 5 March 1998, para 79.*

the ICC Statute). In addition to this right and the right not to be compelled to testify or confess guilt, any person being questioned by either the Prosecutor or national authority for a crime falling within the jurisdiction of the ICC, unlike suspects in Northern Ireland, has the right to have assistance of counsel and to be questioned in the presence of counsel (Article 55(2) of the [ICC] Statute). All people must be informed of this right, and their right to remain silent, prior to being questioned.

As a signatory of the Statute, the UK is legally bound not to take any steps which would defeat the object and purpose of the Statute pending ratification and, once it ratifies the Statute, the UK must ensure that it provides the same fair trial guarantees in the Statute to persons suspected of crimes within the Court's jurisdiction. Amnesty International urges that the government bring its laws and practice throughout the UK in line with the practice it has agreed should be followed when it signed the Statute of the International Criminal Court.

3.B. Composition and Role of the Judiciary

The independence of the judiciary is fundamental to justice. This notion is enshrined in international human rights treaties including Article 6 of the European Convention which provides: "In the determination of his civil rights and obligations or of any criminal charge against them, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The independence of the judiciary is vital to protect other elements of fair trial safeguarded by international standards including the rights to equality before the law and courts and the rights of all accused of crimes to be presumed innocent until proved guilty.

Drafters of the Multi-Party Agreement recognized the central role of the judiciary in the criminal justice system when it charged the Review Group to consider "arrangements for making appointments to the judiciary and magistracy, and safeguards for protecting their independence".

Amnesty International urges that the Review Group make recommendations to ensure that the judiciary of Northern Ireland is representative of the community, is independent, trained in human rights law, and is accountable for inappropriate behaviour.

Amnesty International is concerned that the method in which judges are appointed is not transparent and there is no accountability. The organization is concerned that, at present, the judiciary in Northern Ireland is not representative of the population of Northern Ireland as women, Catholics, and people from ethnic minorities are under-represented amongst judges. According to the information available to the organization, there is only one female judge, the number of judges who are Catholic is not representative of the community and there are no judges who are members of ethnic minorities.

The organization also believes that the training of judges must include intensive training about human rights standards and mechanisms of protection, as well as training which is aimed at preventing any discriminatory behaviour of judges. A written code of conduct for

judges should prohibit discriminatory behaviour and there must be a mechanism to ensure that people who believe that they have been subjected to inappropriate judicial behaviour have recourse to an impartial body for redress.

Amnesty International therefore recommends that:

- Judicial appointments should be made by an independent committee comprised of members of the legal, as well as lay, community. Appointments to this independent committee must be made public.
- Criteria for judicial appointments must be clear and the process for selection must be transparent, and in accordance with an equal opportunities policy. Appointments to the judiciary should be made after open advertisement and interview. Judicial appointments must be guided by the UN Basic Principles on the Independence of the Judiciary.
- All members of the judiciary must receive substantial and continuing training in international human rights law. Such training include focus on the full range of international human rights standards, not only treaties to which the United Kingdom is a state party. In addition, mandatory training of judges should include training about equality and anti-discrimination issues to combat potential prejudicial attitudes and bias.
- Judges should have a clear written code of conduct, which, among other things, should include prohibitions against all forms of discriminatory and oppressive behaviour and should be consistent with the UN Basic Principles on the Independence of the Judiciary. There should be an impartial mechanism to provide impartial redress to people aggrieved by judicial behaviour.

Amnesty International is also concerned that the lack of separation of powers in parts of the legal system of the United Kingdom has an adverse impact on the administration of justice by independent tribunals. In particular, the Lord Chancellor, whose office appoints judges, is both a member of the government and a judge; and the judges who sit as the appellate committee of the House of Lords (the highest court of the United Kingdom) also sit in the House of Lords as members of Parliament. The organization recommends that government make such changes as are necessary to ensure that the judiciary is completely independent of the executive and legislative branches of government, by ensuring that members of the judiciary are neither members of the government nor the legislature.

Amnesty believes that implementation of these recommendations will help to ensure the United Kingdom's obligations to ensure that the judiciary as an institution and individual judges are independent and impartial as required by Article 14(1) of the ICCPR, Article 6(1) of the European Convention on Human Rights, as well as the UN Basic Principles on the Independence of the Judiciary:

- the judiciary shall decide matters before them impartially, without any restrictions, improper influence, inducements, pressures, threats or interferences, direct or indirect (Principle 1)

- the judiciary shall ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected (Principle 6).

