CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF KELLY AND OTHERS v. THE UNITED KINGDOM

(*Application no. 30054/96*)

JUDGMENT

STRASBOURG

4 May 2001

FINAL

04/08/2001

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kelly and Others v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 4 April 2000 and on 11 April 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 30054/96) against the United Kingdom lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Irish nationals, Vincent Kelly, Kevin McKearney, Amelia Arthurs, Letitia Donnelly, Mary Kelly, Annie Gormley, Patrick O'Callaghan, Carmel Lynagh and Brigid Hughes ("the applicants"), on 5 October 1995.

2. The applicants, who had been granted legal aid, were represented by Mr P. Mageean and Mr D. Korff, lawyers practising in Belfast and London, respectively. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. Whomersley of the Foreign and Commonwealth Office, London.

3. The applicants, next-of-kin of nine men killed during a security force operation at Loughgall on 8 May 1987 – Patrick Kelly, Patrick McKearney, Declan Arthurs, Seamus Donnelly, Eugene Kelly, Michael Gormley, Gerard O'Callaghan, James Lynagh and Antony Hughes – alleged that their relatives had been kill unjustifiably, without any attempt being made to bring them before a court, that this disclosed discrimination and that there was no effective remedy available to them in respect of their complaints. They invoked Articles 2, 6, 14 and 13 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that

would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. Having consulted the parties, the President of the Chamber decided that in the interests of the proper administration of justice, the proceedings in the present case should be conducted simultaneously with those in the cases of *Jordan v. the United Kingdom* (no. 24746/94*), McKerr v. the United Kingdom* (no. 28883/95) and *Shanaghan v. the United K*ingdom (no. 37715/97).

7. Third-party comments were received from the Northern Ireland Human Rights Commission on 23 March 2000, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3).

8. A hearing took place in public in the Human Rights Building on 4 April 2000.

There appeared before the Court:

(a) *for the Government*

Mr C. WHOMERSLEY, *Agent*,
Mr R. WEATHERUP, QC,
Mr P. SALES,
Mr J. EADIE,
Mr N. LAVENDER, *Counsel,*
Mr O. PAULIN,
Ms S. MCCLELLAND,
Ms K. PEARSON,
Mr D. MCILROY,
Ms S. BRODERICK,
Ms L. MCALPINE,
Ms J. DONNELLY,
Mr T. TAYLOR, *Advisers*;

(b) *for the applicants*

Mr D. KORFF,
Ms F. DOHERTY, *Counsel,*
Mr P. MAGEEAN, *Solicitor*.

The Court heard addresses by Mr Weatherup and Mr Korff.

9. By a decision of 4 April 2000, the Chamber declared the application admissible.

10. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The facts of the case, as submitted by the parties and which may be deduced from the documents, may be summarised as follows. The applicants accepted that the summaries below are an accurate reflection of the written statements made by the official personnel involved, without making any admission as to the credibility, consistency and veracity of these statements.

A. Background to the operation at Loughgall

12. Following a briefing that there was likely to be a terrorist attack on Loughgall station of the Royal Ulster Constabulary (the RUC) in County Armagh on 8 May 1987, twenty four soldiers and three RUC officers arrived at the station in the early hours of that day. Under the command of Soldier A, the soldiers positioned themselves in six locations surrounding the RUC station. Soldiers A, B, C, D, E and F were dressed in plain clothes and remained inside the RUC station (Position 1). All the other soldiers wore military uniform. Soldiers G, H, I and J were positioned in a wooded area to the south of the Loughgall Road, near the junction with a road which is the first on the right from the police station going towards Armagh (Position 2). Soldiers K, L, M and N were positioned in a wooded area to the south of the Loughgall road, generally opposite No. 202 Loughgall Road (Position 3). Soldiers O, P, Q and R were instructed to position themselves in a wooded area to the south of the Loughgall Road, near what is known as Ballygasey Cottage (Position 4). Soldiers S, T and U were positioned in a wooded area to the rear of St Luke's Church, on the south side of the Loughgall Road and to the east of the RUC station (Position 5). Soldiers V, W and X occupied a position in a wooded area to the north of the Loughgall Road, about 300 to 400 yards to the rear of the RUC station (Position 6).

13. Three members of the RUC, Constables A, B and C, were positioned inside the RUC station. The RUC station, which operated on a part-time basis only, was opened as normal at 9 a.m. on 8 May 1987. Police Constable A was in charge of the station, with B and C assisting him in the running of the station. The station was closed at 11 a.m., re-opened at 5 p.m. and closed again at 7 p.m.

14. At about 2.30 p.m. two hooded men hijacked a blue Toyota Hiace van from a Mr Corr, who was carrying out some work at the Snooker Club, Mountjoy Road, Dungannon, Co Tyrone. He was warned not to report the incident to the police for four hours. When the men left, Mr Corr phoned his employer, the van's owner, and told him about the incident. The owner,

Mr McGrath, waited four hours and reported the incident to Coalisland RUC at approximately 6.50 p.m.

15. At about 6 p.m., three armed men who said they were from the IRA entered the house of the Mackle family in Aghinlig Upper, Dungannon. The men said they wanted to borrow the digger and one of the sons was brought outside to fill it with diesel. At about 6.30 p.m., a vehicle pulled up outside and a fourth man arrived. It appears that a bomb containing 300 to 400 pounds of explosives was prepared in the yard of the house and placed in the bucket of the digger. At about 6.50 p.m. the digger was driven out of the yard and the other vehicle left shortly afterwards. At about 7.10 p.m. the remaining two gunmen left the house. Attempts by the family to phone the police failed as their phone and that of their neighbour were out of order. However, two of the sons eventually alerted a police patrol.

B. The incident at Loughgall

16. The soldiers reported a number of sightings of the blue Hiace van passing in front of the RUC station in both directions. Reports that the van had been hijacked, and that a digger was acting suspiciously in the area, were also received. Given this information and the knowledge that diggers had been used in previous terrorist attacks, the soldiers were on full alert when, between 7.15 and 7.30 p.m., the blue van came from the Loughgall direction and parked outside the station on the far side of the road facing Armagh.

17. A man, dressed in blue overalls and wearing a balaclava, emerged from the rear of the van and began to walk into the roadway. He raised his rifle and began to shoot at the RUC station. Soldiers A to E, who had positioned themselves at windows on the first floor of the station began to return fire without warning. Soldier F had set up the radio equipment in the rear ground floor room, and he remained there during the shooting. The driver then got out of the van and began to fire at the station. At least four more men emerged from the rear of the van and commenced firing at the station. Following continuous fire from the direction of the RUC station and from other soldiers, some of the IRA men began to take cover behind the van and others went to get into the back of the van. Soldiers A to E fired into the side of the van. Soldier B received a facial injury from flying glass after a window by which he was standing was broken by gunfire.

18. During this time, one of the IRA men drove the digger through the front gate of the station and Soldier B, having spotted this, fired a short burst at the driver. The digger stopped and shortly afterwards there was an explosion which caused masonry and dust to fly everywhere. Soldiers A to F and Constable A were unhurt by the blast, which damaged a large part of the station. Constable C was later treated for a fractured skull, damage to his left sinus, broken facial bone, a broken finger, a broken toe and bruising.

Constable B also received some injuries. Constables B and C were led outside by Constable A and Soldier C, who administered first aid to them. Soldier F also left the station by the rear and did not take any part in the shooting.

19. Soldiers A, B, D and E moved towards the front of the RUC station and continued to fire at the men near the van, firing through the sides of the van when the men took cover inside, until there was no further movement from the gunmen. In his statement to the police, Soldier B stated that he approached the van to clear it of further danger to his life and those of his colleagues. As he looked into the back of the van, he saw two men and a number of weapons. One of the men made a sudden movement and Soldier B fired one round into him as it was his belief that it was the man's intention to get one of the weapons. Soldier V stated that he approached the van with Soldier B, carrying out a visual check of the bodies. As he moved alongside the van, there was a movement in the area of a body that caught his eye. He took this as an immediate threat and fired one burst into the body.

20. Soldiers positioned in other areas also fired at the various gunmen once they had begun to shoot at the RUC station. Some of the soldiers stated that they came under fire. Shortly after the bomb exploded, Soldiers K and R observed what they thought was a gunman lying in the grass behind the police station. He failed to stand up when challenged to do so, and both soldiers fired several rounds at what turned out to be a large lump of wood. Moving down along the back of the houses towards the police station, Soldier K saw a man whom he apprehended, tied his hands and feet and handed him over to the RUC who arrested him. This man was a Mr Tennyson who was not involved in the attack. He happened on the shooting, and had left his car to seek cover when he was detained.

21. Soldier V fired at a man in a blue boiler suit crossing the road in a crouched manner. The man fell. He saw another man behind a wall and shouted to him to stand up. The man moved away quickly, then turned fully towards Soldier V who saw something in his hand which he regarded as an immediate threat and fired two bursts from his rifle until the man fell. Soldier S passing the body saw no weapon near it.

22. When the blue van and the digger arrived at the RUC station, there had been a white Citroen car right behind them. After shooting started but before the bomb went off, this car began to reverse towards the soldiers in position 5. Soldiers S, T and U opened automatic fire on the car and when they stopped firing the vehicle was about 20 metres away. The front seat passenger got out of the car despite a warning from Soldier U not to move. He was wearing blue coveralls. Almost immediately, he was hit by gunfire from Soldier U and he fell to the ground. Later realising that he was still alive, Soldiers S and U moved him onto the pavement and put two field

dressings on his wounds. The driver of the car was dead at the wheel of the car.

23. Soldier W approaching the police station noticed ten feet away in the driveway a person lying on his back still moving. He saw that the man's right hand was clenched and that something metallic was protruding. Believing the man to be a threat to himself and Soldier V, he fired two shots at him. Soldier X checking the body found that the man was holding a cigarette lighter.

24. Other vehicles near the scene of the attack included a red Sierra 15 metres from position 6, occupied by a woman and her daughter, a blue Escort about 70 metres from the scene which was empty and a white Sierra, with three female occupants. These cars, or their occupants, were directed to positions of safety by soldiers as soon as the opportunity arose.

