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The Rt. Hon. P.J. Patterson, Q.C., M.P.  
Prime Minister  
Office of the Prime Minister  
Jamaica House  
1 Devon House  
Kingston 6  
Jamaica  
West Indies.  
Fax: 001 876 929 0005

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Dear Prime Minister,

**Amnesty International's concerns regarding the Terrorism Prevention Bill 2003.**

I would like to take this opportunity to express Amnesty International's sympathy for the suffering caused to the people of Jamaica by the recent hurricane "Ivan". I appreciate that it may take some time for the country to recover fully from the devastation caused by Ivan, and would like to offer our best wishes to your Government and all others involved in the rebuilding of the island.

I am writing to express Amnesty International's concerns regarding the Terrorism Prevention Bill 2003, which is currently pending before Parliament.

Amnesty International draws the attention of the Government of Jamaica to UN Security Council's Resolution 1456 (2003), stating that:

*".. States must ensure that any measure taken to combat terrorism complies with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."*<sup>1</sup>

and to the UN General Assembly's Resolution of November 2002 on protecting human rights and fundamental freedoms while countering "terrorism".<sup>2</sup> We also draw your attention to the Inter-American Convention against Terrorism, adopted in June 2002 by the Organization of American States (OAS) General Assembly. This explicitly provides that all counter-terrorism measures should fully respect the rule of law, human rights and fundamental freedoms, and should not conflict with a state's obligations under international law.<sup>3</sup>

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<sup>1</sup> Paragraph 6.

<sup>2</sup> General Assembly Resolution RES/57/219 November 2002.

<sup>3</sup> Jamaica signed the Inter-American Convention on Terrorism on 3 June 2002. The Vienna Convention on the Law of Treaties, which Jamaica ratified on 28 July 1970, states that States that have signed but not ratified treaties (as is the case with the afore-mentioned Convention) must "*refrain from acts which would defeat the object and purpose of a treaty.*"

The stated aim of the Terrorism Prevention Bill is to enable the Government of Jamaica to comply with its international counter-terrorism obligations, specifically those under UN Security Council Resolution 1373 (2001) and under the international treaties on “terrorism” signed by Jamaica. However, Amnesty International believes that the Bill, if enacted into law, would be inconsistent with Jamaica’s international human rights obligations. These concerns can be broadly summarised as follows:

- The proposed legislation radically extends the scope of the mandatory death penalty, contrary to international law and prevailing trends in international jurisprudence and standards;
- The Bill’s broad definition of key terminology, including ‘*terrorism offence*’, ‘*terrorist activity*’, ‘*terrorist group*’ and ‘*terrorist act*’, creates ambiguity and uncertainty about how the Bill would be applied, which could facilitate human rights violations. The definition of terrorism offences, could, for instance, be used to criminalise political protest or other activities, potentially threatening freedom of expression, assembly, and conscience;
- There is no mechanism for review of the legislation. This is of major concern given the extension of powers granted to the executive, with the consequent potential to infringe human rights;
- The Bill reduces protections provided for in international standards to safeguard the rights of the accused at trial;
- The current human rights context raises concerns about how the legislation would, if enacted, be interpreted and enforced. Law enforcement officials in Jamaica have used powers granted under emergency security legislation illegally and inappropriately, resulting in violations of fundamental human rights, including the right to life.<sup>4</sup>

Underlying these concerns is a body of evidence collated from Amnesty International’s worldwide monitoring suggesting that similar legislation, passed pursuant to UN Resolution 1373 (2001), has in some countries been misused and in many instances has led to an erosion of human rights protection.<sup>5</sup> The following is a more detailed explanation of Amnesty International’s main concerns.

### **(1) The extension of the death penalty**

Amnesty International opposes the death penalty in all cases as it violates the right to life and is the ultimate cruel, inhuman and degrading punishment. Amnesty International is therefore alarmed to see a considerable extension of the death penalty under the Second Schedule of the Terrorism Prevention Bill (section 6, ‘Amendments to Other Acts’).

