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Criminal Justice And Human Rights In Northern Ireland

A REPORT TO THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

By WILLIAM E. HELLERSTEIN, ROBERT B. MCKAY AND PETER R. SCHLAM

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I. *Introduction*

The Committee on International Human Rights is a standing committee of the Association of the Bar of the City of New York. In connection with its interest in international human rights, the Committee sponsors programs of general interest to the bar, welcomes visitors from other nations to report on human rights developments in their countries, and commissions occasional fact-finding visits to nations with troubled human rights records.

The mission to Northern Ireland to investigate human rights issues in the administration of criminal justice is the second of a new series of such inquiries supported by grants from The Ford Foundation and the J. Roderick MacArthur Foundation.[1] The choice of Northern Ireland as the subject of this investigation was initiated by Alice H. Henkin, Committee Chair, and approved by the Committee and the President of The Association, Robert M. Kaufman.

The joint authors of this report are all actively involved in the work of The Association,[2] but none of the three had any previous connection with the criminal justice system in Northern Ireland or with the religious and political controversies that have so disfigured the six counties that comprise Northern Ireland, or Ulster as it is commonly known.

Although desirable that an inquiry into this volatile situation should be conducted by individuals without preconceived views of right and wrong or notions about "solutions," that same innocence of detailed knowledge suggested the need for considerable briefing as to facts and issues. In this we were particularly fortunate to receive initial assistance from Martin

Flaherty,[3] a Columbia University Law School student, who spent the summer of 1986 in Belfast with the Committee on the Administration of Justice, and from Diane Orentlicher, Deputy Director of the Lawyers Committee on Human Rights. Shortly before we left on our mission, we also received helpful briefings from the British and Irish consuls in New York City. Finally, we were given access to the most important and best informed spokespersons for official and unofficial viewpoints of every variety in London, Belfast and Dublin.[4] These sources were unfailingly patient and helpful in their efforts to assist our understanding of the complexities of a troubled land in which sectarian impulses have intruded upon the secular with harsh consequences for every aspect of daily life, including the criminal justice system, the focus of our inquiry.

Our itinerary was as follows:

London, May 17-18, 1987
Belfast, May 18-22, 1987
Dublin, May 22-23, 1987

The people of Northern Ireland are so engaging and the country so attractive that the search for a way out of the nation's "troubles" becomes compelling. We three were—and are—very much caught up in that effort. We hope that the limited effort that we undertake in this report will be of some assistance, if not in resolving the deeply divisive issues, at least in explaining to those willing to listen something about how the difficulties developed, and what modest changes might make a difference.

II. *The Contemporary Scene*

Communal strife is not a recent phenomenon in what is now Northern Ireland. For at least four centuries the island has been riven with political and religious disputes, most of the time with Ireland's neighbor and conqueror, Great Britain. For almost the past two decades the "troubles" have accelerated to

new levels of bigotry and violence, often in the form of terrorist activities, sometimes directed at uninvolved civilian populations. Since 1969 nearly 3,000 individuals have been killed through political violence in Northern Ireland. When it is realized that the population is only about a million and a half, a comparable death toll in the United States would be a shocking 400,000 or more. In an area as compact as Northern Ireland, where family and work relationships are necessarily closely intertwined, no one escapes the personal tragedy of the death of friends and loved ones.

Belfast and Londonderry (or simply Derry, depending on one's political persuasion), are divided cities, sometimes with actual barriers separating Catholic and Protestant working class residential areas. Belfast, for example, has in the southern portions of the city, especially in the area around Queens University, the gracious appearance of a prosperous suburb, with handsome botanical gardens, fine restaurants, and a seemingly relaxed way of life. But of course no one can be truly at ease there when other parts of the city, the Falls Road and Shankill Districts in West Belfast, exist as armed camps with homes and shopping areas bombed out or blackened by recurrent fires.[5] Meanwhile, in the hate ridden areas of the city, and in the central shopping district (where permits are needed for automobiles to cross military check points), local authorities and the British Army patrol the streets in armored vehicles, make use of broad emergency powers of arrest and detention, and on occasion resort to the firing of plastic bullets into crowds of protestors deemed unruly. How could this be in a corner of the United Kingdom, a presumed bastion of democracy and civility? The answer lies in history, which requires a short recounting.

III. *A Brief History*

Although religious animosities were not new toward the end of the seventeenth century, one event, not forgotten today, symbolized the Protestant/Catholic feuds and fighting that have

characterized Irish history ever since. On July 12, 1690, the Protestant Prince William of Orange emerged victorious over the forces of the deposed Catholic monarch, James II, thus cementing Protestant English rule and Catholic subjugation for centuries to come.[6] To this day, on the twelfth of July thousands of Protestant unionists march (often provocatively in Catholic areas) to celebrate Prince William's victory.[7] Celebration of symbolic events is not limited to the Protestants. Catholic nationalists rely on such events as the Easter Rising for Irish Independence in 1916. In different ways each use of an embittered past heightens tensions and provokes violence. Nowhere is the relevance of history more apparent—and more alarming.

What is now Northern Ireland first took on a significantly discrete identity in the early 1600s, by which time Ulster, the northernmost of Ireland's four ancient provinces, had become the most militantly Catholic and Celtic region on the island. This began to change in 1603, with the defeat of certain Irish earls by the forces of Queen Elizabeth. Her successor, James I, encouraged the settlement in Ulster of Scottish Presbyterians, much as he concurrently encouraged British settlement in America. In contrast to the rest of Ireland, the Protestant influx there eventually surpassed the Catholic population. Religious strife throughout Europe during this period reinforced the rivalries and tensions between Catholic and Protestant in Ulster. English military campaigns, first by Cromwell and later by William, effectively eliminated any chance for successful Catholic resistance throughout Ireland, until this century. In the meantime, Ulster Presbyterians consolidated their supremacy through successful farming, linen manufacture, and eventually industry such as shipbuilding and, by the nineteenth century, discrimination against the Catholic minority.

The present conflict took further shape with the Act of

Union of 1800, which formally incorporated Ireland into the United Kingdom. The submerged Catholic population responded with a gradually developed tradition of Irish nationalism and a heavy stress on the island's Catholic and Celtic heritage. The Ulster Protestants, a minority outside Ulster, responded by embracing the union with Britain as the best safeguard of their way of life.

When, by the outbreak of World War I, Westminster appeared ready to grant home-rule to Ireland (with a separate but subordinate parliament), Ulstermen, under the leadership of Sir Edward Carson, demanded special treatment. In 1920, Parliament sought a solution of sorts through the Government of Ireland Act, which provided two home-rule parliaments, one for the 26 counties of the south and one for the six counties of the north. This device, however, was unacceptable to the more populous Catholic south. Within a year, Irish Republican Army (IRA) violence convinced Westminster that it was no longer practical to hold onto the rebellious 26 counties. Parliament recognized the Irish Free State in return for acceptance of the fact of partition, leaving Northern Ireland to its separate status as a home-rule part of the United Kingdom. There followed a civil war in the South over acceptance of the British offer between Republicans who sought a complete break with Britain and those who accepted dominion status and limited independence within the Empire. The Republic of Ireland was recognized as completely independent of Britain only in 1949. The Northern Ireland Parliament was established in 1922, unaffected by events in the South.

The Ulster regime thus was established and lasted for 50 years. It was later dubbed "Stormont" for the parliament buildings it occupied in Belfast. It is only fair to characterize its rule as sectarian and replete with anti-Catholic discrimination in employment, housing, education and the franchise. In the absence of a written constitution or meaningful judicial review, the Northern Ireland Parliament enlarged already built-in

Protestant electoral majorities with property qualifications and gerrymandering of election districts. The Catholic population (about one third of the total) regarded the government with contempt, and nationalist leaders engaged in a policy of non-participation. Religious discrimination in employment, housing and education heightened Catholic anger, which evolved into a tradition of hatred.

IV. *Political Parties and the "Troubles"*

The Catholic/Protestant dispute dominates political life in Northern Ireland, even as it does other aspects of national life. The insistence by Ulster unionists on merger with Britain and abhorrence of a united Ireland is matched by nationalist opposition to continued unionist domination. The explosive violence thus triggered is echoed in the rhetoric of the political leaders of the dominant factions. The plurality party, the Official Unionist Party (OUP), led by James Molyneaux, represents the main-line tradition of Protestant unionism that has dominated the province for more than 60 years. More extreme in tone and tactics is Ian Paisley's Democratic Unionist Party (DUP). While both parties vehemently oppose anything that suggests the possibility of eventual rule from Dublin, the Democratic Unionists engage more overtly in anti-Catholic rhetoric and provocative demonstrations.

Together, the OUP and DUP comprise the political voice of the vast majority of the Protestant population, but unionist activities do not end here. Moving from politics to paramilitarism, the Ulster Defense Association (UDA) functions as more or less a counterpart of the IRA, albeit legal, less well organized and devoted ostensibly to mobilizing unionist solidarity rather than campaigns of violence. Most often this last task falls to such unambiguous Protestant terrorist groups as the Ulster Freedom Fighters—widely believed to be a wing of the UDA—and the Ulster Volunteer Force. For various reasons, terrorist organizations from the unionist side have claimed fewer victims than their nationalist counterparts. Quite properly, the official security forces have appeared to apply their enforcement policies with equal vigor against terrorists of both political persuasions.

Contrary to common belief outside Northern Ireland, the nationalist minority consists of far more than the IRA and its sympathizers. Still commanding the largest share of Catholic support is the Social Democratic and Labor Party (SDLP), headed by John Hume. The SDLP derives from a long standing tradition committed to the establishment of a United Irish Republic through constitutional means. Yet, as the name implies, the party also concerns itself with winning what concessions it can within the existing framework.

Sinn Fein (Irish for "Ourselves Alone") represents an equally longstanding tradition dedicated to severing all ties to Britain through force. To remain legal, the party cannot openly participate in terrorist activities, yet, as the political wing of the IRA, its policy objectives are clear. Sinn Fein consequently tends to view reforms of the current system as secondary, if not irrelevant, pending reunification. In this attitude is rooted much of the nationalist campaign to prevent participation by individual Catholics in such official activities as membership in the civil service, the Royal Ulster Constabulary and the judiciary. Intimidation and worse are too often the fate of Catholics seen to cooperate with the despised controlling authority and this results, perversely, in even further exclusion of Catholics from positions of influence.

On the paramilitary side of the nationalist movement, the most important group is the infamous Provisional Irish Republican Army. Since splitting with the "Official" IRA in 1970 over the continued use of violence, the "Provos" have conducted what they view as a legitimate war of liberation against British rule. Another splinter group is the Irish National Liberation Army (INLA).

Not all, most, or even a great many Catholics support any of the extremist groups, although gauging levels of support is necessarily speculative. Consistently better electoral showings by SDLP indicate substantially greater support for constitutional methods.

The relatively narrow middle ground of Northern Ireland politics is held principally by the nonsectarian Alliance party, which claims 10 to 15 percent of the electorate. Alliance aims mainly at reconciliation between the two main communities and rests on a mostly upper middle class and professional base. The current leader is John Cushnahan. Finally, Seamus Lynch's Workers' Party (ironically the inheritor of the Official IRA), also advocates a centrist, nonsectarian position based on reform of the capitalist economy of Northern Ireland.[8]

V. *The Statutory Base for Governing Northern Ireland*

Northern Ireland's "constitution" was until 1973, the Government of Ireland Act of 1920. Considerations of security have always been important, even dominant, in the minds of the controlling authorities. The earliest significant legislation was the Civil Authorities (Special Powers) Act (Northern Ireland) 1922. The Special Powers Act empowered the Minister for Home Affairs, or any designated member of the Royal Ulster Constabulary (RUC), to "[t]ake all steps and issue all such orders as may be necessary for the preserving of peace and the maintaining of order." Specific provisions authorized the minister to impose curfews, ban books, and order internment without trial. The Act remained in force throughout the next half century and was invoked frequently, ordinarily in connection with IRA terrorist campaigns, but sometimes against labor agitation and manifestations of nationalist sentiment. It has served as the model for the emergency statutes since 1972.

The current bout of terrorist intimidation and violence dates

from 1968, although it began more peacefully as a civil rights movement of the Catholic minority modeled on the American experience earlier in that decade. Beginning in October 1968, civil rights marchers encountered violent opposition from unionist mobs. Civil strife led to the intervention of the British Army. While some Catholic protesters originally welcomed the presence of the army as protection against unionist attack, its presence soon stimulated support for the IRA and the subsequent formation of the violent faction, the Provisional IRA.

In 1971, during a sharp increase in violence, internment under the Special Powers Act led to the arrest of 1,576 individuals, of whom 442 were still detained at year's end. For more than four years, the military authorities exercised the power of internment without trial as the principal means of controlling terrorism. In 1972, the infamous "Bloody Sunday" occurred, during which 13 Catholic demonstrators were killed by the army in Derry. There were nearly 500 deaths that year, more than any year before or since.

The events of 1972 initiated a series of acts that led to Northern Ireland's current constitutional arrangements. In March, the British Government imposed direct rule from Westminster. The Northern Ireland (Temporary Provisions) Act of 1972 suspended the Stormont Parliament and its superseding successor, the Northern Ireland Constitution Act of 1973, abolished the Stormont Parliament. Since that time laws for the province have ordinarily been adopted as Orders in Council approved in Westminster. Unlike the debates that precede ordinary legislation, Orders in Council are submitted as draft measures for approval by resolution of both Houses of Parliament (but not there subject to amendment), after which they are recommended to the Queen in the Privy Council for confirmation. With a brief exception, executive authority has rested with a Secretary of State for Northern Ireland (an elected member of Parliament at Westminster), who oversees the

Northern Ireland Office.[9] Although the Government of Ireland Act contemplates a devolved provincial executive and legislative body, neither has been in place since 1974. The Westminster Parliament retains ultimate authority to legislate for the province directly.