25. When the shooting ceased the soldiers and members of the RUC were airlifted back to their barracks.

C. Police investigation of the incident

26. From 7.35 p.m., officers from the RUC Criminal Investigation Department, the Scenes of Crime Department and the Northern Ireland Forensic Laboratory began arriving to survey the crime scene and identify items of forensic interest. Photographs were taken of the scene and of the bodies. The scene can be described as follows:

27. There were two significantly bullet damaged vehicles, a blue Toyota Hiace van (with approximately 125 bullet holes in the bodywork) and a white Citroen car (with approximately 34 bullet holes in the front, rear and side of the car). In the vicinity of the junction of Clovenden Road/Ballygasey Road there were bullet damaged Vauxhall Cavalier and Ford estate cars.

28. The bodies were wearing blue boiler suits except where specified otherwise.

The first body (Patrick Kelly) was found lying at the front of the van with a radio lying on the ground beside the body and a rifle lying on the body. There was debris on the rifle suggesting that this person was lying on the ground before the explosion. The pathologist noted that his right upper canine tooth had recently been torn out.

The second body (Michael Gormley) was lying on the pavement at the north side of the van near the open side door with a rifle nearby. The body was lying on top of the right leg of body 3, strongly suggesting that body 3 was lying on the ground before body 2 fell.

The third body (Seamus Donnelly) was lying on the pavement towards the north side of the Toyota van. There was ammunition and a cigarette lighter near the body. The pathologist observed at least twenty separate missile wounds (i.e. bullet and fragment) and found that discharge abrasion

on an entry wound on the front of the neck indicated that when the gun was discharged the muzzle was within several feet of the body, probably while it was lying on the ground.

The fourth body (Patrick McKearney) was lying face down along the outside panel inside the rear of the van with the head towards the rear door. There was ammunition in the pocket of the boiler suit (he was also wearing a flak jacket) and in the jeans pocket. The *post mortem* examination revealed at least a dozen wounds to the torso and head.

The fifth body (James Lynagh) was lying diagonally across the interior of the van with the feet towards the rear door. There was ammunition in the pocket of the boiler suit and in the anorak and jeans pockets. Material on the body suggested that it was on the floor before the explosion occurred. He had received multiple bullet and fragment injuries.

There were four loaded rifles and one shotgun found in the van. Three of the stocks were folded.

The sixth body (Eugene Kelly), which had massive head damage and multiple injuries elsewhere, was seated in the driver seat of the van. There was a revolver lying between the driver's seat and his door.

The seventh body (Declan Arthurs) was lying in a lane-way opposite the premises of the Loughgall Football Club. This body was not wearing a boiler suit and there was a cigarette lighter close to the right hand.

The eighth body (Gerald O'Callaghan) was lying on its right side on the pavement at the Loughgall side of the lane-way. Twelve wounds were noted by the pathologist.

The ninth body (Antony Hughes) was seated with the seat belt on in the driver's seat of the white Citroen car. The body was not wearing a boiler suit. The *post mortem* examination showed twenty-nine wounds (bullet and shrapnel).

29. At 10.35 p.m. on 8 May 1987, the police took possession of the firearms used by Soldiers A to X which were delivered the following day to the Northern Ireland Forensic Science Laboratory for examination.

30. On the morning of 9 May 1987, a scene of crimes officer and forensic experts from the Northern Ireland Forensic Science Laboratory conducted an examination of the scene and took possession of a large number of exhibits. The cars were removed for expert examination.

31. Spent cartridge cases were recovered from all over the crime scene which stretched from the junction of Cloveneden Road/Ballygasey Road to the Church/Church Hall in the vicinity of the start of Main Street, Loughgall. In total, 678 spent cartridge cases were recovered, 78 of which were from IRA weapons.

32. On 9 and 10 May 1987, two forensic doctors carried out *post mortem* examinations of the bodies.

33. Between 9 and 12 May 1987, police officers conducted lengthy interviews with soldiers A to X, each of whom made a written statement.

On 16 March 1988, soldier L was asked by the police to clarify his statement.

34. On 21 July 1988, the RUC forwarded a report to the Director of Public Prosecutions for Northern Ireland (the DPP) on the outcome of their RUC investigation. On 22 September 1988, he concluded that the evidence did not warrant the prosecution of any person involved in the shootings. The Government stated that this decision was notified to the next-of-kin of the deceased. The applicants stated that only the family of Antony Hughes was informed.

D. The inquests

35. On 9 May 1990, the statements taken during the RUC investigation were forwarded to the Coroner.

36. On 6 September 1990, the Coroner held a preliminary meeting attended by the lawyers representing the relatives of the deceased. At their request, he adjourned the inquest which he had intended to hold on 24 September 1990, pending the determination of the *Devine* case, before the Court of Appeal (and subsequently the House of Lords), which concerned the powers of Coroners and the procedure at inquests. Judgments were given by the Court of Appeal on 6 December 1990 and by the House of Lords on 6 February 1992, pursuant to which it was established that rule 17 of the Coroners' Rules did not prevent coroners admitting written statements in evidence.

37. The inquests were further adjourned pending the outcome of proceedings relating to the inquests into the deaths of Gervaise McKerr, Eugene Toman and Sean Burns (see application no. 28883/95 brought by Jonathan McKerr). These proceedings involved decisions by the High Court on 2 June 1992 and 21 December 1992 and by the Court of Appeal on 28 May 1993, by which it was held that relatives' counsel was entitled to see a document used by a witness to refresh his memory. There were further proceedings before the High Court on 20 April 1994, when the writs of subpoena, by which the Coroner had attempted to obtain, *inter alia*, copies of the Stalker and Sampson Reports, were set aside. The McKerr, Toman and Burns inquests terminated on 8 September 1994.

38. An inquest into the deaths of the men in the present case was opened on 30 May 1995 in public before a Coroner and a jury of 10 members. It lasted four days. The RUC and Ministry of Defence were represented. On the first day of the inquest, counsel representing the families of six out of the nine deceased (Patrick Kelly, Declan Arthurs, Eugene Kelly, Michael Gormley, Seamus Donnell and Gerard O'Callaghan) sought for the statements of prospective witnesses to be made available to them at the commencement of the proceedings together with the maps and photographs. The Coroner made available the maps and photographs but did not permit

counsel (other than those instructed on the Coroner's behalf) to see witness statements until the witness was giving evidence.

39. On the same day of the inquest, counsel for the six families asked for the proceedings to be adjourned to allow them to seek judicial review of the decision to refuse access to the witness statements. This adjournment was refused and, following the rejection of a second application, counsel was instructed by the six families to withdraw from the hearing to seek a remedy by way of judicial review. This step was taken on 31 May 1995 following consultation with the families and because it was felt "utterly impossible for the applicants' interests to be fairly or adequately represented given the rulings of the Coroner".

40. The hearing of the inquest proceeded without representation for any of the nine families. The Coroner heard 45 witnesses, including the brother of Antony Hughes who had been shot and injured, civilian and police eye-witnesses, including Constables A and B and the police officers involved in the investigation. None of the soldiers appeared but their statements were lodged. It was concluded on 2 June 1995 that all nine men had died from serious and multiple gun shot wounds.

41. The family of Declan Arthurs sought judicial review of the Coroner's decisions not to allow the legal representatives to see witness statements before they gave evidence, not to allow additional time to their advisers to consider expert and controversial evidence, and the refusal of the application for an adjournment. Leave was granted on 1 June 1995. In his judgment of 24 May 1996, Mr Justice McCollum in the High Court refused to quash the Coroner's decisions or the jury verdict. In doing so, the judge placed considerable emphasis on the character of an inquest as a fact finding exercise and not a method of apportioning guilt.

E. Civil proceedings

42. Seven of the families (the relatives of Antony Hughes, Kevin Antony McKearney, Michael Gormley, Seamus Donnelly, Declan Arthurs, Gerard O'Callaghan and Eugene Kelly) issued civil proceedings against the Ministry of Defence on 2 December 1988, 20 March 1990 and 4 May 1990 respectively.

43. On 25 April 1991, the Hughes family settled proceedings for 100,000 pounds sterling (GBP) in respect of Antony Hughes, who was a civilian unconnected with the IRA gunmen.

44. No further steps were taken to pursue the proceedings by the family of Kevin Antony McKearney. Regarding the remaining five families, who are represented by the same lawyer, statements of claim were issued in October 1993, alleging that the shooting of the deceased represented excessive force and was unnecessary and unlawful or, alternatively, that

there was negligence, *inter alia*, in failing to give warnings or an opportunity to submit to lawful arrest and using excessive force.

45. On 13 January 1994, the five families issued notice of their intention to proceed with their claims.

46. On 3 March 1994, the Ministry of Defence served their defence, stating *inter alia* that the force used was necessary to prevent the deceased committing unlawful acts and to protect lives and personal safety. They also served a notice requesting further and better particulars of the statement of claim.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Use of lethal force

47. Section 3 of the Criminal Law Act (Northern Ireland) 1967 provides *inter alia*:

> "1. A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting the arrest or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large."

Self-defence or the defence of others is contained within the concept of the prevention of crime (see e.g. Smith and Hogan on Criminal Law).

B. Inquests

1. Statutory provisions and rules

48. The conduct of inquests in Northern Ireland is governed by the Coroners Act (Northern Ireland) 1959 and the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963. These provide the framework for a procedure within which deaths by violence or in suspicious circumstances are notified to the Coroner, who then has the power to hold an inquest, with or without a jury, for the purpose of ascertaining, with the assistance as appropriate of the evidence of witnesses and reports, *inter alia*, of *post mortem* and forensic examinations, who the deceased was and how, when and where he died.

49. Pursuant to the Coroners Act, every medical practitioner, registrar of deaths or funeral undertaker who has reason to believe a person died directly or indirectly by violence is under an obligation to inform the Coroner (section 7). Every medical practitioner who performs a *post mortem* examination has to notify the Coroner of the result in writing (section 29). Whenever a dead body is found, or an unexplained death or

death in suspicious circumstances occurs, the police of that district are required to give notice to the Coroner (section 8).

50. Rules 12 and 13 of the Coroners Rules give power to the Coroner to adjourn an inquest where a person may be or has been charged with murder or other specified criminal offences in relation to the deceased.