This section amends the Offences Against the Person Act (which provides that murder is a criminal offence) to provide that “*any murder committed by a person in the course or*

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<sup>4</sup> See *Jamaica: Killings and violence by police: How many more victims?* AI index 38/003/01

<sup>5</sup> See Amnesty International *USA Human dignity denied – Torture and accountability in the ‘war on terror’*, October 2004; AI Index AMR 51/145/2004; Amnesty International *Guyana Human Rights and Crime Control: Not mutually exclusive*, AI index AMR 35.003.2003; *United States of America: Memorandum to the US Attorney General - AI’s Concerns relating to the post 11 September investigations*, AI Index AMR 51.170.2001; *United States of America - Amnesty International’s concerns regarding post September 11 detentions in the USA*, AI index AMR 51.044.2002; *United Kingdom: Rights denied: The UK’s response to September 11*, AI Index EUR 45.019.2002; *Amnesty International’s Memorandum to the Government on Part 4 of the Anti-terrorism, Security and Crime Act 2001*, AI index EUR 45.017.2002; *India: Briefing on the Prevention of Terrorism Ordinance*, AI index ASA 20,049.2001.

*furtherance of a terrorism offence as defined in section 2 of the Terrorism Prevention Act*” will be punishable as capital murder.<sup>6</sup> “Terrorist” offences which result in murder will be punishable by death. The section also introduces an additional offence of capital murder for “*any murder committed by a person in the course or furtherance of an act involving the use of violence by that person which, by reason of its nature and extent, is calculated to create a state of fear in the public or any section of the public.*”

This extension of the scope of the death penalty violates Jamaica’s obligations arising under the Inter-American Convention on Human Rights (‘American Convention’), ratified by Jamaica on 7 August 1978. Article 4(2) of the American Convention states that “*the application of such punishment [the death penalty] shall not be extended to crimes to which it does not presently apply.*” It also runs counter to trends in international jurisprudence and expert opinions on international human rights law. The UN Special Rapporteur on Extrajudicial, Arbitrary and Summary Executions has stated that “*the scope of application of the death penalty should never be extended.*”<sup>7</sup>

The Bill provides for the death penalty to be imposed as a mandatory punishment. The UN Human Rights Committee has found that the imposition of mandatory capital punishment amounts to the deprivation of the fundamental right to life.<sup>8</sup> The Inter-American Commission on Human Rights recently held that the mandatory death penalty constitutes cruel, inhuman or degrading punishment or treatment. The Commission stated that the penalty could not be reconciled with the essential respect for humanity and the dignity of the individual required under the Declaration.<sup>9</sup> The Inter-American Court subsequently ruled that, in the context of the mandatory death penalty as punishment for the offence of murder, the failure to consider the individual circumstances of the accused and the crime violated the prohibition against the arbitrary deprivation of life, in contravention of Article 4(1) and 4(2) of the Inter-American Convention on Human Rights.<sup>10</sup> It was necessary for the criminal law to allow for a graduated assessment of the gravity of the offence of intentional or premeditated murder.<sup>11</sup>

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<sup>6</sup> Terrorism Prevention Bill, Second Schedule 2, section 6. This adds a new section (f) to s. 2(1) of the Offences Against the Person Act.

<sup>7</sup> Extrajudicial, Arbitrary and Summary Executions: Report by the Special Rapporteur, UN Doc No. E/CN.4/1994/7, 7 December 1993, paragraph 677. The International Covenant on Civil and Political Rights (ICCPR), the expert body established under the ICCPR to examine state parties’ compliance with the Covenant, has stated that “*extension of the scope of application of the death penalty raises questions as to the compatibility with article 6 of the Covenant.*” Article 6(2) states that, “*in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious of crimes.*”

<sup>8</sup> UN Human Rights Committee *Thompson v Saint Vincent and the Grenadines* (2000), UNDOC CCPR/C/70/D/806/1998, submission 05/12/2000, Communication No. 806/1998, paras. 8.2 and 8.3. and *Rawle Kennedy v Republic of Trinidad & Tobago*, UNDOC/CCPR/C/74/D/845/1998, submission 28/03/2002, Communication No. 845/1998.

<sup>9</sup> It was held to violate articles XXV and XXVI of the Declaration. See *Edwards v The Bahamas*, Report No. 48/01, 4 April 2001, paras. 147 and 178.