3.C.The Diplock Courts System

We acknowledge that the Government has indicated in its consultation paper on the proposed introduction of “Legislation Against Terrorism” that, whilst the Diplock Courts will be maintained during what it has termed the “transitional period,” the Government’s position is “to move as quickly as circumstances allow to jury trial for all offences”. We welcome this view. Nonetheless, as the duration of this transitional period has not been set, and as there are outstanding fair trial questions raised in relation to previous cases which resulted in unsafe convictions under the Diplock Courts, we wish to address several points regarding these special courts.

International standards prohibit the establishment of special courts which do not use the duly established procedures of the legal process and displace the jurisdiction of ordinary courts (Principle 5 of the UN Basic Principles on the Independence of the Judiciary). International human rights bodies have said that the trial of civilians outside of the ordinary court system is prohibited apart from ‘exceptional’ cases. Moreover, the international instruments and guidelines require that these courts operate in a manner strictly consistent with fair trial requirements. All courts must be “competent, independent and impartial”. Under UN Basic Principles on the Independence of the Judiciary, adjudication must be based on facts and “in accordance with the law, without any restrictions”. Individuals are entitled to a trial by ordinary courts or tribunals, “in accordance with the law”.

Amnesty International has several concerns regarding the use of the Diplock Courts for “scheduled” offences. The ‘juryless’ system, combined with the lower standard for the admission of evidence allowed under emergency legislation, is incompatible with the right to a fair trial.

Under English law, there is a distinction between the jury, which serves as a trier of fact, and the judge who rules on the admissibility of evidence and matters related to the law. Under the Diplock Courts, the judge must take on both roles -- to weigh the evidence **and** apply the law. There are some serious questions regarding the fairness of such an approach as applied in Diplock Courts. Amnesty International notes that in a number of cases, an alleged confession comprised the primary evidence against an individual. In cases where the defendant denies having made a confession or maintains that the confession was obtained under duress, a *voire dire* is entered. In an ordinary court during a *voire dire* a judge, in the absence of the jury, listens to the evidence to determine whether a confession was obtained lawfully. However, in the Diplock Courts, the judge and trier of fact are one and the same. Therefore, if a trial judge decides that a confession is admissible, he or she must formally warn himself or herself to discount anything that he or she heard during the *voire dire* that would be inadmissible in court. If he or she chooses not to admit the confession, then he or she must disregard everything the judge heard during the *voire dire*. This raises a second, related matter, which is the conditions in which the confession has been obtained. Emergency legislation allows for questioning up to seven days. It is during this period, in the

absence of a solicitor, that confessions are alleged to have been made. Emergency legislation also allows for lower admissibility standards for confessions. Such confessions would not be admissible under ordinary law.

There are two further points which may be interrelated. There are only a small number of judges sitting on Diplock Courts. Given this, we have grave concerns that Diplock Court judges are subject to “case hardening”.³⁵ Second, in a number of cases, Amnesty International has documented certain instances in which Diplock judges have made prejudicial or adverse comments. One example is at the trial of the Ballymurphy 7 when the judge stated, upon their acquittal, that their release was not a “resounding vindication on their innocence”. Another statement was by a judge who acquitted three police officers of the murder of Eugene Toman, in an alleged shoot-to-kill case, and then commended them for “their courage and determination in bringing the three deceased men to justice, in this case, the final court of justice”.

3.D. Disclosure of Evidence

Amnesty International has been concerned that in many cases of miscarriages of justice, information has eventually emerged about the failure by the prosecution or the police to disclose all the relevant evidence to the defence. In some instances documents and even evidence of alibi information has been withheld; in other instances the government has used Public Interest Immunity Certificates to block the disclosure of evidence, in particular during inquests. International standards require the prosecution to disclose all relevant evidence. The lack of full disclosure violates the international fair trial principle of equality of arms to both sides in criminal proceedings. The withholding of information by the prosecution from the defence is contrary to international standards such as the UN Guidelines on the Role of Prosecutors and the UN Basic Principles on the Role of Lawyers. Article 67(2) of the Rome Statute of the International Criminal Court provides that “the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused”. Amnesty International urges the repeal of the Criminal Procedure and Investigations Act, which came into force in April 1997, and the introduction of legislation which will ensure the full disclosure of all evidence to the defence.

We would like to bring the following recent developments to the attention of the Review Group, in support of our concerns.