The two most important statutes concerning security and justice are parliamentary measures: the Northern Ireland (Emergency Provisions) Act of 1978 (amended substantially by the Northern Ireland (Emergency Provisions) Act 1987), and the Prevention of Terrorism (Temporary Provisions) Act of 1984.[10] Together, these statutes supplant the original Special Powers Act and provide the basis for security control and deviation from the criminal justice system in the rest of the United Kingdom.

Since direct rule was instituted, four commissions have reviewed the security system, particularly as to the impact of security needs on the criminal justice system. Lord Diplock, reporting for the first commission in 1972, recommended that internment by the military, as the means for controlling terrorism, be replaced by the police and courts. The Diplock Commission also recommended discontinuance of jury trials for terrorist offenses, substituting trial by a single High Court judge. The controversy to which this led continues and will be discussed in detail below.

Lord Gardiner, reporting for his commission in 1975, recommended that detention without trial, while arguably effective in the containment of violence, should not remain as a long term policy. However, he found it impossible to put forward a precise timetable for its cessation.

Judge Bennett, an English County Court judge, headed a Committee of Inquiry in 1978 to examine the interrogation practices of the police which, until that time, had often used harsh forms of psychological pressure and even physical abuse to extract confessions from suspected terrorists.[11] The Bennett Report recognized that case law up to that time fell far short of

deterring, and may even have effectively sanctioned, certa "degrees of physical violence" in interrogation.[12] The repo included various recommendations for improving the interr gation practices, and these have been largely implemented. T police force is now accountable to the Police Authority, a complaints against its officers must be reviewed by the Pol Complaints Board. Problems remain, however, as will be not below.

Finally, the operation of the Diplock courts and measures control terrorism were the subject of a report by the late Jud Baker.[13] His recommendations discussed below, were in pa adopted in the Northern Ireland (Emergency Provisions) A 1987.

Although the military phase of controlling and sanctioni terrorist acts was terminated by the ruling British authorit after only three years, the criminal justice process that remai in place differs in significant ways from its counterpart in oth parts of the United Kingdom. The criminal justice system Northern Ireland is also markedly different from its counte parts in the Republic of Ireland and in the United States. T remainder of this report will examine those differences and t justifications advanced for the continuing limitations on wh we in the United States would call due process rights of tho accused of crime.

VI. *Provisions for Security in Northern Ireland*

Although the Royal Ulster Constabulary (RUC) is the on law enforcement agency in Northern Ireland, its assigned ta of maintaining peace and order has been augmented since th late 1960s by units of the British Army, who assist in patrol du and in paramilitary operations as needed.

The years since 1968 have been traumatic for the RUC, for all residents of Northern Ireland, and 1986 was one of th most difficult years in terms of terrorist violence, presumabl triggered at least in part by opposition to the Anglo-Iri

Agreement concluded in November 1985. During the years 1968-1987 the RUC has undergone substantial change. To understand its present structure and role in relation to terrorism and the criminal justice system, it is necessary to review the history of the RUC, particularly in recent years.

A. *The Royal Ulster Constabulary: A Brief History*

The RUC came into official existence in June 1922. From its inception it had a dual role: providing law enforcement services comparable to those in other parts of the United Kingdom, and at the same time protecting the state from armed subversion from within and outside its borders.

As internal disturbances escalated from October 1968 to August 1969, the RUC was no longer able to contain the situation. Elements of the British Army moved to the streets and eventually assumed primary responsibility for peace keeping and security.[14] On recommendation of an advisory committee chaired by Lord Hunt, the RUC was then relieved of all duties of a military nature.

Another major development was the establishment of a Police Authority of Northern Ireland, representative of the community and statutorily responsible for the maintenance of an adequate and efficient police force. The existing armed auxiliary police force, the Ulster Special Constabulary (about which complaints had been made) was disbanded. In its place were established the RUC Reserve whose civilian members were given the function of assisting the police on a part-time basis, and the Ulster Defence Regiment, also a voluntary part-time body, but with a military function and under military control.

At an early stage in the current terrorist campaign it was realized that the RUC was considerably under-equipped to serve a community of 1,500,000 people. Over the years the authorized strength of the service has several times been increased. The strength of the regular RUC on December 31, 1986, was 8,234, while there were 4,414 in the RUC Reserve (of

whom 2,754 were then employed on a full time basis).[15] The British Army personnel assigned to Northern Ireland in mid-1987 numbered between 6,000 and 7,000. Control of the RUC is vested in Chief Constable, Sir John Herman, assisted by Deputy Chief Constable, Michael McAtamney.

B. *The Task of Providing Security Against Terrorism*

The police function is everywhere a somewhat hazardous activity, but even in the most crime-ridden urban centers of the Western world the number of police who lose their lives to hostile activity in any given year can be counted on the fingers of one hand. Not so in Northern Ireland, despite the fact that "ordinary" crime is low in terms of what we have regrettably come to expect in the United States. These tragic statistics appear on the chart in Appendix B to this Report. While the deaths of usually innocent civilians far outnumber the deaths of police and military, the almost 800 deaths of police and military personnel in 18 years out of an average force of less than 20,000 portray a truly grim toll. It is clear that membership in the security forces requires a measure of courage and devotion beyond anything we are accustomed to in peacetime.[16]

Confronted with these frightening statistics, it is perhaps not surprising that drastic countermeasures were authorized and that individual officers sometimes (perhaps frequently, as charged) exceeded even their sanctioned use of authority. Issues involving alleged abuse of authority in connection with arrest, detention and interrogation will be considered separately and extensively. Here we discuss briefly the use of plastic bullets for riot control.

Plastic bullets—"P.V.C. baton rounds" as they are officially known—were first used in Northern Ireland in February 1973. By the end of 1974 only 258 had been fired, but in 1975 some 3,500 were fired and the less lethal rubber bullets were no longer used. The weapon comes in two varieties: the 45 grain bullet, for use at a long distance with a muzzle velocity of 75

metres per second, and the 25 grain bullet for use at shorter distances. The latter, more commonly used, is 3.875 inches long and 1.5 inches in diameter, and truly alarming even in repose. Its apparent dangerousness is confirmed by the fact that at least 12 deaths have resulted from the firing of plastic bullets as well as a much larger number of injuries. Government officials, however, argue that if plastic bullets were not available to the security forces, something more lethal would be needed.

C. *Complaints Against the Police*

In a security situation as volatile as that in Northern Ireland, and as dangerous to the police, it is inevitable that there will be complaints of police abuse and indeed that some will be grounded in fact. Accordingly, the process for review of citizen complaints is vital to public confidence and integrity of the police procedures.

Until 1987, the complaints and discipline procedures were governed by the Police Act (Northern Ireland) 1970 and the Police (Northern Ireland) Order 1977. To understand the operation of those procedures, it is instructive to look at the record for a single year, 1986, in which there was a high incidence of terrorist activity and thus of complaints. In reviewing the data it should be understood that the then applicable procedures were entirely internal. The Disciplinary Panel consisted in each case of the Chief Constable and two members of the Police Complaints Board.[17]

In 1986, a total of 2,785 complaints against police officers were received. Of 1,684 cases referred to the Director of Public Prosecutions (DPP),[18] the DPP directed in five of these that eight officers be prosecuted for 12 criminal offenses. In accordance with the requirements of the Police (Northern Ireland) Order 1977, 1,116 investigations of complaints completed in 1986 were referred to the Police Complaints Board. The disposition of these cases is not disclosed in the Chief Constable's Report.[19]

In 1986, a new Order in Council, Police (Northern Ireland) Order 1986, was instituted in response to widespread dissatisfaction with a procedure that was not open to scrutiny outside the RUC. That Order, now effective, abolishes the Police Complaints Board and establishes the Independent Commission for Police Complaints in its place. The Order obligates the new commission to supervise the investigation of serious complaints against police officers, gives it discretion to supervise any other investigation, gives it power to supervise non-complaint matters referred for investigation by the Chief Constable, the Secretary of State, or the Police Authority, and power to approve or veto the appointment of investigating officers for matters within its supervisory jurisdiction. The Commission is to consist of a chairman, two deputy chairmen and at least four others, all appointed by the Secretary of State. Significantly, no member of the Commission may be or have been a member of a police force in any part of the United Kingdom or the Republic of Ireland. The new procedure (comparable to procedures in England and Wales since 1985) should go far to restore public confidence in the integrity of the police function.

VII. *Arrest, Detention and Interrogation*

A. *Preface*

As noted in the preceding section, meaningful steps have been taken to improve police complaint procedures. However, one major segment of persistent controversy in Northern Ireland centers on the very laws and procedures from which the police derive their authority with respect to arrest, detention and interrogation. Because arrest and detention are the points at which the security interests of the government conflict directly with the liberty interests of the individual, it is not remarkable that police authority in these spheres is a point of substantial tension, and one which has drawn, and continues to warrant, close scrutiny. The same can be said of the interroga-

tion process as authorized by law and as conducted by the police. As is true of any criminal justice system, what transpires in one or more of these preliminary phases of the criminal process can also affect seriously the fairness and integrity of the trial process once the decision is made to prosecute an arrested individual. In this section, we examine the laws governing arrest and detention and the laws and practices that regulate police interrogation.

Preliminarily, it should be noted that although the Parliament in Westminster passes laws for Northern Ireland as well as Great Britain, a number of police powers in Northern Ireland are different from those in Great Britain. One reason for this, arguably, is that the conditions under which the police work in Northern Ireland are "more arduous and dangerous than anywhere else in the United Kingdom, or indeed in Western Europe."[20]

Members of the judiciary in Northern Ireland, and their families also have been the subject of assassination attempts by terrorist groups, many of which have been successful or have resulted in severe injuries.[21] Indeed, one of the vivid impressions of our trip was the elaborate security necessary to protect the lives of the Lord Chief Justice, the Lord Justices of Appeal and the Judges of the High Court, who have to forgo much of their privacy to avoid physical violence by terrorists. The seriousness of the threat was underscored when, just two weeks before our arrival in Belfast, Lord Justice Gibson and his wife were killed by a bomb while riding in their car.

The effect of terrorism on the daily life of the Northern Ireland community understandably creates enormous pressure on the RUC to arrest those responsible for the violence, and their efforts are not met with the fullest cooperation in many communities. Moreover, terrorist groups attempt to maintain strong internal discipline,[22] and do not look kindly upon betrayal by their own members.[23] Even crime scene examination by police and forensic personnel is especially difficult because

often the RUC cannot immediately, properly, or safely examin the scene of a serious crime, even with army protection. report of a crime may, itself, "be and often is, the bait to lur [the police] into an ambush."[24] Consequently, it is not surpri ing that the RUC considers arrest, detention, and interrogatio as the most productive methods of obtaining evidence in terro ist cases.

B. *Arrest*

In Northern Ireland, police powers are set forth in sever statutes and a single Order. They are: The Criminal Law A (Northern Ireland) 1967 ("CLA(NI)"), the Northern Irelar (Emergency Provisions) Act 1978 as amended by the Norther Ireland (Emergency Provisions) Act 1987 ("EPA"), the Preve tion of Terrorism (Temporary Provisions) Act 1978 as amen ed by the Prevention of Terrorism (Temporary Provisions) A 1984 ("PTA"), and the Magistrates' Courts (Northern Irelan Order 1981. The statute (or Order) under which an arrest made depends on the nature of the offense. That statute w then govern the duration of the detention and the rules interrogation.

1. *The Criminal Law Act (Northern Ireland) 1967*

Under the Criminal Law Act (Northern Ireland) 1967, apa from emergency powers, the RUC may generally arrest a pe son only with a warrant unless there is reasonable cause suspect that the person has committed, is committing or about to commit an "arrestable offense."[25] An "arrestable o fense" is one punishable by imprisonment for five years more.[26]

2. *The Northern Ireland (Emergency Provisions) Act 1978, 1987*

Where emergency conditions exist, the RUC's power of a rest is significantly broadened. Section 13 of the EPA nc provides that:

> Any constable may arrest without warrant any person who he has reasonable grounds to suspect is committing, has committed or is about to commit a scheduled offense or an offense under this Act which is not a scheduled offense.[27]

Prior to the 1987 amendment, the EPA granted the RUC two powers of arrest. The first was under the controversial former §11, which allowed for an arrest without a warrant of any person whom the constable "[suspected] of being a terrorist." The second, under former §13, allowed for warrantless arrests based on mere suspicion that either a scheduled or non-scheduled offense had been committed, and permitted detention for 72 hours.[28]

As a result of the 1987 amendment, §11 no longer confers on the RUC a power to arrest.[29] That section did not comply with the standards of Article 5(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms requiring that a lawful arrest must be "effected for the purpose of bringing [the arrestee] before the competent legal authority on reasonable suspicion of having committed an offense."

The second arrest power, EPA §13, although still in effect, has been modified substantially by the 1987 amendment. Under the amended statute, an arrest can be effected only when there is *reasonable* suspicion that a scheduled or non-scheduled offense has been committed. The EPA's non-scheduled offenses, which also trigger the arrest powers of §13, are: §18(2) (failing to stop and answer questions); §19(4) (interfering with the power to close roads); §20(7) (failing to stop a vessel, vehicle or aircraft when required to do so); §24(2) (failing to disperse when required to do so); and §27(2) (failing to comply with regulations established by the Secretary of State for preserving peace and order).

3. *The Prevention of Terrorism (Temporary Provisions) Act, 1974, 1976, 1984*

The Prevention of Terrorism (Temporary Provisions) Act applies throughout the UK. The history of the PTA dates back to the IRA terrorist campaign in Great Britain which reached a climax in 1974. In that year, following the bombing of two public houses in Birmingham on November 21, 1974, in which 21 people died and 180 were injured, the Prevention of Terrorism (Temporary Provisions) Bill 1974 was introduced in Parliament.[30] There are three pertinent parts to the Act. The first deals with proscribed organizations; the second with exclusion of suspected terrorists at the discretion of the Secretary of State; and the third with powers to arrest any person suspected of connection with terrorism. Section 12(1) of the PTA sets forth the special powers of arrest:

> (1) a constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be
>
> (a) a person guilty of an offense under section 1, 9 or 10 above;
>
> (b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this Part of this Act applies;
>
> (c) a person subject to an exclusion order.