<sup>10</sup> Inter-American Court of Human Rights, *Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago – Preliminary Objections*, Judgment of June 21, 2002, paras. 103, 108. Articles 4(1) and (2) of the American Convention state that:

1. *Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.*
2. *In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.*

<sup>11</sup> *Cf. Lubuto v. Zambia*, United Nations Human Rights Committee (No. 390/1990) U.N. Doc. CCPR/C/55/D/390/1990/Rev. 1 (Oct. 1995), para. 7.2 (recognising the importance of enabling the competent

In the recent case of *Lambert Watson v The Queen*, the Judicial Committee of the Privy Council (the highest court for all of the English-speaking Caribbean except for Guyana) held that the mandatory death penalty was incompatible with the prohibition on inhuman and degrading punishment in the Constitution of Jamaica.<sup>12</sup> It was an inhuman punishment because it precluded any consideration of matters relating both to the offence and to the offender before sentence was passed. Lord Hope, giving the judgment of the majority of the board, said that the mandatory death penalty was open to the same constitutional objections identified in relation to other jurisdictions in a trilogy of cases determined in March 2002. In those cases the Court recognised that international bodies interpreting human rights instruments have accepted the need for proportionality and individualised sentencing in cases of murder and other serious crimes.<sup>13</sup>

Finally, in the light of the concerns around the vague definition of “terrorist”-related acts provided for under the Bill, Amnesty International fears that there is a danger of the death penalty being imposed following unfair trial procedures.

## (2) Definition of “terrorism”-related offences

Amnesty International is concerned that the Terrorism Prevention Bill includes broad and vaguely worded definitions of key terminology, including ‘*terrorism offence*’, ‘*terrorist activity*’, ‘*terrorist group*’ and ‘*terrorist act*’.<sup>14</sup> This raises concerns on several grounds.

Under section 3(2) for example, the offence of ‘*terrorist activity*’ is committed when a person engages in an act or omission which intentionally :

- (a) *causes*
  - (i) *death; or*
  - (ii) *serious bodily harm, to a person;*

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sentencing authority to exercise discretion in the imposition of sentences and indicating that, according to Article 6(2) of the International Covenant on Civil and Political Rights, the death penalty may only be applied for the "most serious crimes"); *Ndiaye Report*, 1994/82, para. 377, U.N. Doc. E/CN.4/1995/61 (14 December 1994) (holding that due process requires the consideration of all mitigating factors in proceedings that result in the imposition of the death penalty); *Bachan Singh v. State of Punjab* (1980) 2 S.C.C. 475, 534 (the Supreme Court of India held that the "scope and concept of mitigating factors in the area of the death penalty must receive a liberal and expansive construction by the Courts in accord with the sentencing policy writ large... "); *The State v. Makwanyane and McHunu*. Judgment, Case No. CCT/3/94 (June 6, 1995) (the Constitutional Court of South Africa struck down the death penalty provision of the Criminal Procedure Act No. 51 as inconsistent with South Africa's 1993 Constitution and declared in part that "[M]itigating and aggravating factors must be identified by the Court, bearing in mind that the onus is on the State to prove beyond a reasonable doubt the existence of aggravating factors [...] Due regard must be paid to personal circumstances and subjective factors that might have influenced the accused person's conduct, and these factors must then be weighed with the main objects of punishment [...]."

<sup>12</sup> *Lambert Wilson v. The Queen and The Attorney General*, Appeal No. 36 Of 2004, Judicial Committee of the Privy Council.

<sup>13</sup> In *Patrick Reyes v The Queen*, Judicial Committee of the Privy Council, Appeal No. 64 of 2000, delivered 11 March 2002 (concerning Belize) at 43, the Privy Council held that there are murders of quite different purposes and that, "to deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which [the constitutional provision] exists to protect."

Also see *Berthill Fox v The Queen*, Judicial Committee of the Privy Council, Appeal No. 66 of 2000, delivered 11 March 2002; *The Queen v Peter Hughes*, Judicial Committee of the Privy Council, Appeal No. 91 of 2000, delivered 11 March 2002. The Privy Council also upheld the decision from the Eastern Caribbean Court of Appeal that the mandatory death penalty was unconstitutional because it violated the constitutional prohibition on inhuman or degrading punishment or other treatment.

<sup>14</sup> See further appendix.