In March 1999 the European Commission ruled that three men convicted of the so-called M25 murder in 1990 had been denied a fair trial because the prosecution withheld crucial documents. The Commission ruled that the Court of Appeal’s decision to allow the use of Public Interest Immunity Certificates had denied “equality of arms” between the prosecution and the defence.

³⁵ The Diplock Courts in Northern Ireland: A Fair Trial?, by Douwe Korff, SIM, 1983.

In May 1999 the Director of Public Prosecutions of England and Wales warned that there was an increased risk of serious miscarriages of justice because the prosecution authorities were withholding vital evidence from defence teams.³⁶ This statement coincided with the publication of two surveys: one carried out by the Law Society and the other by the Criminal Bar Association and the British Academy of Forensic Sciences. The surveys suggested that disclosure problems could be widespread. It was reported that 60 percent of the barristers who replied to the second survey stated they had had problems with the implementation of the Act. A particular concern was the non-disclosure of witness evidence, especially if that evidence was contradictory.

3. Disputed Killings

4.A.Criminal Investigations Process

Amnesty International does not share the view of the Review Group that the RUC is “always...answerable to the law”. In fact, Amnesty International has repeatedly expressed concern that the police have operated with effective immunity from prosecution and in some cases, with impunity for murder. As a result, public confidence in the impartiality and accountability of the RUC has been severely undermined. Whilst we acknowledge that under the terms of the Multi-Party Agreement, a separate review of policing in Northern Ireland is underway, any review of the criminal justice system must necessarily examine the impact of discriminatory policing in Northern Ireland.

Article 2 of the UN Code of Conduct for Law Enforcement Officials requires the human rights of all persons to be observed, including the right to a fair trial. Article 8 requires that law enforcement officials respect the rule of law. Particularly in cases which involve disputed killings or in cases where death may have been the result of the failure of the police to operate in a manner consistent with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement officials, there have been serious flaws in the investigations process undertaken by the RUC. Particularly in cases where alleged police misconduct is involved, the Director of Public Prosecutions may have failed in its charge to make an independent assessment of the facts of the case in order to determine whether there is sufficient evidence to warrant prosecution.

The following cases illustrate our concerns about criminal investigations and prosecutions:

The Case of Patrick Finucane

On 12 February 1989 Belfast lawyer Patrick Finucane was shot dead in front of his family by Loyalist gunmen. Evidence that emerged in the wake of his killing strongly suggests that there was collusion between members of military intelligence and the loyalist paramilitary group, the Ulster Freedom Fighters, which was responsible for his death. Despite strong evidence of collusion, the government has consistently refused to conduct a prompt,

³⁶ *The Financial Times*, 14 May 1999.

thorough, independent and impartial inquiry into the circumstances surrounding the death of Patrick Finucane.

The internal inquiries carried out by senior police officer John Stevens into some aspects of collusion have not allayed concerns of official involvement in the killing of Patrick Finucane; indeed, the refusal by the government to publish the results of these inquiries contributed to allegations of an official cover-up of the killing not just of Patrick Finucane, but of others. However, the role of the prosecuting authorities also contributed to the allegations of a cover-up. It is not known, for example, whether John Stevens recommended the prosecution of army handlers of Brian Nelson, the military intelligence agent and UDA member, for their role, but no prosecutions were brought despite evidence of collusion. It is not known whether the DPP recommended that prosecutions should be brought; it is not known whether the Attorney General decided that prosecutions should not be brought, or indeed whether the Cabinet was involved in making this decision.

Information recently revealed from classified files, detailing meetings of Brian Nelson and his army handlers between 1987-90, raises further questions about the role of Brian Nelson and the official cover-up of his actions. Brian Nelson was charged and convicted of five conspiracies to murder; however, the files suggest that he may have been involved in 15 murders, 15 attempted murders and 62 conspiracies to murder. This is a much larger number than what was declared publicly in 1992: it raises serious questions about official involvement in 92 cases. It is not known why Brian Nelson was only charged in five cases, nor what role the Attorney General played in deciding on the prosecutions, especially given that it was the Attorney General's office that prosecuted Brian Nelson. It is not known what consultations took place with Cabinet members.

The case of Patrick Finucane raises questions about the independence of the prosecution authorities and the rule of law. As the UN Special Rapporteur, Param Cumaraswamy, stated in his report, "so long as this murder is unresolved, many in the community will continue to lack confidence in the ability of the Government to dispense justice in a fair and equitable manner". Amnesty International has urged the government to establish an independent judicial inquiry to examine the full circumstances surrounding the killing of Patrick Finucane and to explain the role of all official authorities in relation to his death. This inquiry should have the powers to examine all the available evidence on these matters and should present a public report of its findings.