Section 12(1)(a) thus makes violations of sections 1, 9 and 10 of the PTA arrestable offenses under the PTA.[31] Section 1, prohibiting membership in the Irish Republican Army and Irish National Liberation Army, does not apply in Northern Ireland.[32] (In Northern Ireland, IRA and INLA membership, among other groups, are outlawed under the EPA.) Section 9 makes it unlawful to knowingly facilitate the illegal entry of a person subject to an exclusion order. Section 10 makes it unlawful to solicit or receive money or property in connection with commission of acts of terrorism.[33]

Section 12(1)(b) makes it an arrestable offense for a person to be involved in the commission, preparation or instigation of acts of terrorism. "Terrorism is defined as 'the use of violence

for political ends, and includes any use of violence for the purpose of putting the public . . . in fear."[34]

C. *Detention*

There are two forms of detention in Northern Ireland. The first arises out of the police powers to arrest and is termed "detention upon arrest." The second is described as "deprivation of liberty as a result of an extra-judicial process."[35]

1. *Detention Upon Arrest*

In Northern Ireland the maximum length of detention prior to being brought before a magistrate, as set forth in Article 131 of the Magistrates' Courts (Northern Ireland) Order 1981, is 48 hours:

> Where a person arrested without warrant is not, within twenty-four hours of his arrest, released from custody, the member of the Royal Ulster Constabulary in charge of the police station where such person is in custody shall bring him or have him brought before a magistrates' court as soon as practicable thereafter but in any event not later than forty-eight hours after his arrest.

The Order applies to all warrantless arrests and therefore to persons arrested under §2 of the CLA(NI) 1967 and §13 of the EPA. For a person arrested under §13, it makes no difference whether the underlying offense is scheduled or non-scheduled. The Order does not apply to arrests made under the PTA. The PTA specifically exempts its arrest provisions, §12, from the Order, and provides that a person arrested under the PTA can be detained for up to seven days before being brought before a magistrate.[36]

In 1986, extensions beyond the 48-hour period were granted in Northern Ireland in the following frequencies:

1 day (8)
2 days (114)
3 days (297)
5 days (64)[37]

While the length of detention for similar offenses in Great Britain and Northern Ireland is generally the same, there is one significant difference: an arrest in Great Britain for a violation of §1 of the PTA (which section does not apply to Northern Ireland) must occur under §12(1)(a) of the PTA which allows for detention up to seven days. In contrast, a similar offense in Northern Ireland is defined by §21 of the EPA, and arrest for that crime allows for a maximum period of detention of 48 hours.

The significant feature of PTA §12, as it operates in Northern Ireland, is that a person arrested under it can, and frequently does, face up to seven days detention during which he or she is subjected to a regularized, efficient, and intensive police interrogation process.[38] Indeed, that is the very purpose of the type of detention authorized by it. As the Bennett Report noted, "persistent, forceful questioning may be needed," and that it is the announced policy of the RUC "to arrest every terrorist suspect, even if caught in the act of committing a specific offence, under their powers either under section 11 of the 1978 Act (now repealed) or section 12 of the 1976 Act. One clear advantage to the police of doing so is to give them more time in which to carry out their investigation."[39]

Given that the main repositories of persons arrested as suspected terrorists are facilities designed for achieving productive interrogations,[40] we turn shortly to that process. However, in the interest of completeness, we describe briefly the extant provisions, not recently used, of detention of an extra-judicial type.

2. *Extra-judicial Detention*

In 1973, extra-judicial detention began under the EPA as a result of Lord Diplock's recommendation. He distinguished detention from internment which had been in use in Northern Ireland since August, 1971:

> Deprivation of liberty [is] a result of an extra-judicial process we call "detention," following the nomenclature of The Detention of Terrorists (Northern Ireland) Order, 1972. It does not mean imprisonment at the arbitrary Diktat of the Executive Government, which to many people is a common connotation of the term "internment." We use it to describe depriving a man of his liberty as a result of an investigation of the facts which inculpate the detainee by an impartial person or tribunal by making use of a procedure which, however fair to him, is inappropriate to a court of law because it does not comply with Article 6 of the European Convention.[41]

Under the scheme set out in Schedule I of the EPA, the Secretary of State can make an interim custody order (ICO) for the temporary detention of a person. Thereafter, within 28 days, there must be a reference by the Chief Constable of the RUC to a commission for adjudication in private as to whether the person detained had been engaged in an act of terrorism, and whether his detention was necessary for the protection of the public. If these requirements of Schedule I were met, the person would be detained; if not, he would be released.

A detention order has not been made since February 9, 1975, and the last detainee was released at the end of that year. Nevertheless, extra-judicial detention has been retained in the EPA. The argument in favor of its retention is based on the possibility that matters in Northern Ireland could deteriorate so as to require the reintroduction of this procedure. Interestingly, extra-judicial detention has been a source of international embarrassment to the United Kingdom, which is a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.

D. *Interrogation*

1. *The Judges' Rules*

The United Kingdom does not have a Bill of Rights. The rights of persons detained pursuant to police powers are set forth in the Judges' Rules and Administrative Directions. The origin of the Judges' Rules was described in the following manner by the Royal Commission on Criminal Procedure:

> In the middle of the nineteenth century the responsibility for investigating and preparing a case for prosecution passed largely to the police who, lacking statutory authority to question suspects or to hold them for questioning, before long ran into difficulties as to what they should or should not do. In a necessary effort to provide guidance and some control, a set of what came to be termed "The Judges' Rules" was drawn up in 1912, not by Parliament, but by the Judges, and was revised and added to over the years. . . .[42]

The Judges' Rules provide that a police officer investigating the commission of a crime "is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offense. . . ."[43] The law is the same in Great Britain, which codified this particular Rule in the Police and Criminal Evidence Act 1984 ("PCEA"), §37(1) and (2) ("where a person is arrested for an offense without a warrant, if the police officer does not believe that there is sufficient evidence to charge him, the officer may keep the detainee in custody to obtain such evidence by questioning him").

The Judges' Rules further provide that, apart from exceptional cases, once the interrogating police officer gathers sufficient evidence to charge a detainee, all questioning must stop.[44] The officer should, without delay, cause that person to be charged or informed that he may be prosecuted for the of-

fense.[45] This Rule has also been codified in Great Britain in the PCEA, §37(7). In Great Britain, however, §37 of the PCEA does not apply to persons arrested under the PTA. While there does not appear to be a statute or order excluding the applicability of this Judges' Rule to persons arrested under the PTA in Northern Ireland, the inapplicability of §37 to the PTA in Great Britain seems to indicate that the same result would be reached in Northern Ireland.

In any event, regardless of the statute or Order invoked, no detainee is under a duty to answer questions or to make a statement, and at a subsequent trial no adverse inference is to be drawn from silence.[46] However, unlike U.S. practice, "English courts restrict only comments about the evidence of silence; they do not exclude the evidence itself. As a consequence, the jury is fully aware that the defendant refused to answer questions when cautioned and interrogated by the police."[47]

The Judges' Rules further provide for access to legal counsel as follows:

> Every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so.[48]

This rule applies in Northern Ireland to persons detained under the EPA and the CLA(NI). Access to counsel may, however, be denied for up to 48 hours under certain circumstances. For example, persons arrested under the PTA can be denied counsel for up to 48 hours under the 1987 Amendments to the EPA.[49] The same is true for persons detained under the PTA in Great Britain.[50]

In Great Britain, §58 of the PCEA grants to a detainee the right to consult a solicitor at any time, except that such access may be delayed in the instance of a person in custody for a

"serious arrestable offense," in which case the delay in consulting counsel may, under certain circumstances, be delayed for 36 hours. In Great Britain persons detained under §12(1)(b) of the PTA can be denied access to counsel for 48 hours.[51] Persons arrested under §12(1)(a) are treated as having been charged with "a serious arrestable offense" and therefore access to counsel cannot be delayed beyond 36 hours.[52]

Thus, the only difference in delay in access to counsel under the PTA between those detained in Northern Ireland and those detained in Great Britain, is that in Northern Ireland a person arrested under §12(1)(a) of the PTA can be denied counsel for 48 hours whereas a person arrested in Great Britain under the same provision can be denied counsel for 36 hours. As to those arrested under §12(1)(b) of the PTA access to counsel can be delayed for 48 hours in both Northern Ireland and Great Britain.

The real concern is that access to counsel can be denied to a detainee at all. The Bennett Report noted that "the consistent refusal to allow access to a solicitor throughout the whole period of detention is unjustifiable."[53] It recommended, however, that "prisoners in Northern Ireland should be given an unconditional right of access to a solicitor after 48 hours and every 48 hours thereafter. But solicitors should not be permitted to be present at interviews."[54]

The first 36 or 48 hours of police custody can be critical to a person's decision to respond to police interrogation. The statutory proscription of access to counsel during this period is predicated on the very notion that custodial interrogation during this time, untroubled by a right of access, will be most productive for the police and damaging to the rights of the suspect.

The U.S. experience with the dangers of custodial interrogation led to the landmark ruling in *Miranda v. Arizona*.[55] That case held not only that the police must advise a person that he has a right to remain silent, but also that he must clearly be

informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. Consequently, under *Miranda*, if a suspect asserts his desire for counsel, interrogation must cease, unless the suspect himself initiates further discussions with the police or knowingly waives the right which he has just invoked. In short, the police may not badger the suspect who has requested counsel in an effort to get him to change his mind.[56]

We recognize the many differences between the laws governing police interrogation in the United States and in the United Kingdom. We also appreciate the many strains that the terrorist experience has put on the legal system of the United Kingdom. As former Secretary of State Whitelaw, in describing the 1978 EPA, conceded: "the Bill contains some features unpalatable to a democratic society. Her majesty's government does not disguise the fact that it imposed serious limitations on the traditional liberty of the subject."[57] It is difficult, however, to accept with equanimity any period of detention during which a person's request for the assistance of counsel in the face of custodial interrogation is entitled to no respect whatsoever.

2. *Administrative Regulations*

Further provision for persons detained by the police can be found in the "Administrative Directions" of the Judges' Rules as well as in the RUC Code.

The Administrative Directions generally describe the procedures to be followed during the interrogation process and include regulations regarding the comfort and refreshment of the detainee, interrogation of children, young persons, and mentally handicapped persons, confessions in foreign languages, the obligations to provide accused persons with "written statement of charges," "facilities for defence," such as writing materials, and the record of interrogation.

The RUC Code, which is substantially broader, comprises the body of instructions for every member of the force. It includes extensive directions regarding the treatment of persons in police custody and, while its contents are not publicly available, it appears that the Code contains many of the provisions of the Judges' Rules and Administrative Directions.[58]

Despite the detailed rules provided by the Administrative Directions and the RUC Code, an Amnesty International report in 1977 strongly criticized the interrogation practices in Northern Ireland, and it seemed clear that the above rules and regulations were not successful in alleviating public concern about interrogation.[59] In response to that report, the Bennett Committee was commissioned in 1978 to review police practices. That Committee set forth several general principles upon which police stations and police officers should be organized with respect to interrogation:

> [I]t is traditional in the police forces of the British Isles that responsibility for the custody and welfare of prisoners, and for dealing with their needs and requests and for outside inquiries in relation to them, lies with the uniformed branch while responsibility for questioning them lies with detective officers . . . Secondly, experience shows that a major element in ensuring that prisoners are properly treated is meticulous documentation . . . [and] Thirdly, there needs to be provision for proper supervision of both uniformed and detective staff so as to ensure that the procedures laid down are actually observed.[60]

On the basis of these three principles, the Bennett Committee recommended a system of supervision which involved increasing the number and rank of supervisory uniformed officers; improving the physical facilities for supervision (for instance, providing closed circuit television cameras in all interview rooms); developing an even stricter division of responsibility between the uniformed and plain clothes branches; and providing fuller documentation on all aspects of a prisoner's treatment while in police custody.[61] In addition, the Bennett Committee

made specific recommendations on the conduct of interviews which were later incorporated in the RUC Code. The most notable require that female suspects be interviewed only in the presence of female officers; interviews not encroach on normal mealtimes; interviews not start or continue after midnight unless operational requirements demand it; no more than two officers interview a prisoner at one time; no more than three teams of two officers be concerned in interviewing one prisoner; officers identify themselves at the start of the interviews; and all persons detained be given a printed notice of their rights.