- (b) *endangers a person's life;*
- (c) *causes a serious risk to the health or safety of the public or any segment of the public;*
- (d) *causes substantial property damage, whether to public or private property, if such damage is likely to result in the conduct or harm referred to in any of paragraphs (a) to (c) and (e); or*
- (e) *causes serious interference with or serious disruption of an essential service, facility or system, whether public or private.*

The lack of clear definitions in the Bill is cause for concern because emerging ambiguities mean that the legislation could be misused to bring prosecutions for political or other motives. There is no indication of how a "serious risk" to public safety would be assessed, or what level of "property damage" or "interference" with an essential service would trigger the provisions of the legislation. Such decisions would apparently be taken by the prosecuting authorities. Although some limitations have been included,<sup>15</sup> the definition of "terrorist" activity under section 3(2) makes it difficult to identify with certainty what actions constitute "terrorist" offences.

The wide definitions of 'terrorist activity' and 'terrorist act' under the Bill have a consequential effect on other offences under the Bill, which rely on these terms to form their own definitions. For example, section 10 provides for life imprisonment for an individual who:

*"knowingly instructs, directly or indirectly, any person to carry out any activity for the benefit of, at the direction of or in association with, a terrorist group, for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity"* (S.10(1)).<sup>16</sup>

Given that the definition of "terrorist activity" lacks the necessary precision, it is impossible to know how the prosecuting authorities might construe activities that benefit or enhance the ability of a "terrorist" group to carry out "terrorist" activity.<sup>17</sup>

The inclusion of inchoate offences and offences committed by omission increases the difficulty of identifying what actions constitute "terrorist" offences. Section 3(2) states that "terrorism" offences can be committed by an act or omission outside the country. Inchoate

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<sup>15</sup> Section 3(3)(c) states that: (3) *An offence under subsection (2) does not include -*  
 (c) *any advocacy, protest, dissent or stoppage of work, which does not involve an activity that is intended to cause death or serious bodily harm to a person, to endanger a person's life or to cause a serious risk to the health or safety of the public or a segment of the public.*

<sup>16</sup> Section 10(2) states:  
*An offence may be committed under subsection (1) whether or not -*  
 (a) *the activity that the accused instructs to be carried out is actually carried out;*  
 (b) *the accused instructs a particular person to carry out the activity referred to in paragraph (a);*  
 (c) *the accused knows the identity of the person instructed to carry out the activity referred to in paragraph (a);*  
 (d) *the person whom the accused instructs to carry out that activity knows that it is to be carried out for the benefit of, at the direction of, or in association with, a terrorist group;*  
 (e) *a terrorist group actually facilitates or carries out a terrorist activity;*  
 (f) *the activity referred to in paragraph (a) actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity;*  
*or*  
 (g) *the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.*

<sup>17</sup> See for example, the UK case of *R v Judith Ward, Ward*, [1993] 1 WLR 619, 96 Cr App Rep 1, [1993] 2 All ER 577, Court of Appeal (Criminal Division).

offences of conspiracy, attempt, aiding, abetting, procuring and counselling can be committed in relation to both the commission of a ‘terrorism offence’ under s.2(1)(c) and a ‘terrorist activity’ under s.2(d).<sup>18</sup>

The Terrorism Prevention Bill thus violates the principle of legal certainty, which is central to ensuring respect for human rights and the rule of law. The Jamaican Constitution, and international law, both require legislation to be certain and precise in both definition and scope.<sup>19</sup> Worldwide, counter-terrorism legislation has frequently been criticised for a lack of certainty by human rights courts and bodies, particularly with reference to loose definitions of “terrorism” offences.<sup>20</sup>

Legal certainty also helps protect the freedoms of expression, speech and assembly.<sup>21</sup> Public criticism is recognised as an important check upon government conduct in a democratic society. The Inter-American Court has stated that:

*“[F]reedom of expression is a cornerstone upon which the very existence of a democratic society rests.... It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.”*<sup>22</sup>

Freedom of expression is closely associated with freedom of assembly and association and is the logical corollary of the freedom of thought, conscience and religion. These freedoms are enshrined in national constitutions and international human rights treaties and are essential principles underpinning democratic governance.<sup>23</sup> Further, freedom of thought, conscience and religion have been recognised by both the ICCPR and the American Convention as non-derogable.

Amnesty International is concerned that the ambiguous definitions of “terrorist activity” and “terrorist act” contained in the proposed Bill could be interpreted in a way which could criminalise or severely restrict the legitimate expression of criticism, dissenting views or opinions.