The Stalker Affair

The Stalker case also raises substantial questions regarding the independence and indeed effectiveness of the DPP. Whilst undoubtedly the Review Group is aware of this case, we wish to highlight the main issues.

In late 1982, six unarmed people were killed by members of a covert anti-terrorist squad within the RUC. Although prosecutions were brought concerning two of the deaths, no police officer was convicted. It emerged that senior police officers had concocted a false version of events and instructed policemen to give false testimony. As a result of public protest, John

Stalker, a senior British police officer, was appointed by the RUC Chief Constable in May 1984 to examine the cover-ups. He carried out his own re-examination of the evidence in all the cases and believed that he had uncovered crucial new evidence. He alleged that he was obstructed from carrying out a full investigation, and before it was completed he was removed from duty in suspicious circumstances. The inquiry was completed in April 1987 by Colin Sampson, a British Chief Constable. The findings of the Stalker/Sampson inquiry have never been published. In January 1988 the Attorney General announced that the inquiry revealed evidence that RUC officers had attempted or conspired to pervert the course of justice. Nevertheless, because of "national security" and "public interest" considerations, no officer was prosecuted. Disciplinary hearings resulted in 18 officers being reprimanded and one cautioned.

The only alleged criminal actions referred to by the government concerned perverting the course of justice. However, John Stalker had stated that he had uncovered new evidence about the incidents which could point to unlawful killings by policemen in all six deaths. Moreover, a BBC program entitled Public Eye reported that Colin Sampson had himself recommended in 1987 that some RUC officers be prosecuted on criminal charges, including conspiracy to murder one of those killed in 1982. It was also reported that he recommended charges be brought against MI5 (intelligence) officers for the deliberate destruction of a surveillance tape-recording of the shooting of Michael Tighe (crucial evidence in determining whether unlawful action had been taken). Nothing was ever divulged by the government concerning the new evidence uncovered by the inquiry; however at an inquest into one of the incidents, which began in May 1992, the coroner stated his intention of having this evidence presented. However, disclosure of this evidence was blocked through the use of Public Interest Immunity Certificates.

The new evidence uncovered by John Stalker has been in the possession of the Northern Ireland DPP since 1987. It is not known whether or not the DPP considered further criminal prosecutions in relation to the incidents. However, Amnesty International believes that the failure to bring prosecutions in connection with the killings resulted in a concealment of evidence of possible unlawful actions by state officials. Furthermore, the failure to bring prosecutions for the destruction of the tape suggests that the authorities condoned the deliberate destruction of evidence in a potential murder case.

Certain conclusions may be drawn about the 1982 incidents from the Stalker inquiry and its aftermath. It was clear that some suspected members of Republican armed groups who were under surveillance were killed, while unarmed, by a covert anti-terrorist squad of the RUC, and that the surveillance operations involved a large number of police and intelligence officers. The original police investigations were deeply flawed; some officers conspired to cover up the truth; an external police inquiry was allegedly hampered by further attempts to cover up the truth; the failure to publish the findings of the inquiry or to prosecute police officers for alleged offences also contributed to the cover-up; and the repeated measures to conceal the truth contributed to what was effective immunity from prosecution, and possible impunity for murder.

It would also appear from this case that the DPP did not operate independently of the government. The intervention by the then Attorney General Patrick Mayhew³⁷ appears to have prevented the initiation of criminal proceedings despite the fact that, in the opinion of the DPP, there was sufficient evidence to bring charges which included perverting the course of justice.

It is as a result of these case studies, and others, that Amnesty International has concluded that, in cases of disputed killings by the police or army there has been a failure by the prosecuting authorities to fully and effectively execute the duties of this office and, specifically, to bring criminal charges against members of the security forces. Moreover, Amnesty International is concerned that over the years the DPP's office has not been accountable in any way to the public for its decisions. We therefore recommend:

- The establishment of a new and independent prosecuting authority. This authority would be responsible for instructing and advising during the initial investigations period and would be responsible for *all* prosecutions in Northern Ireland.
- The position of director of this office should be publicly advertised and the criteria for selection of the office should be within the public domain. Criteria for appointments should comply with the UN Guidelines on the Role of Prosecutors.
- To ensure compliance with the UN Guidelines and the independence of the prosecution process, the Attorney General would not be permitted to prevent a prosecution by the new body.
- Prosecutors should be trained in international human rights law and standards, as well as in domestic law.
- The Review Group undertake an inquiry as to the reasons why the prosecution rate of the policemen and soldiers involved in killings whilst on duty has been so low.
- The Review Group propose measures, which are consistent with prosecutorial independence, to ensure the accountability of the prosecution authorities for their decisions.