51. Where the Coroner decides to hold an inquest with a jury, persons are called from the Jury List, compiled by random computer selection from the electoral register for the district on the same basis as in criminal trials.

52. The matters in issue at an inquest are governed by Rules 15 and 16 of the Coroners Rules:

> "15. The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely: -
>
> (a) who the deceased was;
>
> (b) how, when and where the deceased came by his death;
>
> (c) the particulars for the time being required by the Births and Deaths Registration (Northern Ireland) Order 1976 to be registered concerning his death.
>
> 16. Neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability or on any matters other than those referred to in the last foregoing Rule."

53. The forms of verdict used in Northern Ireland accord with this recommendation, recording the name and other particulars of the deceased, a statement of the cause of death (e.g. bullet wounds) and findings as to when and where the deceased met his death. In England and Wales, the form of verdict appended to the English Coroners Rules contains a section marked "conclusions of the jury/coroner as to the death" in which conclusions such as "lawfully killed" or "killed unlawfully" are inserted. These findings involve expressing an opinion on criminal liability in that they involve a finding as to whether the death resulted from a criminal act, but no finding is made that any identified person was criminally liable. The jury in England and Wales may also append recommendations to their verdict.

54. However, in Northern Ireland, the Coroner is under a duty (section 6(2) of the Prosecution of Offences Order (Northern Ireland) 1972) to furnish a written report to the DPP where the circumstances of any death appear to disclose that a criminal offence may have been committed.

55. Until recently, legal aid was not available for inquests as they did not involve the determination of civil liabilities or criminal charges. Legislation which would have provided for legal aid at the hearing of inquests (the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, Schedule 1 paragraph 5) has not been brought into force. However, on 25 July 2000, the Lord Chancellor announced the establishment of an Extra-Statutory Ex

Gratia Scheme to make public funding available for representation for proceedings before Coroners in exceptional inquests in Northern Ireland. In March 2001, he published for consultation the criteria to be used in deciding whether applications for representation at inquests should receive public funding. This included *inter alia* consideration of financial eligibility, whether an effective investigation by the State was needed and whether the inquest was the only way to conduct it, whether the applicant required representation to be able to participate effectively in the inquest and whether the applicant had a sufficiently close relationship to the deceased.

56. The Coroner enjoys the power to summon witnesses who he thinks it necessary to attend the inquest (section 17 of the Coroners Act) and he may allow any interested person to examine a witness (Rule 7). In both England and Wales and Northern Ireland, a witness is entitled to rely on the privilege against self-incrimination. In Northern Ireland, this privilege is reinforced by Rule 9(2) which provides that a person suspected of causing the death may not be compelled to give evidence at the inquest.

57. In relation to both documentary evidence and the oral evidence of witnesses, inquests, like criminal trials, are subject to the law of public interest immunity, which recognises and gives effect to the public interest, such as national security, in the non-disclosure of certain information or certain documents or classes of document. A claim of public interest immunity must be supported by a certificate.

2. The scope of inquests

58. Rules 15 and 16 (see above) follow from the recommendation of the Brodrick Committee on Death Certification and Coroners:

> "... the function of an inquest should be simply to seek out and record as many of the facts concerning the death as the public interest requires, without deducing from those facts any determination of blame... In many cases, perhaps the majority, the facts themselves will demonstrate quite clearly whether anyone bears any responsibility for the death; there is a difference between a form of proceeding which affords to others the opportunity to judge an issue and one which appears to judge the issue itself."

59. Domestic courts have made, *inter alia*, the following comments:

> "... It is noteworthy that the task is not to ascertain how the deceased died, which might raise general and far-reaching issues, but 'how...the deceased came by his death', a far more limited question directed to the means by which the deceased came by his death.
>
> ... [previous judgments] make it clear that when the Brodrick Committee stated that one of the purposes of an inquest is 'To allay rumours or suspicions' this purpose should be confined to allaying rumours and suspicions of how the deceased came by his death and not to allaying rumours or suspicions about the broad circumstances in which the deceased came by his death." (Sir Thomas Bingham, MR, Court of Appeal, *R. v the Coroner for North Humberside and Scunthorpe ex parte Roy Jamieson*, April 1994, unreported)

> "The cases establish that although the word 'how' is to be widely interpreted, it means 'by what means' rather than in what broad circumstances ... In short, the inquiry must focus on matters directly causative of death and must, indeed, be confined to those matters alone ..." (Simon Brown LJ, Court of Appeal, *R. v. Coroner for Western District of East Sussex, ex parte Homberg and others*, (1994) 158 JP 357)

> "... it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish the facts. It is an inquisitorial process, a process of investigation quite unlike a trial...
>
> It is well recognised that a purpose of an inquest is that rumour may be allayed. But that does not mean it is the duty of the Coroner to investigate at an inquest every rumour or allegation that may be brought to his attention. It is ... his duty to discharge his statutory role - the scope of his enquiry must not be allowed to drift into the uncharted seas of rumour and allegation. He will proceed safely and properly if he investigates the facts which it appears are relevant to the statutory issues before him." (Lord Lane, Court of Appeal, *R v. South London Coroner ex parte Thompson* (1982) 126 SJ 625)

3. Disclosure of documents

60. There was no requirement prior to 1999 for the families at inquests to receive copies of the written statements or documents submitted to the Coroner during the inquest. Coroners generally adopted the practice of disclosing the statements or documents during the inquest proceedings, as the relevant witness came forward to give evidence.

61. Following the recommendation of the Stephen Lawrence Inquiry, Home Office Circular No. 20/99 (concerning deaths in custody or deaths resulting from the actions of a police officer in purported execution of his duty) advised Chief Constables of police forces in England and Wales to make arrangements in such cases for the pre-inquest disclosure of documentary evidence to interested parties. This was to "help provide reassurance to the family of the deceased and other interested persons that a full and open police investigation has been conducted, and that they and their legal representatives will not be disadvantaged at the inquest". Such disclosure was recommended to take place 28 days before the inquest.

62. Paragraph 7 of the Circular stated:

> "The courts have established that statements taken by the police and other documentary material produced by the police during the investigation of a death in police custody are the property of the force commissioning the investigation. The Coroner has no power to order the pre-inquest disclosure of such material... Disclosure will therefore be on a voluntary basis.."

Paragraph 9 listed some kinds of material which require particular consideration before being disclosed, for example:

– where disclosure of documents might have a prejudicial effect on possible subsequent proceedings (criminal, civil or disciplinary);
– where the material concerns sensitive or personal information about the deceased or unsubstantiated allegations which might cause distress to the family; and
– personal information about third parties not material to the inquest.

Paragraph 11 envisaged that there would be non-disclosure of the investigating officer's report although it might be possible to disclose it in those cases which the Chief Constable considered appropriate.

C. Police Complaints Procedures

63. The police complaints procedure was governed at the relevant time by the Police (Northern Ireland) Order 1987 (the 1987 Order). This replaced the Police Complaints Board, which had been set up in 1977, by the Independent Commission for Police Complaints (the ICPC). The ICPC has been replaced from 1 October 2000 with the Police Ombudsman for Northern Ireland appointed under the Police (Northern Ireland) Act 1998.

64. The ICPC was an independent body, consisting of a chairman, two deputy chairmen and at least four other members. Where a complaint against the police was being investigated by a police officer or where the Chief Constable or Secretary of State considered that a criminal offence might have been committed by a police officer, the case was referred to the ICPC.

65. The ICPC was required under Article 9(1)(a) of the 1987 Order to supervise the investigation of any complaint alleging that the conduct of a RUC officer had resulted in death or serious injury. Its approval was required of the appointment of the police officer to conduct the investigation and it could require the investigating officer to be replaced (Article 9(5)(b)). A report by the investigating officer was submitted to the ICPC concerning supervised investigations at the same time as to the Chief Constable. Pursuant to Article 9(8) of the 1987 Order, the ICPC issued a statement whether the investigation had been conducted to its satisfaction and, if not, specifying any respect in which it had not been so conducted.

66. The Chief Constable was required under Article 10 of the 1987 Order to determine whether the report indicated that a criminal offence had been committed by a member of the police force. If he so decided and considered that the officer ought to be charged, he was required to send a copy of the report to the DPP. If the DPP decided not to prefer criminal charges, the Chief Constable was required to send a memorandum to the ICPC indicating whether he intended to bring disciplinary proceedings against the officer (Article 10(5)) save where disciplinary proceedings had been brought and the police officer had admitted the charges (Article 11(1)). Where the Chief Constable considered that a criminal offence had been

committed but that the offence was not such that the police officer should be charged or where he considered that no criminal offence had been committed, he was required to send a memorandum indicating whether he intended to bring disciplinary charges and, if not, his reasons for not proposing to do so (Article 11(6) and (7)).

67. If the ICPC considered that a police officer subject to investigation ought to be charged with a criminal offence, it could direct the Chief Constable to send the DPP a copy of the report on that investigation (Article 12(2)). It could also recommend or direct the Chief Constable to prefer such disciplinary charges as the ICPC specified (Article 13(1) and (3)).

D. The Director of Public Prosecutions

68. The Director of Public Prosecutions (the DPP), appointed pursuant to the Prosecution of Offences (Northern Ireland) 1972 (the 1972 Order) is an independent officer with at least 10 years' experience of the practice of law in Northern Ireland who is appointed by the Attorney General and who holds office until retirement, subject only to dismissal for misconduct. His duties under Article 5 of the 1972 Order are *inter alia*:

> "(a) to consider, or cause to be considered, with a view to his initiating or continuing in Northern Ireland any criminal proceedings or the bringing of any appeal or other proceedings in or in connection with any criminal cause or matter in Northern Ireland, any facts or information brought to his notice, whether by the Chief Constable acting in pursuance of Article 6(3) of this Order or by the Attorney General or by any other authority or person;
>
> (b) to examine or cause to be examined all documents that are required under Article 6 of this Order to be transmitted or furnished to him and where it appears to him to be necessary or appropriate to do so to cause any matter arising thereon to be further investigated;
>
> (c) where he thinks proper to initiate, undertake and carry on, on behalf of the Crown, proceedings for indictable offences and for such summary offences or classes of summary offences as he considers should be dealt with by him."