### **(3) Review of legislation: lack of a limiting ‘sunset’ clause**

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<sup>18</sup> Inchoate offences are committed when a person takes certain steps towards the commission of a crime. It is unnecessary that the main offence be committed. Prosecutors often favour charging an inchoate offence for evidential reasons.

<sup>19</sup> Section 13(a) of the Jamaican Constitution. *Castillo Petruzzi et al*, Inter-American Court of Human Rights, Judgment of May 30, 1999 (para. 121).

<sup>20</sup> UN Doc. CCPR/C/79/Add.23, para. 8 (9 September 1993).

<sup>21</sup> International law recognises however that some rights may be limited in some circumstances. The ICCPR states that freedom of expression may be subject only to restrictions that are “provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals”. Similarly, no restrictions may be placed on the exercise of freedom of association and the right to peaceful assembly: “other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others”.

<sup>22</sup> Inter-American Court of Human Rights, Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, November 13, 1985 (paras. 50, 70).

<sup>23</sup> The Jamaican Constitution confirms these rights in sections 21-23. See also articles 18, 19 and 21 of the ICCPR; article 12-13 and 15-16 of the IACHR and articles 18-20 of the United Declaration of Human Rights (UDHR), article 19 of which states “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

The Terrorism Prevention Bill was not introduced in response to a domestic threat or emergency, but in order to comply with the requirements of UN Security Council Resolution 1373. Nevertheless it grants the state very wide powers, with the potential to infringe human rights. Despite its restrictive nature, the Bill does not contain a ‘sunset’ clause to limit the duration of legislation. Any legislation that places limits on the exercise of rights should be reviewed on a regular basis. Amnesty International therefore considers that a sunset clause would be an appropriate way to remind present or future governments of the need to periodically revisit the legislation to assess its proportionality and necessity in response to current threats. Amnesty International views the need for such a clause as particularly important, given concerns around the historical precedent for the misuse of security legislation in Jamaica.

#### **(4) Impact on the right to a fair trial**

Amnesty International is concerned that, if enacted into law, the Terrorism Prevention Bill could give rise to unfair trials. Fair trial rights are guaranteed in international and domestic law<sup>24</sup> and comprise several important elements including, *inter alia*: the presumption of innocence, the right of the accused to information about charges, the right to defend oneself in person or through counsel, the right to call and examine witnesses and procedures on the admissibility of evidence.

#### **Exclusion of rules to safeguard the admissibility of evidence**

The Terrorism Prevention Bill makes specific provision to exclude rules designed to safeguard proper procedures for the admissibility of evidence rules under domestic criminal law and international law. Section 14 provides for the practice of proscribing organizations through the listing of ‘entities’. The section allows for proscribed persons or organizations to request judicial review of the decision to list. Under s.14(6), a Judge may, for the purposes of a review, “*receive in evidence anything that, in the opinion of the Judge is reliable and relevant, even if it would not otherwise be admissible evidence in law.*”

The effect of this provision is that the judge may take into account, in reviewing the listing decision, evidence that is not bound by the normal rules of what is admissible in court that are otherwise applicable in domestic criminal procedure. For example, a court could use ‘secret evidence’ or evidence from anonymous witnesses. The review could be based on unproven allegations by the Government that the accused is given no opportunity to see or challenge.

Human rights bodies have already expressed concerns about such practices. The UN Human Rights Committee has criticised the system of ‘faceless judges’ in Colombia whereby the names of witnesses, judges and prosecutors were kept from the defence in regional public order courts trying cases involving charges of “terrorism”, amongst other offences.<sup>25</sup> In the United Kingdom there have been miscarriages of justice in special courts with reduced safeguards. Amnesty International has documented, since the early 1980s, concerns about unfair procedures in “juryless”, single-judge “Diplock courts” in Northern Ireland and has recently called for them

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<sup>24</sup> Section 20(1) of the Jamaican Constitution states that: “Whenever any person is charged with a criminal offense he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law”. Article 14(3)(b) of the ICCPR, Article 8(2)(c) of the IACHR, Article 67(1)(d) of the ICC Statute.