As concerns the closed-circuit TV practices, a uniformed chief inspector supervises the interrogation centers at Castlereagh and Gough Barracks, where the bulk of terrorist interrogation occurs, with at least one RUC inspector on duty during the permitted interview times (8 a.m. to midnight). Closed-circuit TV monitoring consists of two cameras and a monitoring screen for each interview room. All monitoring screens are situated together on one wall of the central monitoring room. In addition, the divisional commander (at Castlereagh) and subdivisional commander (at Gough Barracks) have screens in their offices on which they can view any of the interview rooms they choose.[62]

The RUC Code also provides for a system of medical examinations for persons in custody. It sets forth that, as soon as possible after arrest, medical attention should be provided if:

> a) the prisoner appears to be suffering from any illness or injury or complains to the police that he is so suffering; b) the prisoner is considered to be suffering from the effect of alcohol or drugs; c) the prisoner alleges that he was assaulted before, during or after arrest; d) a police officer alleges an assault by a prisoner (in which case the police officer must also be medically examined); e) the prisoner is alleged to have committed an offense and it is likely that a medical examination will yield evidence tending to prove or disprove the prisoner's guilt, and it is considered advisable that such examination be carried out; f) the prisoner was arrested by a member of H.M. Forces or any person or agency other than the police . . . ; or g) for any other reason the person in charge considers it advisable.[63]

In addition, if a person is arrested for a scheduled offense:

> the RUC Code makes it mandatory upon the police . . . to arrange a medical examination [for such a person], even if none of the conditions listed . . . above applies, as soon as possible after he is taken into police custody . . . but in any event before he comes into contact with any CID or other non-uniformed police officer.[64]

Arrangements may also be made for a prisoner to receive a medical examination by a doctor engaged on the prisoner's own behalf.[65] There is no evidence suggesting any criticism of the doctors responsible for medical matters at police stations in Northern Ireland.[66]

Lord Jellicoe also noted that, after the implementation of the Bennett Committee's recommendations, "allegations of mistreatment during interview were . . . rare and justified complaints of physical assault virtually non-existent."[67]

Our brief sojourn in Northern Ireland did not allow us to assess the true state of affairs with respect to current interrogation practices. It was our sense that notable improvements had been made following the Bennett Report, although many with whom we spoke continued to express substantial doubts about the methods employed at the main interrogation facilities of Castlereagh and Gough Barracks. Typical of these concerns is the assessment of Dermot Walsh, who has written that:

> [T]he Bennett recommendations have [not] been singularly effective in protecting the suspect in police custody. While it is true that the allegations of physical ill-treatment have diminished greatly since the publication of the Ben-

> nett recommendations, this is not necessarily a direct result of their implementation. For a start it would appear that they are not being fully followed in practice. Closed circuit television cameras have been installed, medical examinations are being offered and accepted, detectives are undergoing a training programme, a new code of conduct has been introduced and records are being maintained. But, the recommendations on the number of detectives involved in any one interrogation and in any one case, on access to a solicitor and on the length of interrogation sessions are not being fully complied with. It would also seem that the code is not being strictly followed as many suspects are claiming that they are being verballed and subjected to verbal abuse and to pressure being applied on them to act as informers. Furthermore, the closed-circuit television cameras are not always switched on, and, when they are, they are monitored by uniformed RUC officers.[68]

We are not in a position either to credit or discredit evaluations such as these, made by persons deeply involved in the study of the system. Consequently, we offer no conclusions, one way or the other, as to whether current police practices violate the relevant international human rights norms. It is precisely because we cannot make a factual assessment of these practices that we believe the manner in which the court system receives the product of the pre-trial stages to be of fundamental importance. It is to that process that we now direct our attention.

VIII. *The Diplock Courts*

A. *Preface*

In measuring the fairness of a court system, the task is to select the appropriate frame of reference and then to measure the degree of adherence to the standard selected. Our charge was to examine the Northern Ireland justice system in relation to certain international norms: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. This we did. However, a meaningful assessment of the administration of justice in Northern Ireland is not possible without a frame of reference that is more indigenous than are the international norms. This is so because Northern Ireland is "more or less an integral part of one of the leading western democracies which prides itself on maintaining the highest standards of criminal justice."[69] The controversy in Northern Ireland over the nature of its court system centers on a system which, for many years, has functioned in derogation of its own institutions and traditions. Therefore, an evaluation of the court system in Northern Ireland should properly include an examination of how far the system, as currently operated, is a departure from Northern Ireland's own norms and whether the degree of departure should be left unaltered.

The core issue that confronts the administration of justice in Northern Ireland, as it was put to us, is "How do you administer justice in a society that is so clearly divided . . . in order to insure confidence and fairness?"[70] Or, even more pointedly, "How does a democracy defend against terrorism?"[71]

In fathoming this conundrum, it may be fair to say of the court system what has been said of the entire Northern Ireland situation—there appears to be "a problem to every solution."[72] Nonetheless, we believe there exists the need for meaningful change.

B. *The Structure of the Northern Ireland Court System*[73]

The Northern Ireland court system consists of the Supreme Court of Judicature which is comprised of the Court of Appeal, the High Court and the Crown Court; the inferior courts are known as the County Courts and the Magistrates' Courts.

The Court of Appeal has appellate jurisdiction over the other two branches of the Supreme Court of Judicature.[74] The High

Court consists of the Queen's Bench Division, the Family Division and the Chancery Division. The Crown Court is the trial level court for all indictable offenses.[75]

The judges of the Court of Appeal, the High Court and the County Courts are appointed by the Queen on the advice of the Lord Chancellor. These same judges also sit in the Crown Court. In general, only barristers who have practiced for at least ten years are eligible for appointment, though deputy county court judges, who may after three years be made full county court judges, can be appointed from the ranks of resident magistrates or from solicitors of ten years standing.[76]

The most important judge in Northern Ireland is the Lord Chief Justice of Northern Ireland. As the Lord Chief Justice he is President of the Court of Appeal, the High Court and the Crown Court. In this capacity he assigns work to the judges of the various courts and has a number of other administrative responsibilities.[77]

The Court of Appeal consists of the Lord Chief Justice and a total of three other judges called Lords Justices of Appeal. In criminal cases all judges of the High Court are eligible to sit as judges of the Court of Appeal. The Lord Chief Justice can also ask a Lord Justice of Appeal to sit in the High Court.[78]

The Crown Court was created as a branch of the Supreme Court of Judicature of Northern Ireland in 1979. The court can be presided over by the Lord Chief Justice, a judge of the Court of Appeal, a High Court judge or a county court judge. All cases in the Crown Court are tried before a judge and jury except those offenses listed in the Northern Ireland (Emergency Provisions) Act 1978 (see Appendix C to this Report), which are tried by a single judge. Because that list or "schedule" is extensive, jury trials for most serious crimes have become extremely uncommon.[79] It is this development that is the focal point of much of the controversy surrounding the Northern Ireland criminal justice system.

C. *The Diplock Commission and its Report*

When the British Parliament prorogued the Northern Ireland Parliament in 1972 and direct rule was imposed from Westminster, it established a Commission, chaired by Lord Diplock, and charged it to consider

> what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organizations by bringing to book, otherwise than by internment by the Executive, individuals involved in terrorist activities, particularly those who plan and direct, but do not necessarily take part in, terrorist acts.[80]

The Commission held its first meeting on October 20, 1972. Of the four commission members, only Lord Diplock visited Northern Ireland.[81] This he did twice. Each visit lasted two days and was spent with the security forces.[82] Almost all the evidence was heard in England and consisted of three written presentations and oral testimony from persons with responsibility for the administration of justice in Northern Ireland and from representatives of the Civil and Armed Services.[83]

In December, 1972, the Diplock Commission's report was submitted to Parliament. The report concluded that "the main obstacle to dealing effectively with terrorist crime in the regular courts of justice is intimidation by terrorist organizations of prosecution witnesses."[84] It made a number of key recommendations which were major departures from traditional criminal justice procedures in both England and Northern Ireland. These were that a vast array of crimes, "which are commonly committed at the present time by members of terrorist organizations," be tried by a single judge without a jury; that bail in such cases not be granted except by the High Court and then only if stringent requirements were met; and that in all such cases, the standard for the admissibility of a confession should

be whether "it was obtained by torture or inhuman or degrading treatment."[85]

The Commission's recommendation that jury trials should be abolished was grounded on two concerns—perverse verdicts and juror intimidation. With respect to perverse verdicts, however, the Commission acknowledged that "we have not had our attention drawn to complaints of convictions that were plainly perverse and complaints of acquittals which were plainly perverse are rare."[86]

With respect to juror intimidation, the Commission concluded that "the threat of intimidation of witnesses . . . extends also to jurors, though not to the same extent. It is a serious one, particularly to those in so-called 'Catholic areas' when a Republican terrorist is on trial, and, more important, is the widespread fear of it of which we have had ample evidence."[87] In further support of its recommendation that jury trials be abolished, the Commission also cited then extant property qualifications for jury service which, in addition to the existing population predominance of Protestants would, due to greater property ownership, ensure even greater Protestant presence on juries. It also concluded that this would be exacerbated by a perceived abuse by both the prosecution and defense of the peremptory challenge.[88]

As to the admissibility of confessions, the Commission concluded that the rules of English and Northern Ireland courts "greatly enhance the difficulty of obtaining convictions of guilty men in the exceptional circumstances which now exist in Northern Ireland."[89] It recommended, therefore, that statements should not be inadmissible

> which were obtained as a result of the building up of a psychological atmosphere in which the initial desire of the person being questioned is replaced by an urge to confide in the questioner, or statements preceded by promises of favors or indications of the consequences which might follow if the person questioned persisted in refusing to answer.[90]

To facilitate this proposal, the Commission recommended that the defendant should have the burden of proving that "on a balance of probabilities, [the statement] was obtained by subjecting the accused to torture or to inhuman or degrading treatment."[91]

D. *The Evolution of the Statutory Framework*

In 1973, the vast majority of the Diplock Commission's recommendations were enacted by Parliament in the Northern Ireland (Emergency Provisions) Act 1973. In 1975, the Act was amended in some minor respects and in 1978, it was reenacted as the Northern Ireland (Emergency Provisions) Act without major changes.

In May, 1987 (while we were in Northern Ireland), Parliament passed the Northern Ireland (Emergency Provisions) Act 1987. This was in response to a review of the 1978 Act by the Baker Commission. This Act, while retaining the major provisions of its predecessors, did make a number of substantive changes that were more substantial than in earlier reenactments. For purposes of our discussion, we will trace the development of the Emergency Provisions Act, beginning in 1973, with reference to the conclusions and recommendations of the various committees which have studied the Act at specific junctures and whose work, in turn, led to changes in the Act.

1. *The 1973 Act*

Section 2(1) of the 1973 Act provided that "A trial on indictment of a scheduled offense shall be conducted by the Court without a jury."

A scheduled offense was defined in §27 by reference to schedule 4 of the Act. Scheduled offenses included murder, manslaughter, serious offenses against the person, arson, malicious damage, riot, offenses under the Firearms Act (NI) 1969

and the Explosive Substances Act 1883, robbery and aggravated burglary, intimidation, membership in proscribed organizations and collecting information likely to be of use to terrorists. The Act, however, did empower the Attorney General to certify that particular cases of murder, manslaughter and offenses against the person should not be treated as scheduled offenses and should therefore be tried by a jury.

Section 3 of the Act limited the power to grant bail in the case of scheduled offenses. It provided that a person charged with a scheduled offense shall not be admitted to bail except by a judge of the High Court and if convicted of such an offense, the person shall not be admitted to bail pending any appeal. It further provided that a judge shall not admit any such person to bail unless (a) the judge is satisfied that the defendant will comply with the conditions on which he is admitted to bail, (b) will not interfere with any witnesses, and (c) will not commit any offense while he is on bail.

Section 6 of the Act, pertaining to the admission of statements made by the accused, provided that such a statement is admissible unless prima facie evidence is adduced that "the accused was subjected to torture or to inhuman or degrading treatment in order to induce him to make the statement," and the prosecutor is not able to satisfy the court that the statement was not so obtained.

2. *The Gardiner Committee Report*

In 1974, the Gardiner Committee, chaired by Lord Gardiner, examined the operation of the EPA and issued its report in 1975.

With respect to the abolition of jury trials in scheduled offense cases, the Report conceded that "trial by jury is the best form of trial for serious cases" and remarked that "it should be restored in Northern Ireland as soon as this becomes possible." However, concluded the Report, "there are objections to its restoration at present."[92]

In support of its assessment, the Committee stated that "on the evidence we have received . . . if juries were to be reintroduced for scheduled offences their verdicts would still be subject to the influences of intimidation or the fear of it."[93] The Committee acknowledged that it had no evidence of this or of perverse verdicts (there being no jury trials). Instead, it adverted to evidence it had received of

> 482 instances between 1st January and 31 August 1974 in which civilian witnesses to murder and other terrorist offenses were either too afraid to make any statement at all, or, having made a statement implicating an individual, were so afraid that they refused in any circumstances to give evidence in court.

From this it concluded that "it is reasonable to assume that juries would be equally open to intimidation."[94]

The Committee acknowledged that "the abolition of jury trials raised much protest from those who saw in the jury a cherished safeguard and fundamental civil right." But it also found "wide agreement among those who gave evidence before us and who were best qualified to judge that the new system had worked fairly and well." Thus, concluded the Committee, "the right to a fair trial has been respected and maintained and that the administration of justice has not suffered."[95]

With respect to bail, the Report recommended no major changes in the Act but did urge that the restriction on bail pending appeal should be removed.[96]

On the subject of the admissibility of statements obtained from the accused, the Committee stated that it did not read § 6 of the Act "as eliminating judicial discretion to exclude a statement for reasons other than as defined in Article 3 of the European Convention and embodied in section 6."[97]

Pointing to the fact that the common law has traditionally conferred discretion upon judges to exclude statements induced by "threats, promises, or some form of oppressive con-

duct," the Committee stated that "it is difficult to conclude that Parliament intended to withdraw from the judiciary a well-established discretion of the important nature indicated without saying so in clear terms." This was borne out by its finding that "judges presiding over the trials of scheduled offences in Northern Ireland during the last year have held that this discretion remains vested in them and have exercised it when the interests of justice so required."[98] On this assumption, the Committee urged no substantive change in § 6 but recommended that language be added to the statute that made it clear that such judicial discretion existed.[99]

With respect to scheduled offenses, the Committee recommended that "it should be left solely to the discretion of the Attorney General to certify offenses as being non-scheduled when he considers this to be in the best interest of justice."[100]

3. *The 1975 and 1978 Acts*

The EPA was amended in minor respects in 1975 following the Gardiner Committee report. The list of scheduled offenses was extended to cover certain offenses under the Prison Act (Northern Ireland) 1957 and the Prevention of Terrorism Act 1974 and offenses committed in the Republic but tried in Northern Ireland under the Criminal Jurisdiction Act 1973. Further provision was made for the effective descheduling of any scheduled offense tried summarily, in that the special rules on admissibility of statements and on the burden of proof in possession cases were removed for the purpose of summary trials.