69. Article 6 of the 1972 Order requires *inter alia* Coroners and the Chief Constable of the RUC to provide information to the DPP as follows:

> "(2) Where the circumstances of any death investigated or being investigated by a coroner appear to him to disclose that a criminal offence may have been committed he shall as soon as practicable furnish to the [DPP] a written report of those circumstances.
>
> (3) It shall be the duty of the Chief Constable, from time to time, to furnish to the [DPP] facts and information with respect to –
>
> (a) indictable offences [such as murder] alleged to have been committed against the law of Northern Ireland; ...

> and at the request of the [DPP], to ascertain and furnish to the [DPP] information regarding any matter which may appear to the [DPP] to require investigation on the ground that it may involve an offence against the law of Northern Ireland or information which may appear to the [DPP] to be necessary for the discharge of his functions under this Order."

70. According to the Government's observations submitted on 18 June 1998, it had been the practice of successive DPPs to refrain from giving reasons for decisions not to institute or proceed with criminal prosecutions other than in the most general terms. This practice was based upon the consideration that

(1) if reason were given in one or more cases, they would be required to be given in all. Otherwise, erroneous conclusions might be drawn in relation to those cases where reasons were refused, involving either unjust implications regarding the guilt of some individuals or suspicions of malpractice;

(2) the reason not to prosecute might often be the unavailability of a particular item of evidence essential to establish the case (e.g. sudden death or flight of a witness or intimidation). To indicate such a factor as the sole reason for not prosecuting might lead to assumptions of guilt in the public estimation;

(3) the publication of the reasons might cause pain or damage to persons other than the suspect (e.g. the assessment of the credibility or mental condition of the victim or other witnesses);

(4) in a substantial category of cases decisions not to prosecute were based on the DPP's assessment of the public interest. Where the sole reason not to prosecute was the age, mental or physical health of the suspect, publication would not be appropriate and could lead to unjust implications;

(5) there might be considerations of national security which affected the safety of individuals (e.g. where no prosecution could safely or fairly be brought without disclosing information which would be of assistance to terrorist organisations, would impair the effectiveness of the counter-terrorist operations of the security forces or endanger the lives of such personnel and their families or informants).

71. Decisions of the DPP not to prosecute have been subject to applications for judicial review in the High Court.

In *R. v. DPP ex parte C* (1995) 1 CAR, p. 141, Lord Justice Kennedy held, concerning a decision of the DPP not to prosecute in an alleged case of buggery:

> "From all of those decisions it seems to me that in the context of the present case this court can be persuaded to act if and only if it is demonstrated to us that the Director of Public Prosecutions acting through the Crown Prosecution Service arrived at the decision not to prosecute:

(1) because of some unlawful policy (such as the hypothetical decision in Blackburn not to prosecute where the value of goods stolen was below £100);

(2) because the Director of Public Prosecutions failed to act in accordance with his own settled policy as set out in the code; or

(3) because the decision was perverse. It was a decision at which no reasonable prosecutor could have arrived."

72. In the case of *R. v. the DPP and Others ex parte Timothy Jones* the Divisional Court on 22 March 2000 quashed a decision not to prosecute for alleged gross negligence causing a death in dock unloading on the basis that the reasons given by the DPP – that the evidence was not sufficient to provide a realistic prospect of satisfying a jury - required further explanation.

73. *R. v. DPP ex parte Patricia Manning and Elizabeth Manning* (decision of the Divisional Court of 17 May 2000) concerned the DPP's decision not to prosecute any prison officer for manslaughter in respect of the death of a prisoner, although the inquest jury had reached a verdict of unlawful death - there was evidence that prison officers had used a neck lock which was forbidden and dangerous. The DPP reviewing the case still concluded that the Crown would be unable to establish manslaughter from gross negligence. The Lord Chief Justice noted:

"Authority makes clear that a decision by the Director not to prosecute is susceptible to judicial review: see, for example, R. v. Director of Public Prosecutions, ex parte C [1995] 1 Cr. App. R. 136. But, as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no-one else. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the CPS, as it was here, and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial. If, in a case such as the present, the Director's provisional decision is not to prosecute, that decision will be subject to review by Senior Treasury Counsel who will exercise an independent professional judgment. The Director and his officials (and Senior Treasury Counsel when consulted) will bring to their task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only

means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied."

As regards whether the DPP had a duty to give reasons, the Lord Chief Justice said:

"It is not contended that the Director is subject to an obligation to give reasons in every case in which he decides not to prosecute. Even in the small and very narrowly defined cases which meet Mr Blake's conditions set out above, we do not understand domestic law or the jurisprudence of the European Court of Human Rights to impose an absolute and unqualified obligation to give reasons for a decision not to prosecute. But the right to life is the most fundamental of all human rights. It is put at the forefront of the Convention. The power to derogate from it is very limited. The death of a person in the custody of the State must always arouse concern, as recognised by section 8(1)(c), (3)(b) and (6) of the Coroner's Act 1988, and if the death resulted from violence inflicted by agents of the State that concern must be profound. The holding of an inquest in public by an independent judicial official, the coroner, in which interested parties are able to participate must in our view be regarded as a full and effective inquiry (see McCann v. United Kingdom [1996] 21 EHRR 97, paragraphs 159 to 164). Where such an inquest following a proper direction to the jury culminates in a lawful verdict of unlawful killing implicating a person who, although not named in the verdict, is clearly identified, who is living and whose whereabouts are known, the ordinary expectation would naturally be that a prosecution would follow. In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case: to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given, to vindicate the Director's decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision and to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given. We would be very surprised if such a general practice were not welcome to Members of Parliament whose constituents have died in such circumstances. We readily accept that such reasons would have to be drawn with care and skill so as to respect third party and public interests and avoid undue prejudice to those who would have no opportunity to defend themselves. We also accept that time and skill would be needed to prepare a summary which was reasonably brief but did not distort the true basis of the decision. But the number of cases which meet Mr Blake's conditions is very small (we were told that since 1981, including deaths in police custody, there have been seven such cases), and the time and expense involved could scarcely be greater than that involved in resisting an application for judicial review. In any event it would seem to be wrong in principle to require the citizen to make a complaint of unlawfulness against the Director in order to obtain a response which good administrative practice would in the ordinary course require."

On this basis, the court reviewed whether the reasons given by the DPP in that case were in accordance with the Code for Crown Prosecutors and capable of supporting a decision not to prosecute. It found that the decision had failed to take relevant matters into account and that this vitiated the decision not to prosecute. The decision was quashed and the DPP was required to reconsider his decision whether or not to prosecute.

74. *In the Matter of an Application by David Adams for Judicial Review*, the High Court in Northern Ireland on 7 June 2000 considered the

applicant's claim that the DPP had failed to give adequate and intelligible reasons for his decision not to prosecute any police officer concerned in the arrest during which he had suffered serious injuries and for which in civil proceedings he had obtained an award of damages against the police. It noted that there was no statutory obligation on the DPP under the 1972 Order to give reasons and considered that not duty to give reasons could be implied. The fact that the DPP in England and Wales had in a number of cases furnished detailed reasons, whether from increasing concern for transparency or in the interests of the victim's families, was a matter for his discretion. It concluded on the basis of authorities that only in exceptional cases such as the Manning case (paragraph 73 above) would the DPP be required to furnish reasons to a victim for failing to prosecute and that review should be limited to where the principles identified by Lord Justice Kennedy (paragraph 71 above) were infringed. Notwithstanding the findings in the civil case, they were not persuaded that the DPP had acted in such an aberrant, inexplicable or irrational manner that the case cried out for reasons to be furnished as to why he had so acted.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The United Nations

75. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Force and Firearms Principles) were adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

76. Paragraph 9 of the UN Force and Firearms Principles provides, *inter alia*, that the "intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life".

77. Other relevant provisions read as follows:

Paragraph 10

> "... law enforcement officials shall identify themselves as such and shall give a clear warning of their intent to use firearms, with sufficient time for the warnings to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident."

Paragraph 22

> "... Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control."

Paragraph 23

> "Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly."

78. Paragraph 9 of the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65, (UN Principles on Extra-Legal Executions) provides, *inter alia*, that:

> "There shall be a thorough, prompt and impartial investigation of all suspected cases of extra legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances ..."

79. Paragraphs 10 to 17 of the UN Principles on Extra-Legal Executions contain a series of detailed requirements that should be observed by investigative procedures into such deaths.

Paragraph 10 states, *inter alia*:

> "The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the inquiry ... shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify ..."

Paragraph 11 specifies:

> "In cases in which the established investigative procedures are inadequate because of a lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognised impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided in these principles."

Paragraph 16 provides, *inter alia*:

> "Families of the deceased and their legal representatives shall be informed of, and have access to, any hearing as well as all information relevant to the investigation and shall be entitled to present other evidence ..."

Paragraph 17 provides, *inter alia*:

> "A written report shall be made within a reasonable time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures, methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law ..."

80. The "Minnesota Protocol" (Model Protocol for a legal investigation of extra-legal, arbitrary and summary executions, contained in the UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions) provides, *inter alia,* in section B on the "Purposes of an inquiry":

> "As set out in paragraph 9 of the Principles, the broad purpose of an inquiry is to discover the truth about the events leading to the suspicious death of a victim. To fulfil that purpose, those conducting the inquiry shall, at a minimum, seek:
>
> (a) to identify the victim;
>
> (b) to recover and preserve evidentiary material related to the death to aid in any potential prosecution of those responsible;
>
> (c) to identify possible witnesses and obtain statements from them concerning the death;
>
> (d) to determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death;
>
> (e) to distinguish between natural death, accidental death, suicide and homicide;
>
> (f) to identify and apprehend the person(s) involved in the death;
>
> (g) to bring the suspected perpetrator(s) before a competent court established by law."

In section D, it is stated that "In cases where government involvement is suspected, an objective and impartial investigation may not be possible unless a special commission of inquiry is established ..."

B. The European Committee for the Prevention of Torture

81. In the report on its visit to the United Kingdom and the Isle of Man from 8 to 17 September 1999, published on 13 January 2000, the European Committee for the Prevention of Torture (the CPT) reviewed the system of preferring criminal and disciplinary charges against police officers accused of ill-treating persons. It commented, *inter alia*, on the statistically few criminal prosecutions and disciplinary proceedings which were brought, and identified certain aspects of the procedures which cast doubt on their effectiveness:

The chief officers appointed officers from the same force to conduct the investigations, save in exceptional cases where they appointed an officer from another force, and the majority of investigations were unsupervised by the Police Complaints Authority.