<sup>25</sup> Concluding Observations by the Human Rights Committee UN Doc. CCPR/C/79/Add.75, (April 1997, paras. 21, 40.). Similarly, the Inter-American Commission has stated, with reference to Colombia, that the use of testimony from anonymous witnesses is contrary to due process. Annual Report of the Inter-American Commission of Human Rights, 1996, OEA/Ser.L/V/II.95, doc.7rev.1997, at 658 and 736.

to be abolished.<sup>26</sup> Miscarriages of justice have also occurred in courts which have failed to adequately and fully disclose information to the accused. For example, Amnesty International believes that the convictions of Samar Alami and Jawad Botmeh are unsafe and that they have been denied their right to a fair trial, because of the failure to fully disclose, both during and at the trial, all information, including intelligence information. They were sentenced in 1996 to 20 years' imprisonment after being convicted of conspiracy to cause explosions in 1994 at the Israeli embassy and Balfour House in London. On 1 November 2001, the Court of Appeal of England and Wales denied all grounds of appeal against their conviction and sentencing.<sup>27</sup>

Such rules have been prescribed in order to minimize the risk of innocent persons being convicted and punished. Both international law and domestic criminal procedures in Jamaica recognise that the defence must have the opportunity to challenge evidence against the accused. They should be able to call witnesses on their behalf, and to examine, or have examined, witnesses against them. If an accused were to be deprived of the opportunity to challenge a witness's testimony, the trial would not meet international standards for fair trial.<sup>28</sup>

### **Presumption of innocence**

Amnesty International is particularly concerned that the Terrorism Prevention Bill could affect the presumption of innocence. This is an internationally protected and essential component of the right to a fair trial.<sup>29</sup> The Jamaican Constitution also protects the presumption of innocence under s.20(5), which states that:

*(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.*

The presumption of innocence in practice may be weakened by the fact that omissions as well as acts can constitute the basis of a "terrorist" offence. This is because the onus is likely to fall on the accused to prove their innocence, rather than on the prosecution to prove the case.<sup>30</sup> For example, it is an offence under sections 3(2) and (4) to "endanger a person's life" by omitting to act... "for an ideological purpose... with the intention of intimidating ... a section of the public... with regard to its economic security..." A person accused under this section may be required to prove that they did not do anything with the intention of intimidating the public and that they had no "ideological purpose".

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<sup>26</sup> See Amnesty International, *United Kingdom, Summary of concerns raised with the Human Rights Committee*, AI Index EUR 45.024.2001, November 2001, p17-19.

<sup>27</sup> See Amnesty International, *United Kingdom, Summary of concerns raised with the Human Rights Committee*, AI Index EUR 45.024.2001, November 2001, p19-20.

<sup>28</sup> The ICCPR for example states in article 143(e) that: "*In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.*"

See also American Convention, article 8(2)(f).

<sup>29</sup> For example, Article 14 (2) of the ICCPR states that: "*Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*"

Further, Articles 10 and 11 of the UDHR set out the right to a fair trial and the presumption of innocence and Article 8 (2) of the American Convention on Human Rights confirms "*The right of every person accused of a criminal offense to be presumed innocent until his guilt is fully proven is a principle set forth.*"

<sup>30</sup> For this reason, in most jurisdictions the criminal law does not generally punish failure to act. If an accused can be punished for what they did not do, the offences may actually result in a positive action obligation being placed on him or her. If an accused could be found guilty on the basis of doing nothing, the onus could easily shift so that, instead of having to prove that he or she did not do anything, an accused has to prove that he or she actually did something.

The right to the presumption of innocence requires that laws and rules of evidence ensure that the prosecution bears the burden of proof throughout a trial. Of particular concern in this regard are a list of specific offences that can be committed in connection with the possession and use of property in relation to alleged “terrorist” offences or actions. Under sections 5 and 6, it is an offence to use or possess or deal with property for “terrorist” purposes.

The section requires a person charged under these sections to prove that he or she was not “*in possession*” at the relevant time, but fails to define “*possession*”, making it potentially hard for the accused person to raise an effective defence. The Bill provides no specific defences to enable the accused to show that he or she was not in “*possession*” at the relevant time. Requiring in law that an accused explain a key element of the offence with which he or she is charged is termed a statutory presumption. Statutory presumptions have been challenged on the grounds that they impermissibly shift the burden of proof from the prosecution to the accused, in violation of the presumption of innocence. In order to safeguard the right of the accused to a fair trial, the evidential burden should at all times be on the prosecution to prove beyond reasonable doubt that the defence raised is not satisfied.