The 1978 Act was a consolidation statute; there were no significant changes with respect to the functioning of the Diplock courts. The Gardiner Committee's recommendation concerning a specific statement as to the existence of discretion in the courts to exclude statements obtained other than by torture or inhuman or degrading treatment was not adopted.

4. *The Baker Report*

On April 8, 1983, the Rt. Honourable Sir George Baker, a retired President of the Family Division of the High Court, was appointed to examine the operation of the Northern Ireland (Emergency Provisions) Act 1978. The terms of reference of his mandate accepted that "temporary emergency powers are necessary to combat sustained terrorist violence," and within that framework charged him to determine whether the Act's provisions

> strike the right balance between the need on the one hand to maintain as fully as possible the liberties of the individual and on the other to provide the security forces and the courts with adequate powers to enable them to protect the public from current and foreseeable incidence of terrorist crime.[101]

In April 1984, Sir George transmitted to Parliament his extensive review of the Act. The Report sets the matrix for what is to follow in the way of specific recommendations when it states that "despite admitted improvement in the security situation the reasonably foreseeable incidence of terrorist crime is such that there is little room for manoeuvre in making changes in the act."[102]

With respect to bail, the Report recommended that the Supreme Court Judge or the trial judge should retain the powers given them by §2(1) of the Act—that bail should remain a matter for the High Court in scheduled cases with the only exception that an application may be granted by a Resident Magistrate if the Crown consents. A change was suggested as to §2(2) to provide a wider discretion for the trial judge in the granting of bail based on guidelines drawn from the present Act and from the Bail Act 1976.[103]

On the question of trial by jury, the Report concluded that "the time is not ripe for the return of jury trial for scheduled cases."[104] It concluded further that §7(1) of the 1978 Act should remain intact and that the trial should continue to be

conducted by a single judge without a jury and not by a plurality of judges, nor by a judge with lay assessors.[105] The only change recommended was that §6(1) of the Act should be amended to enable the Lord Chief Justice to direct the trial of a scheduled offense at a location other than in Belfast.[106]

The Report again focused on the two bases for elimination of jury trials—juror intimidation and perverse verdicts. As had its predecessors, it concluded that "there cannot be any doubt that there was actual intimidation of juries before the 1973 EPA. According to Sir Elwyn Jones, the Attorney General gave a 'vivid' and grim account of particular cases of intimidation of jurors by IRA and UVF men." Only two such instances were described, however.[107] Nonetheless, the Report shifted the burden of proof to advocates of a return to trial by jury: "It must be for those who allege of trial without a jury that 'no other aspect of the emergency law system has done so much to diminish the credibility of the administration of justice' to establish at least the probability that juries will not now be 'harassed, frightened and partial' as they were in 1973." The Report determined that the burden had not been carried and that, indeed, "the overwhelming weight of opinion from those best qualified to judge is that members of juries in serious cases would be in more danger than ever before. The methods of intimidation are more sophisticated and have been well tried on witnesses and others."[108]

The Baker Report, although sensitive to arguments that even if jury trial could not be restored, single-judge trials should not remain, rejected the idea of any form of plural court. The rejection was not one of principle but one of practicality. The Report concluded that a two-judge court was not sensible and that a three-judge tribunal would pose serious operational difficulties. It referred to Lord Gardiner's earlier opinion that if the court were manned with three judges, then the five, or hoped-for six, non-jury courts then sitting would require an additional twelve judges. It was estimated that this would constitute more than half the strength of Queen's Counsel, from which appointments to the bench are made, at the Northern Ireland bar. According to the Report, in January 1984, there were 28 Queen's Counsel, 33 Junior Barristers with over ten years standing, 41 with over seven years standing, 128 with under seven years standing, 17 Resident Magistrates and ten Deputy Resident Magistrates. In addition, observed the Report, the case of a person accused of a scheduled offense is heard by four judges—the trial judge and three in the appeal court. Thus, "a plurality of trial judges could well make the manning of a three-judge appeal court impossible."[109]

The Baker Report also rejected the argument that plural courts were required because of "case hardening" on the part of individual judges. While stating that he "accepted at once that is possible," Sir George rejoined that "it is a poor argument for a plurality of judges. Two or three case-hardened judges would be no better and indeed worse than one." He also expressed his belief that "the danger is well recognized and I am convinced that each one [of the judges] is continually thinking of the possibility and warning himself against leaning or even appearing to lean to the prosecution or against the defence."[110] For him, "the real question must be whether anyone or any appreciable number of accused have been wrongly convicted." He answered it by stating that he had "heard of no instances of a person being wrongly convicted nor has the Lord Chief Justice."[111] As to the argument that a plural court would "look better," it was rejected as "purely cosmetic."[112]

A court comprised of a single judge with several lay assessors was also rejected on the basis of testimony of many witnesses who "stressed the difficulty, indeed impossibility of providing security for assessors and that two would be a more concentrated target than 12 jurors."[113]

As to confessions, the Baker Report reiterated the recommendation of the Gardiner Committee that §8 (formerly §6) should be redrafted to make clear that judges retain a discre-

tion to exclude statements obtained other than by torture or degrading treatment and to specifically state that violence and the threat of violence are prohibited. It rejected the view, arguably contained in several judicial opinions,[114] that Parliament intended to leave it open to the interviewer to use a moderate degree of physical mistreatment to induce the making of a statement, or that the section only applies where the accused was subjected to the degrading treatment in order to induce him to make the statement. The Report observed that the judges had not given a restrictive interpretation to the section and that they had retained discretion to reject statements that might fit within the language of §8.[115]

With respect to some measure of a return to normalcy, the Report declared that "there is a path which can be taken with relative safety." The path recommended was the descheduling of certain offenses. Acknowledging that initial thought was given to an "opting in" procedure, under which the Attorney General would have to certify that a specific case should be tried without a jury, the Report rejected that approach as "impracticable." The most compelling reason for its rejection was that "there would be delay because the Attorney General would have to deal with a vastly increased number of cases."[116]

Instead, the Report recommended the following:

> 2. All scheduled offences which are triable summarily or which carry a maximum sentence of imprisonment for 5 years or less should be capable of being certified out, i.e. as not to be treated as scheduled offences.
>
> 13. Kidnapping and false imprisonment, which are sometimes offenses of a purely domestic nature, should also be capable of being certified out.
>
> 14. Robbery and aggravated burglary . . . should be capable in any particular case of being certified out.
>
> 15. All the offences under the Firearms (NI) order 1981 (EPA, Schedule 4, para 11) should be capable of being certified out.
>
> 16. The DPP (Director of Public Prosecutions) (NI) should be given the power to certify out any case which is capable of being certified out in the new legislation.[117]

5. *The 1987 Act*

In May, 1987, Parliament passed the Northern Ireland (Emergency Provisions) Act 1987. One of the stated purposes of the Act was to amend the 1978 Act in light of the Baker Report. This it did with respect to the functioning of the Diplock Courts in several respects:

1. It moved the onus in bail applications in scheduled cases from the defense to the prosecution;

2. It enabled the Lord Chancellor after consultation with the Lord Chief Justice of Northern Ireland to direct that a particular trial of a scheduled offense be held at the Crown Court sitting elsewhere than in Belfast.

3. It provided for statements to be inadmissible if evidence is adduced that the accused was subjected to violence or the threat of violence, and codified in declaratory form the discretion of a judge to exclude statements in the interests of justice.

Parliament did not adopt the Baker Report's recommendations with respect to the descheduling of certain offenses.

IX. *Perceptions and Points of Tension*

As our discussion of the statutory framework creating and governing the Diplock Courts makes clear, the justice system is best described as one which seeks to accommodate the necessity for supplanting a policy of internment with one which returns the justice apparatus of Northern Ireland to criminal law adjudication processes. Nonetheless, it is still a system which is in derogation of the common law traditions of the country and it continues in existence as a "temporary" measure more than 14 years after its inception. The question of whether it is a "fair"

system is complex and multifaceted. It is also a question which, in addition to the numerous commissions and committees that have analyzed it, has been studied at length and in depth by highly qualified scholars as well as respected human rights organizations.[118] Our conclusions are based on both the impressions formed during our visit and the extensive materials that we have studied.

One baseline measure of the fairness of a judicial system (but not necessarily the only one) is whether it produces wrongful convictions—convictions of innocent persons or convictions of ostensibly guilty persons but not based on the evidence in a given case. Consequently, in every interview which we conducted we sought that information. Not one person to whom we spoke, however, directed our attention to a single case in which there existed a belief that a factually erroneous conviction had occurred. Certainly, the absence of such a claim by even the severest critics of a court system helps to reduce the degree of disquiet that one might have about the administration of justice in a state of emergency.

Our interviews of judges, prosecutors and defense counsel also left us with certain positive feelings. We were impressed with the independence, professionalism, and knowledge of the jurists and prosecutors with whom we spoke as we were with the talents of the defense bar in the representation of persons accused of scheduled offenses. There is, in fact, one unique feature of defense representation in Northern Ireland that is absent from our own in the United States: an indigent defendant has the right to counsel of his own choosing and thus can avail himself of the talents of the country's most outstanding barristers.[119]

It can be said, however, that the issue is not simply whether any person convicted in the Diplock courts can be shown to have been innocent and wrongly convicted, but whether it can be confidently concluded that the present rules and proceedings assure that persons can be convicted only upon proof of

their guilt beyond a reasonable doubt.[120] Consequently, our impressions signal only the beginning of our assessment and not its end. As Professors Boyle, Hadden and Hillyard have noted:

> Trials in Diplock courts have in practice settled down to a regular legal routine. * * * To the casual observer the proceedings would be more or less indistinguishable from those in the ordinary criminal trial. The defendants sit in the dock surrounded by prison warders. There is a full complement of lawyers on either side, and the usual procession of witnesses who are examined and cross-examined in the usual way. The most obvious difference from an ordinary trial is the absence of a jury. But that in itself has a limited immediate impact in the majority of cases. In the first place there is a very high proportion of guilty pleas for which a jury would not in any event be empannelled. And in contested cases the major issue is frequently the admissibility of an alleged confession. In such cases the jury would be excluded from the hearing of evidence and legal argument on the issue of admissibility until the judge had ruled that the statement was admissible.[121]

Therefore, beneath the surface apparent to the casual observer, there exists a plethora of subjects which inform the inquiry as to the fairness of the Diplock courts beyond the singular search for the wrongfully convicted defendant. They are subjects which were pressed upon us by many of those whom we interviewed and which are prominently raised in the literature. They pertain not only to the actuality of justice in the Diplock court system but to the equally important factor, especially in a system dominated historically by the majority Protestant population, of the appearance of justice. They are the following: a) the absence of trial by jury for scheduled offenses and the desirability of alternative adjudicatory mechanisms; b) the Schedule of Offenses and the question of "opting" in or

out; c) the standard governing the admissibility of statements obtained from the accused and d) the special problem of "Supergrasses."

A. *The Jury Trial Issue*

The continued absence of trial by jury for scheduled offense cases figured prominently in every discussion we had. The arguments in favor of restoration of jury trials for scheduled offenses had several major characteristics. First, a result-specific claim—that, in fact, the Diplock courts were producing erroneous verdicts because judges had become case-hardened. This argument was augmented by emphasis on the prominence of the role of confessions in scheduled offense cases. That is because, absent a jury, the judge who rules on the admissibility of a confession is also the judge who tries the case. Consequently, the argument goes, even if the judge excludes the confession, he cannot perform the menial feat of erasing its content from his mind when deciding the question of guilt.

The second argument in favor of restoration is representational—in a political system that has known nothing but domination by the Protestant majority, the jury system is essential as a representative political institution which involves a cross-section of the entire community. It is therefore said to be a necessary prerequisite to the maintenance of public confidence in the justice system.

Other arguments are that there has not been sufficient proof that perverse verdicts have occurred or that there was or would be juror intimidation if jury trials are restored. In this regard, it is also argued that, at the very least, the burden of proof rests with the government to demonstrate a continuing necessity for suspension of the right to a jury trial and that the burden has not been discharged.

The arguments against restoration of the jury acknowledge the jury's fundamental place in Northern Ireland's legal framework. However, they contend that the political backdrop of

"terrorist" crime would produce perverse verdicts and that jurors will be intimidated by political forces that cannot accept the legitimate functioning of a fair court system because it is inconsistent with revolutionary goals. As was stated to us, "those who would assassinate judges would not refrain from intimidating jurors."

The provision for an automatic right of appeal from Diplock court convictions was also urged as constituting a fair trade-off for retention of the status quo. However, the existence of such a right is not responsive to either the representational or case-hardening arguments advanced by jury trial proponents. The Court of Appeal is comprised of judges, not lay people drawn from a cross-section of the community. Moreover, it does not, in the ordinary case, review trial court factual findings that are based on credibility. Indeed, the only noteworthy feature of the automatic right to appeal arises from the peculiarity of a system such as Northern Ireland's which does not afford such a right to all convicted persons.