It stated at paragraph 55:

"As already indicated, the CPT itself entertains reservations about whether the PCA [the Police Complaints Authority], even equipped with the enhanced powers which have been proposed, will be capable of persuading public opinion that complaints against the police are vigorously investigated. **In the view of the CPT, the creation of a fully-fledged independent investigating agency would be a most welcome development. Such a body should certainly, like the PCA, have the power to direct that disciplinary proceedings be instigated against police officers. Further, in the interests of bolstering public confidence, it might also be thought appropriate that such a body be invested with the power to remit a case directly to the CPS for consideration of whether or not criminal proceedings should be brought.**

In any event, **the CPT recommends that the role of the 'chief officer' within the existing system be reviewed.** To take the example of one Metropolitan Police officer to whom certain of the chief officer's functions have been delegated (the Director of the CIB [Criminal Investigations Bureau]), he is currently expected to: seek dispensations from the PCA; appoint investigating police officers and assume managerial responsibility for their work; determine whether an investigating officer's report indicates that a criminal offence may have been committed; decide whether to bring disciplinary proceedings against a police officer on the basis of an investigating officer's report, and liase with the PCA on this question; determine which disciplinary charges should be brought against an officer who is to face charges; in civil cases, negotiate settlement strategies and authorise payments into court. It is doubtful whether it is realistic to expect any single official to be able to perform all of these functions in an entirely independent and impartial way.

57. ...Reference should also be made to the high degree of public interest in CPS [Crown Prosecution Service] decisions regarding the prosecution of police officers (especially in cases involving allegations of serious misconduct). Confidence about the manner in which such decisions are reached would certainly be strengthened were the CPS to be obliged to give detailed reasons in cases where it was decided that no criminal proceedings should be brought. The CPT recommends that such a requirement be introduced."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

82. The applicants submitted that their relatives had been unjustifiably killed and that there had been no effective investigation into the circumstances of their death. They invoked Article 2 of the Convention which provides:

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

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

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

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

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. The submissions made to the Court

1. The applicant

83. The applicants submitted that the death of their relatives was the result of the unnecessary and disproportionate use of force by SAS soldiers and that their relatives were the victims of a shoot-to-kill policy operated by the United Kingdom Government in Northern Ireland. They argued that in this case the planning and conduct of the operation were such as to suggest that its object was to kill all those involved or that it was negligent as to whether deaths would occur. They referred to the context in which the authorities were applying a more aggressive security response, to the prior knowledge which the security forces had of the operation, including the members of the IRA involved, the fact that no steps were taken to arrest or intercept the IRA members before the incident and that the operation was run as an ambush intended to kill those walking into it. There was no attempt to warn or arrest the IRA members when they arrived on the scene. Instead, there was a heavy concentration of fire which also placed civilians at risk of death and injury. No attempt was made to stop civilian cars from entering the location of the ambush. Having regard to the number and type of bullets fired (600 bullets were recovered out of a possible 2585 used and a mixture of ball tracer and armour piercing ammunition employed), the fact that at least three of the dead men were unarmed, the way in which the soldiers acted to neutralise any perceived threat and the evidence that at least one man (Seamus Donelly) had been shot at close range while on the ground, the operation could not be regarded as employing minimum or proportionate force.

84. The inadequate investigations into this and other cases were also evidence of official tolerance on the part of the State of the use of unlawful lethal force. Here, none of the soldiers were arrested although there were grounds for doing so. They were allowed to leave the scene and not questioned for up to three days later. They had not been isolated from each other and their statements bore remarkable similarity in language, structure and content.

85. The applicants submitted that, while they had been denied any effective resolution to their claims, there was sufficient evidence to justify the Court in ruling that there had been a substantive violation of Article 2. They pointed out that the Government had not presented any arguments that the authorities had done their best to minimise the risk to life during the operation. To the extent that the Court felt unable to reach any conclusions on the facts, they argued that the Court should hear evidence from the soldiers and police officers involved in the incident and the investigation.

86. The applicants further submitted that there had been no effective official investigation carried out into the killings, relying on the international standards set out in the Minnesota Protocol. They argued that the RUC investigation was inadequate and flawed by its lack of independence from the security forces involved in the operation, as well as a lack of publicity or input from the family. The DPP's own role was limited by the RUC investigation and he did not make public his reasons for not prosecuting. The inquest procedure was flawed by the delays, the limited scope of the enquiry which could not deal with issues of training or planning or control of the operation, a lack of legal aid for relatives, a lack of access to documents and witness statements, the non-compellability of security force or police witnesses and the use of public interest immunity certificates. The Government could not rely on civil proceedings either, as this depended on the initiative of the deceased's family.

2. The Government

87. While the Government did not accept the applicants' claims under Article 2 that their relatives were killed by any excessive or unjustified use of force, they considered that it would be wholly inappropriate for the Court to seek itself to determine the issues of fact arising on the substantive issues of Article 2. This might involve the Court seeking to resolve issues, and perhaps examining witnesses and conducting hearings, at the same time as the High Court in Northern Ireland, with a real risk of inconsistent findings. It would also allow the applicants to forum-shop and would thus undermine the principle of exhaustion of domestic remedies. They submitted that there were in any event considerable practical difficulties for the Court to pursue an examination of the substantive aspects of Article 2 as the factual issues would be numerous and complex, involving live evidence with a substantial number of witnesses. This primary fact finding exercise should not be performed twice, in parallel, such an undertaking wasting court time and costs and giving rise to a real risk of prejudice in having to defend two sets of proceedings simultaneously.

88. Insofar as the applicants invited the Court to find a practice of killing rather than arresting terrorist suspects, this allegation was emphatically denied. The Government submitted that such a wide ranging allegation calling into question every anti-terrorist operation over the last thirty years

went far beyond the scope of this application and referred to matters not before this Court. They denied that there had been any inadequacy in the investigation in this case. The police officers who investigated had no prior knowledge of, or involvement in the operation, and their independence and integrity were not compromised by the fact that they were stationed in Armagh. The soldiers were interviewed as soon as the interviewing officers were ready to do so and the number of soldiers involved resulted in the process taking several days. They were entitled to have their legal advisers present and were instructed not to discuss the incident beforehand or to bring statements ready prepared. There was no evidence of collusion in the statements given.

89. The Government further denied that domestic law in any way failed to comply with the requirements of this provision. They argued that the procedural aspect of Article 2 was satisfied by the combination of procedures available in Northern Ireland, namely, the police investigation, which was supervised by the ICPC and by the DPP, the inquest proceedings and civil proceedings. These secured the fundamental purpose of the procedural obligation, in that they provided for effective accountability for the use of lethal force by State agents. This did not require that a criminal prosecution be brought but that the investigation was capable of leading to a prosecution, which was the case in this application. They also pointed out that each case had to be judged on its facts since the effectiveness of any procedural ingredient may vary with the circumstances. In the present case, they submitted that the available procedures together provided the necessary effectiveness, independence and transparency by way of safeguards against abuse.

3. The Northern Ireland Human Rights Commission

90. Referring to relevant international standards concerning the right to life (e.g. the Inter-American Court's case-law and the findings of the UN Human Rights Committee), the Commission submitted that the State had to carry out an effective official investigation when an agent of the State was involved or implicated in the use of lethal force. Internal accountability procedures had to satisfy the standards of effectiveness, independence, transparency and promptness, and facilitate punitive sanctions. It was however, in their view, not sufficient for a State to declare that while certain mechanisms were inadequate, a number of such mechanisms regarded cumulatively could provide the necessary protection. They submitted that the investigative mechanisms relied on in this case, singly or combined, failed to do so. They referred, *inter alia,* to the problematic role of the RUC in Northern Ireland, the allegedly serious deficiencies in the mechanisms of police accountability, the limited scope of and delays in inquests, and the lack of compellability of the members of the security forces who have used lethal force to appear at inquests. They drew the Court's attention to the

form of enquiry carried out in Scotland under the Sheriff, a judge of criminal and civil jurisdiction, where the next of kin have a right to appear. They urged the Court to take the opportunity to give precise guidance as to the form which investigations into the use of lethal force by State agents should take.

B. The Court's assessment

1. General principles

91. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which in peacetime no derogation is permitted under Article 15. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-147).

92. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as for example in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death which occur. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC] no. 21986/93, ECHR 2000-VII, § 100, and also *Çakıcı v. Turkey*, [GC] ECHR 1999- IV, § 85, *Ertak v. Turkey* no. 20764/92 [Section 1] ECHR 2000-V, § 32 and *Timurtaş v. Turkey*, no; 23531/94 [Section 1] ECHR 2000-VI, § 82).

93. The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor however to be taken into account in assessing its necessity. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11

of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (the McCann judgment, cited above, §§ 148-149).

94. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also 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 (see, *mutatis mutandis*, the McCann judgment, cited above, p. 49, § 161, and the Kaya v. Turkey judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 329, § 105). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, for example, *mutatis mutandis*, *İlhan v. Turkey* [GC] no. 22277/93, ECHR 2000-VII, § 63).

95. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see e.g. Güleç v. Turkey judgment of 27 July 1998, *Reports* 1998-IV, §§ 81-82; *Öğur v. Turkey*, [GC] no. 21954/93, ECHR 1999-III, §§ 91-92). This means not only a lack of hierarchical or institutional connection but also a practical independence (see for example the case of Ergı v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, §§ 83-84 where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident).

96. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (e.g. Kaya v. Turkey judgment, cited above, p. 324, § 87) and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see concerning autopsies, e.g. *Salman v. Turkey* cited above, § 106; concerning witnesses e.g.

Tanrıkulu v. Turkey [GC], no. 23763/94, ECHR 199-IV, § 109; concerning forensic evidence e.g. *Gül v. Turkey*, 22676/93, [Section 4], § 89). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.