### **Risk of politically-motivated prosecutions**

Finally, the broad definition of “terrorism” offences raises the prospect that the decision to bring a prosecution under the legislation could, in some cases, be politically-motivated. It is a principle of international law that there should be no prosecution for acts which have not already been clearly defined as criminal offences.<sup>31</sup> The risk of wrongful prosecutions (including those that are politically-motivated) increases where a law is vague. The UN Human Rights Committee has criticised the definition of “terrorist” activities where this lends itself to abuse.<sup>32</sup>

#### **(5) Context – a pattern of persistent police killings and other human rights concerns**

The current political and social context in Jamaica raises serious concerns about how the legislation would, if enacted, be interpreted and applied. Jamaica faces serious violent crime problems, including narcotics and gang-related violence. The country currently ranks third in the world in terms of its *per capita* murder rate, behind only Colombia and South Africa.<sup>33</sup> At least 1,045 people were reported murdered in 2002, including 16 police officers.<sup>34</sup> Jamaica also suffers a high incidence of extrajudicial killings by police, and there are frequent reports of torture, ill-treatment and unlawful arrests, searches and detentions.

Amnesty International has reported extensively on the lack of accountability for illegal killings and other human rights violations allegedly carried out by police officers. Thorough

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<sup>31</sup> See for example Article 15(1) of the ICCPR, which states “*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed....*”.

<sup>32</sup> See for example the Concluding Observations of the UN Human Rights Committee in the case of Algeria, where, among other things, the Committee noted that a definition of “terrorist” or “subversive” activities in Algerian Penal Laws lent itself to abuse and recommended that an anti-terrorism law be amended to bring it into compliance with international human rights standards. CCPR/C/79/Add.95 - Concluding Observations of the UN Human Rights Committee: Algeria 10/08/98.

<sup>33</sup> Sources: Jamaica Constabulary Force; Seventh United Nations Survey of Crime Trends and Operations of Criminal Justice Systems, covering the period 1998 - 2000 (United Nations Office on Drugs and Crime, Centre for International Crime Prevention).

<sup>34</sup> Source: Jamaica Constabulary Force.

investigations into such allegations are seldom carried out, and prosecutions or even disciplinary sanctions against officers remain rare.<sup>35</sup>

Lawful, accountable policing is of particular importance in countries with high rates of armed violence. Impunity fosters further instability and human rights abuses. Inadequate accountability mechanisms and the failure to prosecute officers who improperly use lethal force reduce the confidence of the population in the Government's ability to uphold the rule of law. This, in turn, undermines the Government's capacity to deal with security issues. As the UN High Commissioner for Human Rights has stated:

*"Impunity for violations [of human rights] induces an atmosphere of fear and terror. It produces unstable societies and de-legitimizes Governments. It encourages terrorist acts and undermines the international community's effort to pursue justice under the law."*<sup>36</sup>

Amnesty International is encouraged that the Jamaican Attorney General and Minister of Justice, the Hon. A.J. Nicholson, has acknowledged that, in the context of the Jamaican Bill, there must be a '*balancing act*' between the needs of national security and the human rights of Jamaicans, and that he has declared the promotion and protection of constitutional rights to be "*the first order of business for the State.*"<sup>37</sup>

However, the organization remains concerned that there is a lack of political will to deal with crime in Jamaica in a manner which respects human rights. In this situation, Amnesty International fears that the Terrorism Prevention Bill could aggravate the situation further by granting potentially unfettered power to law enforcement officials who have been shown to be capable of using their powers inappropriately, with often fatal consequences. Although aimed at the problem of international "terrorism", Amnesty International fears that the legislation could be misused, by present or future governments, to suppress international human rights standards and fundamental freedoms in the context of domestic crime-fighting.

## Conclusion

For the reasons stated above, Amnesty International believes that, in its present form, the Terrorism Prevention Bill, 2003, poses a risk to the human rights of the citizens of Jamaica. Amnesty International therefore urges the Government of Jamaica to revise the Terrorism Prevention Bill, in order to ensure its compliance with Jamaica's binding obligations arising under international law. In particular, the organization urges you to ensure that the legislation complies with obligations arising under the Charter of the United Nations, the Charter of the Organization of American States, international humanitarian law, international customary law, international human rights law, and international refugee law.