Determining the rightness or wrongness of these positions is no easy task. The data on the case-hardening of Diplock court judges is "soft" to say the least. For example, the extensive study conducted of Diplock court trials from 1973 to 1979 by Professors Boyle, Hadden & Hillyard concludes that the declining acquittal rate in Diplock trials in these years "is the result of judges becoming case-hardened."[122] They estimate that the acquittal rate in Diplock courts declined from about 50 percent in 1973 and 1974 to about 35 percent for 1975, 1976 and 1979. They concede, however, that "whether this decline is due primarily to judges becoming case-hardened or, as the authorities argue, to greater care by prosecuting authorities in the selection and preparation of cases cannot be conclusively established."[123] They attempt to deal with this difficulty by comparing the acquittal rate in Northern Ireland jury trial cases with that in the Diplock courts, a rate which showed a rise from 38 percent in 1974 to 61 percent in 1977 and remained static at 59 percent

in 1978 and 1979. These "contrasting trends," they assert, "provide strong support for the view that the declining acquittal rate in Diplock trials is the result of judges becoming case-hardened."[124] Nonetheless, they continue to urge caution in drawing compelling conclusions from statistics on trial outcomes because:

> The essence of the problem is that there is no ideal acquittal rate. A high figure may indicate either that large numbers of guilty defendants are being acquitted or that large numbers of innocent persons are being brought to trial. A low figure may equally mean that some innocent defendants are being convicted or that the prosecuting authorities are being unduly cautious in bringing apparently guilty suspects to trial.[125]

Subsequent studies build on the statistical model of the Boyle, Hadden and Hillyard survey and echo its conclusions as to case-hardening.[126] A different statistical picture, however, is contained in the Baker Report, which showed a decline in the acquittal rate in Diplock trials from 38 percent in 1973 to a relatively constant 20 percent for the next ten years with the exception of 1981 and 1982 when it rose to 34 percent and 35 percent respectively. These figures led Baker to conclude that they do not "prove or even tend to prove anything."[127]

Whatever the merits of these arguments, there is unquestionably a stalemate on the issue of an immediate or imminent return to trial by jury for all offenses in Northern Ireland. That stalemate has produced a number of alternative approaches short of return to the traditional jury. One such approach is implementation of a modified jury system that would have as its main feature the protection of the identity of jurors. The most detailed of such proposals is that proffered by Professors Greer and White. The major features of their proposal are that:

a. Scheduled offenses should continue to be tried in Belfast.

b. Separate jury panels should be selected from jury rolls throughout Northern Ireland and that only a small skeleton staff of court officials in Belfast should have access to the names and addresses of these prospective jurors.

c. Lawyers for both the defense and prosecution should not be given access to the lists at any stage in the trial.

d. Prospective jurors should not be told until they arrive at court whether they have been chosen for a scheduled offense trial.

e. Jurors in scheduled offense cases should be concealed from the public.

f. The number of peremptory challenges for the defense and prosecution should be the same and should be limited to three per defendant (as in England and Wales).

g. To reduce the risk that jurors might be recognized while leaving the court house, a mini-bus should be made available to take those who wish it into the center of Belfast and deposit them at a spot randomly selected for each trip by a court official other than the driver.[128]

A major feature of the Greer and White proposal, endorsed by a number of persons with whom we spoke, was their recommendation for a "Contingent Jury Trial System." Under such a system, there would be a presumption in favor of a jury in that *all* scheduled offense trials would begin before a judge and jury. A jury would be defeased only where the prosecution or the defense could prove that it was more likely than not that a prospective juror had been intimidated, in which case the trial would re-start before a different judge and fresh jury. If intimidation is shown to have recurred, only then would the trial be conducted by the judge alone.[129]

The idea of a presumptive jury system, such as that proposed

by Professors Greer and White, found favor with a number of persons who felt that the paucity of proof in the Diplock Report as to either jury intimidation or perverse verdicts undercut *ab initio* the legitimacy of jury abolition. Others felt that irrespective of the state of affairs that existed in 1973, this derogation from so fundamental a safeguard of the common law system for 14 years, required a shift in favor of jury trials subject to a demonstration that, in a discrete instance, one was not feasible.

Still others felt that a system that would greatly inhibit the defense from knowing the identity and abode of jurors was itself so extensive a derogation of the jury system as to render it unworthwhile. Many held the view that given the small size of Northern Ireland, safeguards such as those proposed by Professors Greer and White would be ineffectual—that a juror's absence from his or her home for more than a day would make it apparent to terrorist group members that such absence was in all likelihood attributable to a call to jury service.

It was precisely such a combination of views that led the Standing Advisory Commission on Human Rights to conclude, in its 1985-86 Report to the Secretary of State for Northern Ireland, that it did "not feel able to recommend a full return to trial by jury at this juncture:"[130]

> The Commission considers that the . . . proposals for preserving the anonymity of jurors during the course of what could be a lengthy trial were not likely to be successful. In any event, it is important in any trial by jury for the defendant to be able to object to some members of the jury panel; this right could not be properly exercised without some information as to the jurors' identity. Similarly, it is important both for the jury to be able to observe the defendant during the course of the trial and for counsel for the defence to be able to observe the impact on the jury of the evidence given in court and of counsel's arguments in relation thereto. For such reasons the jury could not be hidden behind screens for the duration of the trial. If identified, however, they would be liable to intimidation and the likelihood of this occurring is particularly strong during the current wave of unrest. In addition, the Commission feels that there is considerable danger that a number of juries selected at random might, in present circumstances, reach perverse verdicts and convict—or acquit—in the face of the evidence presented by the prosecution and the defence.[131]

A second major approach, prompted in the main by the insolubility of the jury trial conundrum, is the proposal for the creation of a collegial court. It was the feeling of many with whom we met that such a court would ensure greater accuracy in fact-finding and would improve the appearance of fairness by diluting the possibility of case-hardening. Proponents of change, however, were fearful that, if adopted, a collegial court would be viewed by Parliament as a major innovation and would postpone indefinitely a return to trial by jury. Opponents expressed the view that collegial courts would not greatly enhance the accuracy of verdicts or alter public perceptions as to fairness. Still others were of the view that given the limited judicial resources of the Northern Ireland court system, a collegial court was simply unworkable.

The debate as to whether a collegial court is an acceptable interim solution to the frustration engendered in so many by the single-judge Diplock court also centered around the type of collegial court that would be workable. A number of models were presented to us and are described in the literature.[132] The most widely discussed were:

1. a court in which the presiding judge rules on questions of law but does not participate in the verdict. The other two judges, who could be trained jurists or lay assessors, perform the traditional jury role and are not even present when ques-

tions of law arise, such as in voir dire on the admissibility of a confession;

2. a court in which the presiding judge, in addition to singularly deciding legal questions, also participates with the other judges in the determination of questions of fact;

3. a court in which all the members would participate in all decisions of the court, including matters of law as well as matters of fact.

Arguments for the inclusion of lay persons on a collegial court were most strongly urged by Professors Boyle, Hadden and Hillyard. They argue that reintroduction of some element of lay participation in the trial of scheduled offenses would produce multiple benefits such as 1) protection against case-hardening on the part of judges; 2) assistance to judges in resolving the difficult decisions on contested confessions or charges against members of the security forces; 3) reemphasis of the public nature of the trial process and 4) returning to the public some say in controlling the abuse of state power.[133]

The Standing Advisory Commission, on the other hand, did not embrace a collegial court with lay participants. It did recommend, however, that a collegial court should be introduced for the trial of scheduled offenses and that such a court should:

1. be comprised of a High Court judge and two County Court judges;

2. be a full participant court in theory in that all three judges would, in principle, be entitled to participate in the making of any rulings on points of law but that in actuality, the majority of the rulings would be made by the presiding judge with the tacit consent of the other judges;

3. be a full participant court with respect to the special problem of confessions so that the voir dire as well as the trial itself would be conducted by all three judges;

4. render a unanimous verdict; and

5. include all three judges in the sentencing process.[134]

B. *The Schedule of Offenses Issue*

While the predominant view of proponents of change with whom we met was that the very nature of the adjudicatory mechanism had to be altered, either by restoration of the jury itself or by creation of a plural court, the idea of a modification of the schedule of offenses was also pressed upon us, albeit less enthusiastically. As the Baker Report itself recognized, such a step would not implicate major institutional change and would be a positive step towards reducing the degree of departure from traditional common law norms; a reduction in scheduled offenses would increase commensurately the number of offenses for which a jury trial would be available. The importance of any movement in this direction is underscored by the fact that between October 1973 and December 1984, 9,249 people were tried by the Diplock courts.[135] Thus, Parliament's rejection, in May 1987, of Baker's recommendation for some lessening of the scheduled offense list does not eliminate the need for further exploration of the issue.

Under Schedule 4 of the 1978 Act, the Attorney General has the power to deschedule ("opt out of") offenses such as murder, manslaughter, assault causing bodily harm, assisting a prisoner to escape, arson and bomb hoaxes. Theoretically, these offenses should be descheduled if no element of terrorism is involved in their commission.[136] As a practical matter, relatively few such crimes have been descheduled and there is no appellate recourse for review of the Attorney General's refusal to do so.

On the other hand, a crime as common as robbery cannot be descheduled where it is charged that an explosive, firearm, imitation firearm or offensive weapon was used in its commission. Nor can there be descheduling of the crimes of rioting, kidnapping, causing bodily harm by explosives or withholding information about acts of terrorism.

Unquestionably, a number of scheduled offenses relate directly to the "troubles." But Schedule 4 is, in actuality, a list of

felonies. As such, it absorbs many offenses which may not be related to the political situation. Between 1976 and 1980, convictions were secured in Diplock courts for 39 different offenses ranging from murder to criminal damage,[137] and it has been estimated that as many as 40 percent of defendants tried before Diplock courts are charged with crimes unrelated to political incidents.[138] It also seems clear that even for the most serious of scheduled offenses, a wide range of sentences is imposed.[139] Indeed, it was this fact which led, in part, to the Baker Report's recommendation that all offenses with a maximum sentence of five years imprisonment or less be descheduled.[140]

In addition to reduction of the substantive content of the list of scheduled offenses, considerable sentiment was expressed that the Attorney General should have to act affirmatively to designate a specific charge or charges against a defendant—that the Attorney General should have to "opt in" rather than "opt out." The only argument that we heard in opposition to this proposal, and one which the Baker Report had previously accepted, was that the cases were far too numerous for the Attorney General to be capable of performing such a screening function and thus that it was impracticable. It is noteworthy, however, that over the last five years the Attorney General received 2,685 applications for decertification of scheduled offenses and he acceded in 1,865 of them—approximately two thirds. This might suggest that a change to an opt-in procedure would not necessarily be unduly burdensome.[141]

C. *The Admissibility of Statements Issue*

The dominant reality of trials in the Diplock courts, and also its uniqueness, is the extensive reliance by the prosecution on statements obtained from the accused during police interrogation. It is estimated that at certain times confessions have furnished the sole evidence in 75 to 80 percent of the cases.[142] It is this feature of the Diplock trial process that raises the most serious concerns about fairness.

There are two major points of tension in the controversy over admissibility. One is substantive and arises from the differences between the standard of admissibility under the Northern Ireland (Emergency Provisions) Act and under the common law. The other is procedural and stems from the fact that the Diplock court judge, who sits as both trier of fact and law, rules on admissibility questions so that when he determines a statement to be inadmissible he must erase his knowledge of the statement's content in arriving at a verdict. Also, the defendant is deprived of the opportunity to have the jury determine, as a factual matter, the believability of his confession despite the judge having deemed it admissible as a matter of law.

1. *The Substantive Problem*

The common law rule as to admissibility, which is contained in paragraph (3) of the 1964 version of the Judges' Rules and is known as the "voluntariness rule" has long been that:

> It is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.[143]

In Northern Ireland, despite the extreme intensity of the political situation in the late sixties and early seventies, the judges continued to apply the established common law rules on the admissibility of confessions.[144] The Diplock Commission's hostility, noted above, to adherence to the common law rules in terrorist crimes, produced the far more stringent requirement for exclusion, contained in the Northern Ireland (Emergency Provisions) Act 1973 (§8 of the 1978 Act) that the defense must adduce prima facie evidence "that the accused was subjected to

torture or to inhuman or degrading treatment in order to induce him to make the statement." This standard was geared specifically to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and was contemplated by Lord Diplock to meet the lowest threshold for admissibility possible under international norms.

The confluence of a new statutory enactment and existing common law doctrine created a substantial degree of uncertainty as to the precise state of the law in Northern Ireland with respect to the admissibility of confessions. Northern Ireland court decisions have read the statute as an intended abrogation of the common law voluntariness rule, but there is a considerable lack of clarity as to the extent of the abrogation. For example, in a 1973 decision, the Lord Chief Justice wrote that the statute had to be read to "render admissible much that previously must have been excluded. There is no need now to satisfy the judge that a statement is involuntary in the sometimes technical sense which that word has acquired in relation to criminal trials."[145] And in the leading case of *R.* v. *McCormick*,[146] Lord Justice McGonigal wrote that §6 (now §8):

> appears to accept a degree of physical violence which could never be tolerated by the courts under the common law test and if the words in section 6 are to be construed in the same sense as the words used in Article 3 (of the European Convention for the Protection of Human Rights and Fundamental Freedoms), it leaves open to an interviewer to use a moderate degree of physical maltreatment for the purpose of inducing a person to make a statement.[147]

Two years later, however, doubt was cast on this interpretation by the Lord Chief Justice writing in *R.* v. *O'Halloran*:[148]

> This Court finds it difficult to envisage any form of physical violence which is relevant to the interrogation of a suspect in custody and which, if it had occurred, could at the same time leave a court satisfied beyond reasonable doubt in relation to the issue for decision under section 6.