97. A requirement of promptness and reasonable expedition is implicit in this context (see Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-IV, pp. 2439-2440, §§ 102-104; *Cakıcı v. Turkey* cited above, §§ 80, 87 and 106; *Tanrikulu v. Turkey*, cited above, § 109; *Mahmut Kaya v. Turkey*, no. 22535/93, [Section I] ECHR 2000-III, §§ 106-107). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

98. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see Güleç v. Turkey, cited above, p. 1733, § 82, where the father of the victim was not informed of the decisions not to prosecute; *Öğur v. Turkey*, cited above, § 92, where the family of the victim had no access to the investigation and court documents; *Gül v. Turkey* judgment, cited above, § 93).

2. Application in the present case

a. Concerning alleged responsibility of the State for the death of the nine men at Loughgall

99. It is undisputed that the nine men at Loughgall were shot and killed by SAS soldiers. Three of the men at least were unarmed: Antony Hughes who was a civilian unconnected with the IRA, as well as the IRA members Declan Arthurs and Gerard O'Callaghan. This use of lethal force falls squarely within the ambit of Article 2, which requires any such action to pursue one of the purposes set out in second paragraph and to be no more than absolutely necessary for that purpose. A number of key factual issues arise in this case, in particular whether any warnings could have been given; whether the soldiers acted on an honest belief perceived for good reasons to be valid at the time but which turned out subsequently to be mistaken, namely, that they were at risk from the men who were shot, and whether any of the deceased were shot when they were already injured and on the ground in circumstances where it would have been possible to carry out an arrest.

Determining these issues would involve *inter alia* careful scrutiny of the accounts of the soldiers as to the circumstances in which they fired their weapons during the operation. Assessment of the credibility and reliability of the various witnesses would play a crucial role.

100. These are matters which were raised in the civil proceedings lodged by seven of the families. The action in negligence brought by the family of Antony Hughes was settled, the family of Kevin McKearney have dropped their proceedings, whilst the claims of five other families are still pending (see paragraphs 42-46 above).

(i) Concerning the five families involved in pending civil proceedings

101. The Court considers that in the circumstances of this case it would be inappropriate and contrary to its subsidiary role under the Convention to attempt to establish the facts of this case by embarking on a fact finding exercise of its own by summoning witnesses. Such an exercise would duplicate the proceedings before the civil courts which are better placed and equipped as fact finding tribunals. While the European Commission of Human Rights has previously embarked on fact finding missions in cases from Turkey where there were pending proceedings against the alleged security force perpetrators of unlawful killings, it may be noted that these proceedings were criminal and had terminated, at first instance at least, by the time the Court was examining the applications. In those cases, it was an essential part of the applicants' allegations that the defects in the investigation were such as to render those criminal proceedings ineffective (see e.g. *Salman v. Turkey*, cited above, § 107, where the police officers were acquitted of torture due to the lack of evidence resulting principally from a defective autopsy procedure; *Gül v. Turkey*, cited above, § 89, where *inter alia* the forensic investigation at the scene and autopsy procedures hampered any effective reconstruction of events).

102. In the present case, the Court does not consider that there are any elements established which would deprive the civil courts of their ability to establish the facts and determine the lawfulness or otherwise of the deaths (see further below concerning the applicants' allegations about the defects in the police investigation, §§ 112-113).

103. Nor is the Court persuaded that it is appropriate to rely on the documentary material provided by the parties to reach any conclusions as to responsibility for the death of the applicants' relatives. The written accounts provided have not been tested in examination or cross-examination and would provide an incomplete and potentially misleading basis for any such attempt. The situation cannot be equated to a death in custody where the burden may be regarded as resting on the State to provide a satisfactory and plausible explanation.

104. The Court is also not prepared to conduct, on the basis largely of statistical information and selective evidence, an analysis of incidents over

the past thirty years with a view to establishing whether they disclose a practice by security forces of using disproportionate force. This would go far beyond the scope of the present application.

105. Conversely, as regards the Government's argument that the availability of civil proceedings provided the applicants with a remedy which they have not exhausted as regards Article 35 § 1 of the Convention and, therefore, that no further examination of the case is required under the Article 2, the Court recalls that the obligations of the State under Article 2 cannot be satisfied merely by awarding damages (see e.g. Kaya v. Turkey, p. 329, § 105; Yaşa v. Turkey, p. 2431, § 74). The investigations required under Articles 2 and 13 of the Convention must be able to lead to the identification and punishment of those responsible. The Court therefore examines below whether there has been compliance with this procedural aspect of Article 2 of the Convention.

(ii) Concerning the family of Antony Hughes

106. The Court considers that in bringing civil proceedings for aggravated damages in respect of her husband Antony Hughes the applicant, Bridget Hughes, has used the local remedies available. It has not been shown that the state of domestic law *per se* fails to comply with the Convention standards or that there has been an administrative practice which would render civil procedures ineffective as a remedy for her complaints. Nor has it been shown that the applicant had no alternative to accepting the settlement offered by the authorities in those proceedings and therefore that the civil courts offered no prospect to the applicant of obtaining a finding of liability in her favour.

107. The Court therefore finds that in settling her claims in civil proceedings concerning the death of her husband, and in accepting and receiving compensation, the applicant has effectively renounced further use of these remedies. She may no longer, in these circumstances, claim to be a victim of a violation of the Convention as regards the alleged excessive or disproportionate force used in killing her husband. Her complaints concerning the procedural obligations under Article 2 will be considered below, with those of the other applicants.

(iii) Concerning the families who did not pursue or lodge any civil proceedings

108. The Court has noted above that civil proceedings offered the possibility of obtaining a determination of the issues of lawfulness of the use of force, including its proportionality, as well as providing the possibility of compensation. The applicants have stated that it was not worthwhile to embark on such proceedings as the practice of the State in offering settlements prevented any admissions of liability being issued by the courts, which was what they wanted rather than money as such.

109. The Court observes that in only one of the seven cases introduced by the applicants was a settlement offered by the authorities. In the previous case of *Caraher v. the United Kingdom*, (no. 24520/94, decision [Section 3] 11.01.00), where the applicant accepted a settlement of her action in respect of the killing of her husband by two soldiers, the Court did not find that the civil proceedings had been shown to be ineffective as a means of redress for the applicant's complaints. It finds nothing in the submissions of the applicants in this case to persuade it to reach another conclusion.

110. Consequently, as regards those applicants who did not take or pursue civil proceedings regarding the alleged unlawfulness of the deaths of their relatives, the Court finds that they have failed to make use of the available domestic remedies. It is therefore precluded from examining the applicants' complaints of a substantive violation of Article 2 due to the alleged excessive use of force or negligence in the planning or control of the operation. Their complaints concerning the procedural obligations under Article 2 will be considered below, with those of the other applicants.

b. Concerning the procedural obligation under Article 2 of the Convention

111. Following the deaths of the nine men at Loughgall, an investigation was commenced by the RUC. On the basis of that investigation, there was a decision by the DPP not to prosecute any soldier. An inquest was opened on 30 May 1995 and terminated on 2 June 1995 with verdicts that the nine men had died from serious and multiple gun shot wounds.

112. The applicants have made numerous complaints about these procedures, while the Government have contended that even if one part of the procedure failed to provide a particular safeguard, taken as a whole, the system ensured the requisite accountability of the police for any unlawful act.

(i) The police investigation

113. Firstly, concerning the police investigation, the Court finds little substance in the applicants' criticisms. It appears that the investigation started immediately after the operation ended. The necessary scene of the incident procedures were carried out and evidence secured. The appropriate forensic examinations were conducted. While the soldiers were not interviewed immediately, the interviews were concluded within three days, a not unreasonable period of time considering the numbers involved. While the applicants alleged that the soldiers were not kept apart from their colleagues and their statements showed similarities, the Court does not find any striking signs of stereotyping which would support a finding that the investigators had colluded in, or facilitated, the production of co-ordinated statements.

114. The applicants also complained that the RUC officers involved in the investigation could not be regarded as independent or impartial. While

the investigating officers did not appear to be connected structurally or factually with the soldiers under investigation, the operation at Loughgall was nonetheless conducted jointly with local police officers, some of whom were injured, and with the co-operation and knowledge of the RUC in that area. Even though it also appears that, as required by law, this investigation was supervised by the ICPC, an independent police monitoring authority, this cannot provide a sufficient safeguard where the investigation itself has been for all practical purposes conducted by police officers connected, albeit indirectly, with the operation under investigation. The Court notes the recommendation of the CPT that a fully independent investigating agency would help to overcome the lack of confidence in the system which exists in England and Wales and is in some respects similar (see paragraph 81 above).

115. It is furthermore the case that the investigation was not open to the public and did not involve the applicants or the families. Investigation files are not accessible in this way in the United Kingdom, the Government submitting that the efficiency of procedures requires that the contents be kept confidential until the later stages of a prosecution. The Court considers that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Article 2. The requisite access of the public, or the victim's relatives may be provided for in other stages of the available procedures.

(ii) The role of the DPP

116. The Court recalls that the DPP is an independent legal officer charged with the responsibility to decide whether to bring prosecutions in respect of any possible criminal offences carried out by a police officer. He is not required to give reasons for any decision not to prosecute and in this case he did not do so. No challenge by way of judicial review exists to require him to give reasons in Northern Ireland, though it may be noted that in England and Wales, where the inquest jury may still reach verdicts of unlawful death, the courts have required the DPP to reconsider a decision not to prosecute in the light of such a verdict, and will review whether those reasons are sufficient. This possibility does not exist in Northern Ireland where the inquest jury is no longer permitted to issue verdicts concerning the lawfulness or otherwise of a death.

117. The Court does not doubt the independence of the DPP. However, where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making. Where no reasons are given in a controversial incident involving the use of lethal

force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision.

118. In this case, nine men were shot and killed, of whom one was unconnected with the IRA and two others at least were unarmed. It is a situation which, to borrow the words of the domestic courts, cries out for an explanation. The applicants however were not informed of why the shootings were regarded as not disclosing a criminal offence or as not meriting a prosecution of the soldiers concerned. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Article 2, unless that information was forthcoming in some other way. This however is not the case.