4.B. Inquests

Amnesty International urges the Review Group to address the issue of inquests, even though it was not in the original remit. The inquest procedure is an integral part of the criminal justice system in providing, in most instances, the only public scrutiny of the circumstances of a disputed killings. Some aspects of the inquest procedure are currently under review in England and Wales.

³⁷ Mayhew publicly stated that he had brought to the attention of the DPP matters which related to “public interest and national security” on the basis of which the DPP elected not to initiate criminal proceedings.

Our recommendations on the inquest system are guided by Article 6 of the ICCPR, Article 2 of the European Convention and the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. As Amnesty International has documented over the years, the Northern Ireland inquest procedure fails to satisfy these international standards for thorough, prompt, independent and impartial investigations.³⁸ A review of the current structure of the inquest procedure in Northern Ireland reveals a system that is largely inquisitorial, rather than adversarial. An inquest is undertaken to determine the identity of a deceased person and beyond that, how, when and where that person died. It cannot, beyond these details, examine the full circumstances in which people have been killed. Thus, there is currently no effective public scrutiny of possible unlawful killings. Additionally, there is a systematic use of Public Interest Immunity Certificates which blocks the disclosure of crucial evidence concerning the planning of operations and contributes to the lack of accountability of the security forces.

The inquest procedure in Northern Ireland shares some features with England and Wales, specifically that the victim's family does not receive legal aid, and that the lawyers of the victim's family are unable to receive any evidence before the inquest in order to prepare for the questioning of witnesses. However, the two systems differ in several important aspects. First, any person in Northern Ireland connected with a killing who is, or might be, charged with a criminal offence cannot be compelled to give evidence. In England and Wales, persons allegedly involved in the death, be it police officers, soldiers or prison officers are required to attend the inquest and to give oral testimony. Second, there are no verdicts in Northern Ireland, whereas the inquest jury in England and Wales is able to reach a range of verdicts, including unlawful killing or an open verdict.

We draw the Review Group's attention to the following changes being considered in England and Wales; we are not aware whether these changes are being introduced or considered in Northern Ireland at the same time:

- * The inquiry led by Sir William MacPherson into the police investigation of the killing of Stephen Lawrence recommended that there "should be advance disclosure of evidence and documents as of right to parties who have leave from a Coroner to appear at an inquest";
- * The Police Complaints Authority published a report in February 1999 in which it promised full disclosure of all relevant evidence to the families of the bereaved;
- * The Home Secretary issued guidance in April to the police and to the prison service, requiring the disclosure of documentary material to interested parties before the inquest hearing; the implementation of this guidance will be reviewed after 12-18 months;

³⁸ See among others, *Northern Ireland: Killings by Security Forces and "Supergrass" Trials*, AI Index: EUR 45/08/88; *Political Killings in Northern Ireland*, AI Index: EUR 45/01/94.

* The Stephen Lawrence inquiry also recommended that legal aid should be available to families of victims at inquests, in “appropriate” cases; the Home Secretary stated that there would be explicit statutory provision for “exceptional” cases in the Access to Justice Bill;

* New guidelines are being issued to end the delays suffered by families trying to find out how their relative died while in police custody.

The right to life is a fundamental and non-derogable right. The European Court of Human Rights, in its judgment in *McCann and Others v. UK* (the Gibraltar Three case) stated:

"A general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision ... requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State".³⁹

The inquest system in Northern Ireland fails to comply with international standards. International standards for investigations of suspected cases of extra-legal, arbitrary and summary executions require that:

- investigations...determine the cause, manner and time of death, the person responsible, and procedures to undertake such inquiries;
- [those undertaking investigations] shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify. The same shall apply to any witness. To this end, they shall be entitled to issue summons to witnesses including the officials allegedly involved and to demand the production of evidence.