Although this statement created a higher threshold for admissibility where some physical mistreatment was shown than did the *McCormick* case, there remains even greater doubt as to what extent treatment not amounting to physical abuse would render a statement inadmissible under §8. The statute itself has been construed not to include statements obtained other than by torture or other degrading treatment. The Lord Chief Justice wrote in *R.* v. *McGrath:* "[I]t has nothing to say concerning the holding out of inducements (however great) to a suspect, although the latter course could tend strongly to destroy the reliability of a confession."[149] And in *R.* v. *Cowan,* Lord Justice McDermott held that "since the passing of the 1973 Act an induced statement is not inadmissible and it is wrong to say that a police officer must be acting improperly if he makes promises or makes a deal." A contrary holding, he wrote, "would reinstate pro tanto the exclusionary rule relating to confessions not proved to be voluntary, and derogate pro tanto from the provisions enacted by Parliament in section 8(1) of the 1978 Act."[150]

The courts in Northern Ireland, however, have held that they retain a certain discretion to exclude "any admissible evidence on the ground that (by reason of any given circumstance) its prejudicial effect outweighs its probative value and that to admit the evidence would not be in the interest of justice."[151] And in their 1980 survey, Professors Boyle, Hadden and Hillyard observed that:

> In a few cases judges have used their residual discretion to exclude statements obtained by trickery or other improper practices. In one case . . . the judge excluded an oral admission obtained from a defendant by a false claim by the detectives that "they had ample evidence against him" and that there was a witness who could identify him, and

after an assurance that what he said would not be written down and used in evidence; as there was no other evidence against him, the defendant was acquitted. In another trial in December 1979 the judge admitted a statement made by a 15 year old schoolboy who was attending a school for the mentally handicapped at the time of the interview, and who was assessed as having the mental age of a child of eight though it was accepted that the administrative direction requiring the presence of a parent or relative in such a case had not been complied with.[152]

On the other hand, judicial views have been expressed, such as that of Lord Justice McGonigal, that a judge who

exercises his discretion without regard to section 6 . . . will in all probability exclude statements obtained in circumstances not considered by Parliament to warrant exclusion. * * * The effect of the exercise of the discretion if unfettered by the existence of section 6 might be, therefore, to negate the effect of section 6 and under the guise of the discretionary power have the effect of reinstating the old common law test insofar as it depended on the proof of physical or mental maltreatment.[153]

Given the state of judicial opinion on the subject, we can do no better than set forth the conclusions reached in a 1984 study of the Diplock courts commissioned by Amnesty International:

The law regarding the admissibility in evidence of statements made by a suspect in police custody has been fundamentally altered. Involuntary statements are legally admissible evidence, unless induced by torture, or by inhuman or degrading treatment. This change has not only obviated "technical" legal requirements, but has also removed from the law on admissibility the basic function of minimizing the risk that unreliable statements are brought before the tribunal of fact.

* * *

Nonetheless (and contrary to Lord Diplock's proposals), the courts have retained a discretion to exclude evidence on the grounds that its "prejudicial effect outweighs its probative value and to admit the evidence would not be in the interests of justice."

It would appear that the courts usually exercise this discretion to exclude confessions apparently obtained as a result of physical maltreatment falling short of torture, inhuman or degrading treatment. Beyond this, there is no consistent judicial practice, but neither statements obtained as a result of repeated, prolonged and forceful questioning, nor statements obtained as a result of threats or promises are as a rule excluded.[154]

Of considerable interest will be developments under Part I, §5 of the newly enacted Northern Ireland (Emergency Provisions) Act 1987. The section replaces §8 of the 1978 Act and modifies it in two respects. First, it adds "threat of violence" as a ground for exclusion of a confession and second, it codifies, in declaratory form, the discretion of a judge to exclude statements in the interests of fairness to the accused or in the interests of justice.

While addition of the "threat of violence" ground is considered by many a welcome change, the ground for admissibility is still more permissive than that for all cases other than scheduled offense cases in Northern Ireland. Moreover, codification, in declaratory form, of a body of law that is itself in a state of flux and uncertain in the extreme, advances the need for clarity hardly at all. Indeed, under normal circumstances, one might conclude that such a codification is a meaningless act. But under the conditions existing in Northern Ireland, the view is strongly held that legislative recognition of the fact of discretion alone is significant. Nonetheless, advocates of change urge Parliament to go much further and require exclusion of all

statements that are obtained by "any threat, inducement or oppressive treatment."[155]

2. *The procedural problem*

The absence of a jury in Diplock trials deprives the defendant of a dual procedural safeguard. In cases where the trial judge determines that a confession is inadmissible, there is not the slightest possibility, in a jury trial, of the confession's content contributing to the verdict. The jury simply never learns of its existence. In cases where the trial judge rules that a confession is admissible as a legal matter, the defendant may still persuade the jury that it is unreliable as factual evidence of guilt. Without a jury, the defendant is deprived of that important opportunity. And in a system in which confessions constitute the prosecution's evidence more often than in ordinary criminal cases, the significance of this deprivation is greatly heightened.

With respect to cases in which a Diplock court judge satisfies himself that a confession is inadmissible, the only safeguard against the confession's content playing some role in the verdict is something beyond even the judge's integrity; it is nothing less than his ability to steel himself against even the slightest subjective encroachment of illicit knowledge on the remaining legitimate evidence. Few would contend that even the finest judge can perform this feat without some difficulty.

In cases in which the confession is deemed admissible, the defendant's guilt appears to be a forgone conclusion. The author of the Amnesty International study reported that no case had been brought to his attention in which an accused was acquitted though his confession was ruled admissible.[156] And he points out that under ordinary circumstances, "the law envisages an assessment of the reliability of confessions, independent of and subsequent to the judge's ruling on 'admissibility.' "[157] However, "rather than addressing the question of reliability separately [as could a jury], the judges in the 'Diplock' courts appear to subsume this task under their rulings on the 'admissibility' of confessions."[158] Taken together with the interrogation

procedures used to obtain confessions and the lower threshold for admissibility in Diplock trials even after the 1987 amendments to the Emergency Provisions Act, the single-judge trial cannot easily be said to ensure against conviction based on an admissible but unreliable confession.

D. *The Special Case of the "Supergrass"*

In 1981, there began in Northern Ireland a series of prosecutions in the Diplock courts known as "Supergrass" trials. For five years thereafter, these trials were a phenomenon in their own right and the term "Supergrass" took on a special symbolic meaning indigenous to the Diplock court system. By the time of our visit to Northern Ireland, primarily as a result of significant reversals by the Court of Appeal of convictions based on "Supergrass" evidence, the general consensus was that the "Supergrass" phenomenon had all but passed on. It is nonetheless more than worthy of mention for, on one hand, it was a discrete instance where arguments for the return of jury trial took on special meaning and, on the other hand, it evidenced, in substantial degree, the integrity of Northern Ireland's judges. Moreover, there is no institutional barrier to its reappearance.

The term "Supergrass" denotes "a person who has repeatedly taken part in serious criminal enterprises, and who agrees to give evidence for the prosecution against alleged participants in those same crimes."[159] To some, supergrasses are distinguishable from ordinary accomplices by the number of defendants they are prepared to implicate and because they are "the creation of deliberate prosecution initiatives."[160] To others, they are "converted terrorists" or "witnesses from terrorist organisations who have decided voluntarily to give evidence in court against former accomplices."[161]

Between November 1981 and November 1983, some seven unionist and 18 nationalist supergrasses were responsible for the arrest of nearly 600 suspects. Fifteen of these retracted their evidence but of 217 defendants whose cases were not aborted,

120 were convicted after trial or pleaded guilty. However, in the five cases in which appeals were taken, 67 of 74 convictions were reversed. Thus, the overall conviction rate for the ten supergrass trials of this period stood at 44 percent.[162] Were it not for the action of the Court of Appeal, the conviction rate in the ten supergrass trials during this period would have been approximately 57 percent.[163]

The cardinal danger in supergrass cases was the ability to secure convictions based on the uncorroborated testimony of the supergrass. The law in Northern Ireland with respect to accomplice testimony is the same as in England and Wales—corroboration of that type of testimony is not required. Where there is a jury, however, it is the duty of the judge to instruct that although they may convict on such evidence, it is dangerous to do so unless it is corroborated. Where there is no jury, as in the Diplock courts, the judge must warn himself that, although he may convict on the evidence of an accomplice, it is dangerous to do so unless it is corroborated.[164] The efficacy of the latter has been criticised as requiring "a staggering leap in legal logic because the very foundation of the rule is the assumption that there is a jury separate from the judge, to whom the warning can be issued."[165]

Had not the Court of Appeal reversed so many of the supergrass convictions, the existence of the supergrass phenomenon would have remained a major issue in the debate over the fairness of the Diplock courts. The initial rate of convictions by the Northern Ireland judges was sufficiently high to nurture the argument that the absence of a jury was crucial to the outcome of a case. One commentator wrote of his examination of English supergrass trials, which were conducted before juries, that "from the information available, there is no case in which it is clear that a person has been convicted on the evidence of a single supergrass, without corroboration from any other testimony."[166] Another assessed the British experience as indicative of the fact that although not required by law to find corroboration,

juries in supergrass cases there "have tended to behave as if they were, almost invariably acquitting where the only evidence against the people in the dock is that supplied by an informer" and he concluded, therefore, that the absence of the jury in the Northern Ireland supergrass cases "seems to have made a profound difference to the fate of the accused."[167]

Moreover, had not the Court of Appeal entered on a course of reversing convictions in the major supergrass trials of the past few years, the supergrass phenomenon also would have constituted a primary basis for a continued attack on the Diplock court system. The absence of a jury, by definition, tends to dilute the burden of proof beyond a reasonable doubt which the prosecution must meet because only one person need be convinced rather than twelve. The nature of the supergrass trial and the early incidence of convictions before a single judge greatly exacerbated the already low level of public confidence in the Diplock courts. And the rate of conviction on such evidence justifiably gave rise to a widely held belief that innocent defendants had been condemned. It was heartening for us to learn, therefore, not only that the supergrass phenomenon was at its end but also of the manner in which it met its demise. As one of the system's severest critics has put it, "[I]t would be a mistake to dismiss the relative autonomy of the courts in Northern Ireland as insignificant. It can hardly be a matter of indifference to those whose convictions in the supergrass system were quashed."[168]

X. *International Human Rights Norms: Are They Violated by Diplock Court Trials?*

A. *The Relevant Norms*

There are three international human rights instruments that are germane to our inquiry: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of

Human Rights and Fundamental Freedoms. The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on December 10, 1948. The norms contained in it have been developed into legally binding commitments in both the European Convention (1950) and the International Covenant (1966). The United Kingdom is a State-Party to both.[169] The relevant provisions of each are as follows:

1. *The Universal Declaration of Human Rights*

Article 3: Everyone has the right to life, liberty and security of person.

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11: 1. Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

2. *The International Covenant on Civil and Political Rights*

Article 4: In time of public emergency which threatens the life of the nation and the existence of which is officially

proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 14:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. * * *.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without

payment by him in any such case if he does not have sufficient means to pay for it;

(e) 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;

(g) Not to be compelled to testify against himself or to confess guilt.

4. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

3. *The European Convention for the Protection of Human Rights and Fundamental Freedoms*

Article 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 6:

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. * * *.

2. Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

B. *As Applied to the Diplock Courts*

We are unable to conclude that either in structure or in operation, the Diplock courts *per se* violate any of the international norms set forth above. The one possible exception is the process by which confessions are obtained from defendants and the legal standard by which their admissibility at trial is determined. This, however, is a subject that traverses the criminal process from arrest through interrogation to the trial itself when the confession is offered in evidence. In this subsection, we focus on the Diplock courts solely as trial entities.

With respect to the absence of trial by jury for scheduled offenses, it must be concluded that no international law is violated. There is no provision in any of the instruments for the guarantee of a right to trial by jury. This is understandable since many nations that are signatories to these international instruments have never had such a guarantee as part of their legal tradition. Thus, this major focal point of controversy surrounding the Diplock courts cannot be measured against any affirmative international obligation. The only conceivable argument that can be made is one under Article 7 of the Universal Declaration of Human Rights, which guarantees all persons equal protection of the law. Insofar as the right to jury trial in Northern Ireland is afforded to one class of felony defendant but not to another, the claim could be made that such a restriction is arbitrary and irrational and therefore is violative of equal protection.[170] This is an argument, however, that cannot seriously be maintained given the conditions that exist in Northern Ireland. Article 4 of the International Cove-

nant and Article 15 of the European Convention provide for derogation in times of emergency.[171]

Our observation of proceedings in a Diplock court and our analysis of the relevant materials do not provide us with any basis upon which to take issue with the conclusions reached by Professor Korff of The Netherlands in his 1984 study of the Diplock courts undertaken for Amnesty International. With but one major exception pertaining to the freedom from self-incrimination and the presumption of innocence, Professor Korff found that in many respects, trials in the Diplock courts are in accordance with prevailing international norms. As he has written:

> The tribunals have been established by law; the proceedings are held in accordance with the law. The judges are independent from the executive and legally experienced; they are impartial at least in the sense that they deal even-handedly with defendants of different political and/or religious persuasions. The accused is informed before the trial of the accusations against him; he is afforded adequate time and facilities for the preparation of his defence, including legal assistance of his own choice from the moment he is charged. If necessary, his defence lawyer will be paid from public funds. Custody on remand, by international standards, is not excessively long. At the trial, the defence has full procedural "equality of arms" with the prosecution: it can challenge prosecution evidence and cross-examine witnesses, and can call witnesses and evidence on its own behalf. The trial is public; the accused has a virtually unlimited right of appeal.[172]

The exception upon which Korff focuses is, however, a major one. It concerns the violation of Article 14.3(g) of the International Covenant on Civil and Political Rights, which provides that everyone shall be entitled "not to be compelled to testify against himself or to confess guilt." His conclusions are worth quoting in full:

> The most important questions regarding adherence to international norms for a fair trial, however, relate to the freedom from self-incrimination and the presumption of innocence. The right not to be coerced into making a confession is explicitly stated in Article 14(3)(g) of the International Covenant on Civil and Political Rights, to which the United Kingdom is a party. It also flows from the presumption of innocence, contained in all human rights instruments. Furthermore, the equally fundamental (and internationally recognized) principle that the guilt of the accused must be established beyond a reasonable doubt implies a prohibition to convict on the basis of unreliable evidence, such as confessions obtained under duress.
>
> The institutionalized use in Northern Ireland of strong psychological pressure on suspects in order to induce them to confess appears to be in breach of at least Article 14(3)(g) of the International Covenant on Civil and Political Rights. Convictions based solely on contested confessions obtained under duress furthermore raise serious doubts about the adherence by the "Diplock" courts to the presumption of innocence in all cases. These aspects of the "Diplock" court system therefore raise questions about the extent to which trials in the "Diplock" courts accord with international norms for a fair trial, contained in such international instruments as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights.[173]

As is evident, Korff's analysis of the Diplock courts in relation to international norms is inextricably entwined with the pretrial phases of the criminal justice process, particularly that of inter-

rogation. As noted earlier, however, we were not in a position to ascertain the precise state of affairs that currently exists with respect to interrogation practices. Nonetheless, it is clear that a system which so heavily depends on extracted confessions for its success as does that in Northern Ireland, will continue to raise concerns as to basic fairness both within its own borders and in the international community. Indeed, the proliferation of commissions, committees, and scholars who have studied the subject is ample evidence of that fact. From our limited vantage point we share those concerns, but we cannot improve upon the vast amount of material on this subject that already exists.