(iii) The inquest

119. In Northern Ireland, as in England and Wales, investigations into deaths may also be conducted by inquests. Inquests are public hearings conducted by coroners, independent judicial officers, normally sitting with a jury, to determine the facts surrounding a suspicious death. Judicial review lies from procedural decisions by coroners and in respect of any mistaken directions given to the jury. There are thus strong safeguards as to the lawfulness and propriety of the proceedings. In the case of McCann and Others v. the United Kingdom (cited above, p. 49, § 162), the Court found that the inquest held into the deaths of the three IRA suspects shot by the SAS on Gibraltar satisfied the procedural obligation contained in Article 2, as it provided a detailed review of the events surrounding the killings and provided the relatives of the deceased with the opportunity to examine and cross-examine witnesses involved in the operation.

120. There are however a number of differences between the inquest as held in the McCann case and those in Northern Ireland.

121. In inquests in Northern Ireland, any person suspected of causing the death may not be compelled to give evidence (Rule 9(2) of the 1963 Coroners Rules, see paragraph 56 above). In practice, in inquests involving the use of lethal force by members of the security forces in Northern Ireland, the police officers or soldiers concerned do not attend. Instead, written statements or transcripts of interviews are admitted in evidence. At the inquest in this case, none of the soldiers A to X appeared. They have therefore not been subject to examination concerning their account of events. The records of their statements taken in interviews with investigating police officers were made available to the Coroner instead (see paragraphs 16 to 23 above). This does not enable any satisfactory assessment to be made of either their reliability or credibility on crucial factual issues. It detracts from the inquest's capacity to establish the facts immediately relevant to the death, in particular the lawfulness of the use of

force and thereby to achieve one of the purposes required by Article 2 of the Convention (see also paragraph 10 of the United Nations Principles on Extra-Legal Executions cited at paragraph 79 above).

122. It is also alleged that the inquest in this case is restricted in the scope of its examination. According to the case-law of the national courts, the Coroner is required to confine his investigation to the matters directly causative of the death and not extend his inquiry into the broader circumstances. This was the standard applicable in the McCann inquest also and did not prevent examination of those aspects of the planning and conduct of the operation relevant to the killings of the three IRA suspects. The Court is not persuaded therefore that the approach to inquests taken by the domestic courts necessarily contradicts the requirements of Article 2. The domestic courts accept that an essential purpose of the inquest is to allay rumours and suspicions of how a death came about. The Court agrees that a detailed investigation into policy issues or alleged conspiracies may not be justifiable or necessary. Whether an inquest fails to address necessary factual issues will depend on the particular circumstances of the case. It has not been shown in the present application that the scope of the inquest as conducted prevented any particular matters relevant to the death being examined. The inability to address issues of the planning, control and execution of the operation resulted primarily from the absence of the soldiers concerned.

123. Nonetheless, unlike the McCann inquest, the jury's verdict in this case could only give the identity of the deceased and the date, place and cause of death (see paragraph 53 above). In England and Wales, as in Gibraltar, the jury is able to reach a number of verdicts, including "unlawful death". As already noted, where an inquest jury gives such a verdict in England and Wales, the DPP is required to reconsider any decision not to prosecute and to give reasons which are amenable to challenge in the courts. In this case, the only relevance the inquest may have to a possible prosecution is that the Coroner may send a written report to the DPP if he considers that a criminal offence may have been committed. It is not apparent however that the DPP is required to take any decision in response to this notification or to provide detailed reasons for not directing a prosecution as recommended.

124. Notwithstanding the useful fact finding function that an inquest may provide in some cases, the Court considers that in this case it could play no effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, falls short of the requirements of Article 2.

125. The public nature of the inquest proceedings is not in dispute. Indeed the inquest appears perhaps for that reason to have become the most popular legal forum in Northern Ireland for attempts to challenge the conduct of the police and security forces in the use of lethal force. The

applicants complained however that their ability to participate in the proceedings as the next of kin to the deceased was significantly prejudiced as legal aid was not available in inquests and documents were not disclosed in advance of the proceedings.

126. The Court notes that six of the families were represented by counsel at the inquest. Legal aid was also available for a judicial review application concerning the Coroner's procedural decisions. It has not been explained why the others were not represented by the same, or by another, counsel or indeed whether they wished to be represented at the inquest. It has not been established therefore that the applicants have been prevented, by the lack of legal aid, from obtaining any necessary legal assistance at the inquest.

127. As regards access to documents, the applicants were not able to obtain copies of any witness statements until the witness concerned was giving evidence. This was also the position in the McCann case, where the Court considered that this had not substantially hampered the ability of the families' lawyers to question the witnesses (cited above, p. 49, § 62). However it must be noted that the inquest in that case was to some extent exceptional when compared with the proceedings in a number of cases in Northern Ireland (see also the cases of *Jordan v. the United Kingdom,* no. 24746/94, *McKerr v. the United Kingdom*, no. 28883/95, and *Shanaghan v. the United Kingdom*, no. 37715/97). The promptness and thoroughness of the inquest in the McCann case left the Court in no doubt that the important facts relating to the events had been examined with the active participation of the applicants' experienced legal representative. The non-access by the next-of-kin to the documents did not, in that context, disclose any significant handicap. However, since that case, the Court has laid more emphasis on the importance of involving the next of kin of a deceased in the procedure and providing them with information (see *Öğur v. Turkey*, cited above, § 92).

Further, the Court notes that the practice of non-disclosure has changed in the United Kingdom in the light of the Stephen Lawrence Inquiry and that it is now recommended that the police disclose witness statements 28 days in advance (see paragraph 61 above).

128. In this case, it may be observed that problems of lack of access to the witness statements was the reason for several long adjournments before the inquest opened. This contributed significantly to prolonging the proceedings. The Court considers this further below in the context of the delay (see paragraphs 130-134). Once the inquest opened, the applicants who were represented requested an adjournment to apply for judicial review of the Coroner's decision not to give them prior access to witness statements. When this was refused, they instructed their lawyer to withdraw from the inquest. The inability of the families to have access to witness statements before the appearance of the witness must be regarded as having

placed them at a disadvantage in terms of preparation and ability to participate in questioning. This contrasts strikingly with the position of the RUC and army (Ministry of Defence) who had the resources to provide for legal representation and had access to information about the incident from their own records and personnel. The Court considers that the right of the family of the deceased whose death is under investigation to participate in the proceedings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in the events. The Court is not persuaded that the interests of the applicants as next-of-kin were fairly or adequately protected in this respect.

129. Reference has also been made to the allegedly frequent use of public interest immunity certificates in inquests to prevent certain questions or the disclosure of certain documents. However, no certificate in fact issued in the inquest in this case. There is therefore no basis for finding that the use of these certificates prevented examination of any circumstances relevant to the deaths of the applicants' relatives.

130. Finally, the Court has had regard to the delay in the proceedings. The inquest opened on 30 May 1995, more than eight years after the deaths occurred. Although the DPP's decision not to prosecute issued on 22 September 1988, the RUC did not forward the papers to the Coroner until 9 May 1990. No explanation has been forthcoming for this delay. There were then a series of adjournments before the inquest opened. Once it opened, it concluded within a matter of days, on 2 June 1995. The adjournments were as follows:

– The inquest was due to open on 24 September 1990. The Coroner agreed to an adjournment on 6 September 1990 at the request of the applicants pending the determination of the *Devine* case concerning access of relatives to witness statements. The *Devine* case concluded on 6 February 1992, some sixteen months later.

– The Coroner agreed to an adjournment pending the judicial review proceedings in the McKerr, Toman and Burns inquests concerning access to documents used by witnesses to refresh their memories. These concluded on 28 May 1993, fifteen months later.

– The adjournment continued pending the court proceedings in the McKerr, Toman and Burns inquests concerning access to the Stalker and Sampson Reports which allegedly concerned issues of a shoot-to-kill policy. These concluded on 20 April 1994, eleven months further on. The inquest however only resumed on 30 May 1995 more than a year later.

131. The Court observes that these adjournments were requested by, or consented to, by the applicants. They related principally to legal challenges to procedural aspects of the inquest which they considered essential to their ability to participate - in particular as regards their access to the documents. It may be noted that the judicial review proceedings which resulted in an

adjournment from 6 September 1990 to 6 February 1992 (over one year and four months) concerned access to witness statements which are now being disclosed voluntarily due to developments in what is perceived as a desirable practice *vis-à-vis* a victim's relatives. The second set of judicial proceedings also concluded in favour of the families, since the courts held that Coroners should make available statements used by witnesses to refresh their memories. Nor can it be regarded as unreasonable that the applicants agreed to an adjournment to await the possible disclosure of an independent police enquiry which was alleged to concern issues of a deliberate policy of the security forces in using lethal force.

132. While it is therefore the case that the applicants contributed significantly to the delay in the inquest being opened, this has to some extent resulted from the difficulties facing relatives in participating in inquest procedures (see paragraphs 127-128 above concerning the non-disclosure of witness statements). It cannot be regarded as unreasonable that the applicants had regard to the legal remedies being used to challenge these aspects of inquest procedure. The Court observes that the Coroner, who was responsible for the conduct of the proceedings, acceded to these adjournments. The fact that they were requested by the applicants do not dispense the authorities from ensuring compliance with the requirement for reasonable expedition (see *mutatis mutandis* concerning speed requirements under Article 6 § 1 of the Convention, Scopelliti v. Italy judgment of 23 November 1993, Series A no. 278, p. 9, § 25). If long adjournments are regarded as justified in the interests of procedural fairness to the deceaseds' families, it calls into question whether the inquest system was at the relevant time structurally capable of providing for both speed and effective access for the families concerned.

133. Nor did the inquest progress with diligence in the periods unrelated to the adjournments. The Court refers to the delay in commencing the inquest and the lapse of time in scheduling the resumption of the inquest after the adjournments.

134. Having regard to these considerations, the time taken in this inquest cannot be regarded as compatible with the State's obligation under Article 2 of the Convention to ensure that investigations into suspicious deaths are carried out promptly and with reasonable expedition.

(iv) Civil proceedings

135. As found above (see paragraph 102), civil proceedings would provide a judicial fact finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages. It is however a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the

assessment of the State's compliance with its procedural obligations under Article 2 of the Convention.