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<sup>35</sup> No police officer has been convicted of an unlawful killing in the past five years. In April 2004, six police officers were charged with murder in connection with the deaths of four people at Crawle, Clarendon on 7 May 2003. In November 2003, six police officers were charged with murder in connection with the deaths of seven youths in Braeton, Jamaica in March 2001. In March 2004, the trial of a police officer charged with the murder of Janice Allen collapsed on the opening day, after the prosecution failed to present any evidence. See Amnesty International *Jamaica: Janice Allen case demonstrates lack of political will to end police killings*, 16 March 2004; Amnesty International *Jamaica: Death threats and possible extra-judicial executions*, 8 March 2004; Amnesty International, *Jamaica: Braeton Officers charged: a milestone towards ending impunity?*, AMR 38/020/2003, 5 November 2003.

<sup>36</sup> Report of the United Nations High Commissioner for Human rights submitted pursuant to General Assembly Resolution 48/141 Human rights: a uniting framework E/CN.4/2002/18 27 February 2002

<sup>37</sup> Speech given on his behalf to the Commonwealth Workshop on Human Rights Defenders for the Caribbean Region on February 4, 2004.

I would like to thank you for your time and look forward to hearing from you on this important matter.

Yours sincerely,

For Irene Khan  
Secretary General

## Appendix

### Jamaica: draft Terrorism Prevention Act's definition of 'Terrorism'

Under s.2, the Act defines terrorism as follows:

a **“terrorism offence”** means -

- (a) an offence constituted by an act or omission referred to in the definition of “terrorist activity”;
- (b) an offence under section 4, 5, 6, 7, 8, 10, 11 or 12; or
- (c) a conspiracy or attempt to commit, or aiding or abetting, procuring or counselling in relation to, an offence referred to in paragraph (b);

**“terrorist activity”** means an act or omission in or outside Jamaica that, if committed in Jamaica, would be one of the following offences -

- (a) an offence under section 12, 13, 16 17, 17A or 18 of the Aircraft (Tokyo, Hague and Montreal Conventions) Act; or
- (b) an offence referred to in section 3 (1)
- (c) an offence under section 3(2); or
- (d) a conspiracy or attempt to commit, or aiding, abetting, procuring or counselling in relation to, an offence referred to in paragraph (a), (b) or (c);

And a **“terrorist group”** means -

- (a) an entity that has, as one of its purposes or activities, facilitating or carrying out any terrorist activity; or
- (b) a listed entity, and includes an association of such entities.

To commit an offence of terrorism, a person must engage in an act or omission which would lead to terrorist activity as set out below under s.3(2):

*“Any person who commits an act, or omits to act, in the circumstances referred to in subsection (4) commits an offence if the act or omission intentionally -*

- (a) causes
  - (i) death; or
  - (ii) serious bodily harm, to a person;
- (b) endangers a person's life;
- (c) causes a serious risk to the health or safety of the public or any segment of the public;
- (d) causes substantial property damage, whether to public or private property, if such damage is likely to result in the conduct or harm referred to in any of paragraphs (a) to (c) and (e); or
- (e) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private.”

Section 3(4) adds the following requirement:

*“The circumstances mentioned in subsection (2) are that the act or omission is committed in whole or in part for a political, religious or ideological purpose, objective or cause with the intention of—*

*(a) intimidating the public, or a segment of the public, with regard to its security, including its economic security; or*

*(b) compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the person, government or organization is inside or outside Jamaica.”*

Alternatively, a “terrorist” act may be committed through one of the specific offences under ss.s.4-8 and 10-12 of the Act or under the international conventions on terrorism. Offences under the Act include the following:

Section 4 - Providing, making available etc., property or services for terrorist purposes

Section 5 - Using or possessing property for terrorist purposes

Section 6 -Dealing in property for terrorist purposes

Section 7 - Participation in activity of terrorist group

Section 8- Facilitating terrorist activity

Section 10 - Instructing commission of offence for terrorist group

Section 11-Instructing to carry out terrorist activity

Section 12 -Harbouring or concealing

Unlike offences under s.3(2), the offences carried out under ss.4-8 and 10-12 do not require any ideological, philosophical or political motivation on the part of the perpetrator. Thus, certain specified acts automatically fall under the definition of terrorism even if they are not designed by the person carrying them out to influence the public or have one of the other prohibited effects.