Amnesty International is very concerned that the government is failing to protect the fundamental right to life by not meeting its obligation to review effectively the lawfulness of the use of lethal force by state agents in Northern Ireland. The inquest system in Northern Ireland has been so severely restricted -- first through legislation, and then through judicial interpretation of the law and the rules -- that it can no longer fulfill any useful role in determining the full circumstances of a disputed killing, or inquiry into the legality of the actions taken by the security forces.

Amnesty International has raised issues related to disputed killings over many years, and we remain concerned that in recent years the courts have increasingly restricted the powers of the inquest. In none of the cases where there may have been an extrajudicial execution has there

³⁹ The Court went on to state that it considered the inquest proceedings in Gibraltar had not "substantially hampered the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killings". The Court made it quite clear that the "procedure" mentioned in the cited paragraph above clearly related to the inquest procedure. However, the Northern Irish system is much more restrictive than the one in Gibraltar.

been a public clarification of the full facts surrounding the killings; in none has justice been seen to be done. In none of these cases do the families of the victims feel that they have been treated as victims, nor can they put the past behind them because they have been deprived of the means of doing so: such means must include a belief that all the evidence concerning the death has been placed before an inquest and that the inquest has been able to draw the necessary conclusions from these facts.

Under Principle 11 of UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, when investigative procedures are inadequate either as a result of the 'lack of expertise or impartiality' and when, in such cases, a victim's family complains because of these inadequacies, governments are obliged to conduct an "independent commission of inquiry". This independent commission must be impartial, and competent and must be independent of any institution or agency that is the subject of inquiry. Therefore, the organization urges the Review Group to recommend the establishment of a different public judicial procedure to examine disputed killings and deaths, a procedure which would be in conformity with international standards and which would meet the needs of accountability and justice.

4. Discriminatory Policing

Amnesty International believes that police investigations into cases of disputed killings by the security forces have not been conducted in a prompt, thorough and impartial manner. The organization has also been concerned about police investigations into incidents in which the police have been indirectly involved. We refer the Review Group to the case of Robert Hamill. Robert Hamill and three of his relatives were returning from a Catholic dance hall through the centre of Portadown on 27 April 1997 when they were confronted by a large group of Protestants who attacked them. The two men, Robert Hamill and Gregory Girvan, were beaten and kicked savagely, while the large crowd shouted sectarian abuse. Robert Hamill, a 25-year-old father of two, died of his head injuries 12 days later.

The relatives stated that four RUC officers, who were sitting in a Landrover in the centre of town, and who were within view of the incident, had not intervened to stop the attack. The initial RUC statements after the incident were totally misleading in that they referred to a fight between rival factions and claimed that the police had come under attack. No one was arrested that evening or in the immediate days afterward for the beating of Robert and his cousin. *It was only after Robert Hamill died that six people were arrested and charged with his murder. Charges against five of the six were subsequently dropped. The sixth man was convicted in March 1999 of affray. No one was ever charged in connection with the assault on Gregory Girvan, the relative of Robert Hamill, who suffered facial cuts and severe bruising. No police officer was suspended pending the investigation.*

The most basic of all human rights is the right to life. The protection of life is the primary duty of law enforcement officials. Article 1 in the Code of Conduct for Law Enforcement Officials requires that law enforcement officials serve the community and protect “all persons against illegal acts, consistent with the high degree of responsibility required by their profession”. The RUC officers failed to fulfill their role and to protect those involved. In the aftermath of the incident, the RUC issued misleading press statements, and the RUC failed to make arrests and to secure forensic evidence promptly. In this case, the family of the victim believes that the investigation into Robert Hamill's killing was not conducted in a prompt, thorough or impartial manner. In any such case, an independent and impartial civilian body should be able to review the investigation at a very early stage, if the family believes that the investigation is not being carried out impartially and thoroughly. Amnesty International also urges the Review Group to give consideration to the recommendation made by Sir William MacPherson, which states: “that consideration be given to the proposition that victims or victims’ families should be allowed to become ‘civil parties’ to criminal proceedings, to facilitate and to ensure the provision of all relevant information to victims or their families”. A special conference in the autumn will apparently be considering this recommendation, along with other ideas arising from the issue of how victims’ views might be taken into account in criminal proceedings.

The questions and concerns highlighted by this particular case have been raised throughout our submission. Our examination of this case study, along with other complaints received and cases reviewed by Amnesty International, has led the organization to conclude that in cases where the conduct of the police is in question, the criminal justice system has failed to operate in a manner consistent with the UK’s obligations under international law to protect the right to life and with international guidelines.