(v) Conclusion

136. The Court finds that the proceedings for investigating the use of lethal force by the security forces have been shown in this case to disclose the following shortcomings:

– a lack of independence of the investigating police officers from the security forces involved in the incident;

– a lack of public scrutiny, and information to the victims' families of the reasons for the decision of the DPP not to prosecute any soldier;

– the inquest procedure did not allow for any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which might have been disclosed;

– the soldiers who shot the deceased could not be required to attend the inquest as witnesses;

– the non-disclosure of witness statements prior to the witnesses' appearance at the inquest prejudiced the ability of the applicants to participate in the inquest and contributed to long adjournments in the proceedings;

– the inquest proceedings did not commence promptly and were not pursued with reasonable expedition.

137. It is not for this Court to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. While reference has been made for example to the Scottish model of enquiry conducted by a judge of criminal jurisdiction, there is no reason to assume that this may be the only method available. Nor can it be said that there should be one unified procedure providing all requirements. If the aims of fact finding, criminal investigation and prosecution are carried out or shared between several authorities, as in Northern Ireland, the Court considers that the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of the material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner. In the present case, the available procedures have not struck the right balance.

138. The Court would observe that the shortcomings in transparency and effectiveness identified above run counter to the purpose identified by the domestic courts of allaying suspicions and rumours. Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force. Lack of such procedures will only add fuel to fears of sinister motivations, as is illustrated *inter alia* by the

submissions made by the applicants concerning the alleged shoot-to-kill policy.

139. The Court finds that there has been a failure to comply with the procedural obligation imposed by Article 2 of the Convention and that there has been, in this respect, a violation of that provision.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

140. The applicants invoked Article 6 § 1 which provides as relevant:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

141. The applicants claimed that their relatives were arbitrarily killed in circumstances where an arrest could have been effected by the soldiers and that the soldiers deliberately killed their relatives as an alternative to arresting them. They referred to concerns expressed, for example, by Amnesty International that killings by the security forces in Northern Ireland reflected a deliberate policy to eliminate individuals rather than arrest them and bring them before a court for any determination of a criminal charge.

142. The Government submitted that the shooting of the applicants' relatives could not be regarded as a summary punishment for a crime. Nor could the alleged failure to prosecute raise any issues under Article 6 § 1 of the Convention.

143. The Court recalls that the lawfulness of the shooting of the nine men at Loughgall is pending consideration in the civil proceedings instituted by five of the applicants' families. The Hughes family have settled their civil claims, while three families have not considered it worthwhile to lodge or pursue proceedings (see paragraphs 42-46 above). In these circumstances and in the light of the scope of the present application, the Court finds no basis for reaching any findings as to the alleged improper motivation behind the incident. Any issues concerning the effectiveness of criminal investigation procedures fall to be considered under Articles 2 and 13 of the Convention.

144. There has, accordingly, been no violation of Article 6 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

145. The applicants invoked Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

146. The applicants submitted that the circumstances of the killing of their relatives disclosed discrimination. They alleged that, between 1969 and March 1994, 357 people had been killed by members of the security forces, the overwhelming majority of whom were young men from the Catholic or nationalist community. When compared with the numbers of those killed from the Protestant community and having regard to the fact that there have been relatively few prosecutions (31) and only a few convictions (four, at the date of this application), this showed that there was a discriminatory use of lethal force and a lack of legal protection vis-à-vis a section of the community on grounds of national origin or association with a national minority.

147. The Government replied that there was no evidence that any of the deaths which occurred in Northern Ireland were analogous or that they disclosed any difference in treatment. Bald statistics (the accuracy of which was not accepted) were not enough to establish broad allegations of discrimination against Catholics or nationalists.

148. Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group. However, even though statistically it appears that the majority of people shot by the security forces were from the Catholic or nationalist community, the Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14. There is no evidence before the Court which would entitle it to conclude that any of those killings, save the four which resulted in convictions, involved the unlawful or excessive use of force by members of the security forces.

149. The Court finds that there has been no violation of Article 14 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

150. The applicants complained that they had no effective remedy in respect of their complaints, invoking Article 13 which provides:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

151. The applicants referred to their submissions concerning the procedural aspects of Article 2 of the Convention, claiming that in addition to the payment of compensation where appropriate Article 13 required a

thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.

152. The Government submitted that the complaints raised under Article 13 were either premature or ill-founded. They claimed that the combination of available procedures, which included the pending civil proceedings and the inquest, provided effective remedies.

153. The Court's case-law indicates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law (see the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-IV, p. 2286, § 95; the Aydın v. Turkey judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; the Kaya v. Turkey judgment cited above, pp. 329-30, § 106).

154. In cases of the use of lethal force or suspicious deaths, the Court has also stated that, given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure (see the Kaya v. Turkey judgment cited above, pp. 330-31, § 107). In a number of cases it has found that there has been a violation of Article 13 where no effective criminal investigation had been carried out, noting that the requirements of Article 13 were broader than the obligation to investigate imposed by Article 2 of the Convention (see also Ergı v. Turkey, cited above, p.1782, § 98; *Salman v. Turkey* cited above, § 123).

155. It must be observed that these cases derived from the situation pertaining in south-east Turkey, where applicants were in a vulnerable position due to the ongoing conflict between the security forces and the PKK and where the most accessible means of redress open to applicants was to complain to the public prosecutor, who was under a duty to investigate alleged crimes. In the Turkish system, the complainant was able to join any criminal proceedings as an intervenor and apply for damages at the conclusion of any successful prosecution. The public prosecutor's fact-finding function was also essential to any attempt to take civil proceedings.

In those cases, therefore, it was sufficient for the purposes of former Article 26 (now Article 35 § 1) of the Convention, that an applicant complaining of unlawful killing raised the matter with the public prosecutor. There was accordingly a close procedural and practical relationship between the criminal investigation and the remedies available to the applicant in the legal system as a whole.

156. The legal system pertaining in Northern Ireland is different and any application of Article 13 to the factual circumstances of any case from that jurisdiction must take this into account. An applicant who claims the unlawful use of force by soldiers or police officers in the United Kingdom must as a general rule exhaust the domestic remedies open to him or her by taking civil proceedings by which the courts will examine the facts, determine liability and if appropriate award compensation. These civil proceedings are wholly independent of any criminal investigation and their efficacy has not been shown to rely on the proper conduct of criminal investigations or prosecutions (see e.g. *Caraher v. the United Kingdom*, no. 24520/94, decision of inadmissibility [Section 3] 11.01.00).

157. In the present case, seven of the applicants lodged civil proceedings, of which five are still pending, the Hughes family having settled their claims and another family having ceased to pursue their claims. Two families did not consider that it was worthwhile bringing such proceedings. The Court has found no elements which would prevent civil proceedings providing the redress identified above in respect of the alleged excessive use of force (see paragraph 102 above).

158. As regards the applicants' complaints concerning the investigation into the death carried out by the authorities, these have been examined above under the procedural aspect of Article 2 (see paragraphs 111-139 above). The Court finds that no separate issue arises in the present case.

159. The Court concludes that there has been no violation of Article 13 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

160. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

161. The applicants submitted that though their primary goal was to obtain a judgment from the Court to the effect that the respondent

Government had violated the Convention, they considered that an award of damages should be made. They argued that, where there was a finding of a violation of a fundamental right, the Court should impose the only penalty it can on the offending State. Not to do so sent the wrong signal and appeared to penalise the victims rather than those responsible for the violation. This was particularly the case concerning Antony Hughes who was unconnected with the IRA though it was accepted that an amount of compensation had been given domestically in that case.

162. The Government disputed that any award of damages would be appropriate in the present case. They considered that the applicant, Mrs Bridget Hughes, had been fully compensated for the loss suffered as a result of the death of Antony Hughes as she had accepted the settlement in the civil proceedings. In their view, no loss flowed from any violation of the procedural elements of Article 2 of the Convention and a finding of violation in that context would in itself constitute just satisfaction.

163. The Court recalls that in the case of McCann and others (cited above, p. 63, § 219) it found a substantive breach of Article 2 of the Convention, concluding that it had not been shown that the killing of the three IRA suspects constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence. However, the Court considered it inappropriate to make any award to the applicants, as personal representatives of the deceased, in respect of pecuniary or non-pecuniary damage, "having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar".

164. In contrast to the McCann case, the Court in the present case has made no finding as to the lawfulness or proportionality of the use of lethal force which killed the nine men at Loughgall, or as to the factual circumstances, including the activities of the deceased which led up to the killing, which issues are pending in the civil proceedings. Accordingly, no award of compensation falls to be made in this respect. On the other hand, the Court has found that the national authorities failed in their obligation to carry out a prompt and effective investigation into the circumstances of the death. The applicants must thereby have suffered feelings of frustration, distress and anxiety. The Court considers that the applicants sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation as a result of the Convention. It has not taken into account the settlement in the Hughes case, which related to the substantive claims of that applicant and not to the lack of procedural efficacy in the investigation.

165. Making an assessment on an equitable basis, the Court awards each applicant the sum of 10,000 pounds sterling (GBP).

B. Costs and expenses

166. The applicant claimed a total of GBP 54,594.20. This included GBP 5,218.20 and GBP 20,000 respectively for two counsel and GBP 29,276 for solicitors' fees, exclusive of VAT.

167. The Government submitted that these claims were excessive, noting that the issues in this case overlapped significantly with the other cases examined at the same time.

168. The Court recalls that this case has involved several rounds of written submissions and an oral hearing, and may be regarded as factually and legally complex. Nonetheless, it finds the fees claimed to be on the high side when compared with other cases from the United Kingdom and is not persuaded that they are reasonable as to quantum. Having regard to equitable considerations, it awards the global sum of GBP 30,000, plus any value added tax which may be payable. It has taken into account the sums paid to the applicants by way of legal aid from the Council of Europe.

C. Default interest

169. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7,5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 2 of the Convention in respect of failings in the investigative procedures concerning the deaths of the applicants' relatives;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been no violation of Article 14 of the Convention;

4. *Holds* that there has been no violation of Article 13 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicants, within three monthsfrom the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, plus any value-added tax that may be chargeable;
      (i) 10,000 (ten thousand) pounds sterling to each applicant in respect of non-pecuniary damage;

(ii) a global sum of 30,000 (thirty thousand) pounds sterling in respect of all their costs and expenses;

(b) that simple interest at an annual rate of 7,5% shall be payable from the expiry of the above-mentioned three months until settlement;

6. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 4 May 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President