XI. *Places of Detention*

Although the jails and prisons are very much a part of the criminal justice system, and long a source of human rights complaints in Northern Ireland, an investigation of the conditions of detention was beyond the scope of our mission. A brief description of that subject is warranted, however, in the interest of completeness. Without doubt, serious abuses of prisoners were common in the initial reaction—perhaps over-reaction—to the terrorist threat. In fact, apart from reports of the horrors of the terrorist killings and other degradations, nothing so caught the attention of the outside world as the reports of inhumane treatment of persons suspected of terrorist activity—or even of knowledge of the activities of others. As has been previously noted, the worst of the abuses were discontinued over time through implementation of recommendations of investigative commissions sent from Westminster, or through compliance with judgments of the European Court of Human Rights.

The Prison Service in Northern Ireland, though operating within a separate jurisdiction, is run along lines similar to the equivalent service in England and Wales. Social and political factors, however, have led to differences. The five prisons in Northern Ireland are at Belfast (Crumlin Road, the site of the

1987 Maze escape trial), Maze (near Lisburn) and Magilligan (near Londonderry), all for males, Armagh, for females, and the newest at Maghaberry (also near Lisburn), for males and females. Prisoners are governed by the Prison Rules (Northern Ireland) 1982. These regulations and their administration are said to compare favorably with prison regimes in the United Kingdom, the Republic of Ireland and Western Europe.

The current inmate population is approximately 3,000, and on an average day about 400 untried prisoners are held on remand. The average length of sentence served by an adult prisoner is about 15 months. Prisoners can earn up to 50 percent remission on their sentences, and those serving life sentences can be released on the Secretary of State's license, but there is no parole system in Northern Ireland.[174]

To put the above figures in perspective, it is relevant to note that the rate of incarceration in the United States is substantially higher in proportion to population than in Northern Ireland (despite almost total absence of offenders confined on terrorist charges in the United States). The number detained in United States jails awaiting trial or serving sentences of less than a year was about 250,000 in early 1987, while the number of sentenced offenders confined to federal and state prisons was about 650,000. The number continues to rise every year, while the equivalent detention figures in Northern Ireland tend to be relatively stable.

XII. *The Anglo-Irish Agreement*

Partition of Ireland, although a fact since 1921, continues to be viewed from drastically different perspectives by the various communities in both North and South. In Northern Ireland partition remains the central political issue. To the unionists, whether radical or moderate in their acceptance of violence, oneness with Britain is regarded as the only assurance of their way of life and protection against Catholic dominance. The mostly Catholic nationalists, on the other hand, regard continu-

ation of partition as an indication of the intent of the Protestant majority to preserve their dominant position, including religious discrimination in employment, housing, education and voting.

In the Republic of Ireland the views about partition range from grudging acquiescence to stormy, sometimes violent demands for union. The official position of recent governments is that it is preferable to live with peaceful separation than to undergo the violent disruption of attempted union and the certain wrath of the Republic's important trading partner, the United Kingdom.

The most important, and the most controversial move toward stabilization of the status quo since partition in 1921, was the Anglo-Irish Agreement between the United Kingdom and the Republic in November 1985. The Agreement was signed by Margaret Thatcher, Prime Minister of the United Kingdom, and Garret FitzGerald, the Prime Minister (Taoiseach) of the Republic of Ireland. The Agreement, after approval by the two parliaments, came into force on November 29, 1985.[175] It has been registered with the United Nations and has the force of international law.

A. *Main Points of the Agreement*

The Agreement covers three main areas:

1. *The Status of Northern Ireland*

Both governments agree that any change in the status of Northern Ireland would come about only with the consent of the inhabitants of Northern Ireland, and recognize that at present a majority do not want such a change. Both governments also undertake that, should a majority in Northern Ireland formally consent to the establishment of a united Ireland, they would introduce and support the necessary legislation.

2. *Intergovernmental Conference*

An Anglo-Irish Conference has been established to promote

a reconciliation between the two traditions in Northern Ireland by providing a forum within which the Irish Republic can put forth its views on a range of political, security and legal matters, thus reflecting the concerns of the nationalist community in the north. The Secretary of State for Northern Ireland and the Foreign Minister of the Republic are committed to joint chairmanship of the Conference's regular meetings. The Agreement provides that the agenda for those discussions should include human rights, electoral arrangements, the use of flags and emblems, avoidance of discrimination, relations between the security forces and the minority community, the administration of justice, extradition, prison regimes, and cross-border cooperation on security, economic, social and cultural matters.

3. *Increased Cooperation Between North and South*

The Agreement encourages increased cooperation in the fight against terrorism. The Chief Constable of the Royal Ulster Constabulary (RUC) and the Commissioner of the Garda Siochana (the Republic of Ireland's police force) are designated to work toward enhancing security in such areas as threat assessments, exchange of information, liaison structures, technical cooperation in training of personnel and operational resources. (Subsequent to the Agreement the Irish government acceded to the European Convention on the Suppression of Terrorism, to which the United Kingdom was a previous signatory.)

B. *Response to the Agreement*

The Agreement, as the culmination of more than 18 months of discussion and negotiation, reflected the desire of both governments to bring peace, stability and reconciliation to Northern Ireland. It followed a series of efforts at political settlement, all designed to accomplish the reestablishment of a devolved administration in Northern Ireland, which had not existed since 1972. Nothing in the Agreement specifically related to that end, but certainly nothing in the Agreement impedes

that result. Indeed, a key point in the Agreement is the provision for just such a devolution if the Northern Ireland parties can agree on a mutually acceptable basis for it. In that event, the Intergovernmental Conference would cease to consider any matters that had been devolved to a local administration. The government of the Republic has declared its support for such a devolved form of government, and the Agreement allows it to advance views as to how such a devolution might be achieved. Specifically, the Republic of Ireland is permitted to offer recommendations on political arrangements, security and the administration of justice.

The Anglo-Irish Agreement has been welcomed by most Western nations and by many other countries. President Reagan said that "we applaud its promise of peace and a new dawn for the troubled communities of Northern Ireland." Thomas P. (Tip) O'Neill, then Speaker of the United States House of Representatives, referred to "this important and courageous step of constructing a framework for peace and reconciliation in Northern Ireland." And the Congressional "Friends of Ireland" issued a statement, signed by more than 40 members of Congress, including Senators Kennedy and Moynihan, declaring strong support for the Agreement. Declarations of support came also from the United Nations Secretary General and the President of the European Commission.

The response in Northern Ireland was more hostile than had been anticipated. The majority unionist community expressed acute alarm when the Agreement was signed and has scarcely moderated its opposition since. Particularly striking is the fact that the most important factions of the Protestant majority, however great their differences on other issues, joined in denouncing the Agreement as the first step toward a united Ireland. The two main political parties joined in opposition. Only the minority Social Democratic and Labor Party (SDLP) and Alliance Party offered initial support. Perhaps what said it most emphatically for visitors to Belfast in May 1987 was the

banner across the central portico of City Hall proclaiming implacable opposition in these words: "BELFAST SAYS NO."

Ironically, some elements of the Catholic minority in Northern Ireland, while less strident in tone, also opposed the Agreement, but for the entirely opposite reason. Their concern was that the Agreement supported and solidified the partition by recognizing its existence so long as the majority (still a substantial two thirds) favored it.

In the Republic the Agreement, while not without its critics, has been more favorably received. The main opposition party, Fianna Fail, initially attacked it on the ground that it served only to perpetuate the partition of 1921. But that opposition appears to have dwindled in strength; Fianna Fail became the governing party in subsequent elections in 1987, and has continued to work for the Agreement despite its earlier objections.

C. *Implementation of the Agreement*

Although the Agreement has not proved a strong force for reconciliation of the opposing factions in Northern Ireland, its principal success lies in the fact that it is still in place and is, if anything, more strongly supported than in the beginning by the British and the Irish governments.

The Intergovernmental Conference established by the Agreement has provided a useful forum for the exchange of views. During the first year of the Agreement, the Intergovernmental Conference met 10 times in London, Belfast[176] and Dublin. Security matters have been discussed at most meetings and on those occasions included the RUC Chief Constable and the Commissioner of the Garda Siochana. Unquestionably, improved cooperation in matters of intelligence, relating particularly to terrorist activities, has been a significant, if not widely publicized, result. Indeed, most of the activity of the Conference (which can only recommend, not command) has been undramatic; and by no means have all of its recommendations been implemented. The important thing is that discussion con-

tinues, and ways, even though mostly small, have been found to ease tensions.

Issues relating to the administration of justice, particularly in the context of security concerns, are probably the most sensitive to confront the Intergovernmental Conference. Although no move has been made to provide for jury trial in place of the one-judge Diplock courts, other changes have been made to ameliorate the harshness of practices dating from the early 1970s.

a. An order was published in 1986 increasing the discretion to assign cases for trial by jury.

b. Proposals have been advanced to make certain other changes, including the expansion of rights for suspects in police custody and the strengthening of arrangements for dealing with complaints against the police.

c. Steps have been taken to eliminate avoidable delays in bringing suspects to trial.

d. An additional Roman Catholic judge has been appointed to the Northern Ireland High Court bench.

D. *Cooperation in Matters of Security*

No task undertaken by the Intergovernmental Conference is more important than the enhancement of security cooperation across the border between Northern Ireland and the Republic. Manifestations of such increased cooperation exist in greater contact between the two police forces and frequent meetings between the RUC Chief Constable and the Garda Commissioner. Joint reports have been prepared on such matters as intelligence cooperation, liaison structures and operational and technical matters. Both sides are resolved to continue their joint efforts.

A further manifestation of the Irish government's commitment to combating terrorism is, as previously noted, its signature of the European Convention on the Suppression of Terrorism. This is an important step in a nation where courts had long declined to extradite those who were charged with terrorist offenses in the North on the ground that those offenses were "political." Ultimately, however, Dublin acknowledged not only that terrorist methods are repugnant to a democratic society, but also that terrorist efforts are aimed at the South as well as the North.[177]

Despite moves toward cooperation in matters of security prospects for substantial progress in the near term remain problematic so long as unionist hostility continues at the intense levels of the mid-1980s. For the present the important fact is the firm commitment of the two governments to the principle of cooperative efforts to deal with the threat and the reality of terrorism.

William V. Shannon, United States Ambassador to the Republic of Ireland in 1977-81, concludes his evaluation of the Anglo-Irish Agreement in these words:

> The route to reconciliation in Northern Ireland will be long and tortuous. The Intergovernmental Conference must show results through changes in the police, the courts and the prisons if the alienation of the Catholic community is to diminish and its support of the IRA to decline. Time will have to pass before unionist fears subside and members of that community begin to recognize that enlisting Dublin's active involvement has not damaged their security and has, in fact, made some problems easier to manage.[178]

XIII. *Recommendations and Conclusion*

The political situation in Northern Ireland remains troublesome. Though we wish it were otherwise, we cannot conclude that an immediate, complete return to normal institutional life in Northern Ireland is a realistic possibility. The Diplock court system, although it departs from the standard norms of British

justice, does conform to the requirements of the international standards on fair trial. The one possible exception concerning confessions is the subject of recommendations below. Nonetheless, we believe that there is a compelling need for much more significant modification of existing practices than has yet occurred and that this need obliges the government to pursue such modifications with greater intensity, imagination and, indeed, courage, than it ever has. Our assessment is based on several factors:

a. the period of "emergency" has been of especially long duration and there exists the danger that the current derogations from Northern Ireland's legal traditions will themselves become institutionalized;

b. the legitimacy and importance of Northern Ireland's legal institutions, particularly trial by jury, is disputed by no one;

c. the existing skepticism about the fairness of the Diplock court system is manifest in the political consciousness of Northern Ireland's large Catholic minority and is therefore counterproductive to conciliatory undertakings;

d. certain derogations from ordinary procedural safeguards, such as the rules that govern the admissibility of confessions, are unwarranted even under the current "emergency" conditions.

We therefore make the following recommendations:

1. The list of scheduled offenses should be greatly reduced and the Attorney General should be required to "opt in" those scheduled offenses which, for good and substantial reason, he believes cannot be tried under the normal processes of Northern Ireland's legal system.

While we would like to propose a return to trial by jury for all offenses, we cannot ignore the realities of the current political situation in Northern Ireland. Terrorist activity still abounds and we believe it presumptuous for us to propose a step that

could possibly result in harm to potential jurors. There is much to be said in favor of the Greer and White proposal for a "contingent jury trial" system under which a jury trial could be defeased only upon the occurrence of a threatening event. However, because such an event, in the first instance, could be a fatal one, we hesitate to join in such a proposal. The safer path would be to combine a substantial reduction in the list of scheduled offenses with an affirmative obligation placed on the Attorney General to justify trial without jury in a specific case. While certainly not optimal, this dual modification would increase substantially the number of jury trials in Northern Ireland.

2. For those cases that remain triable without a jury, there should be a three-judge collegial panel in which all judges participate fully, render a unanimous verdict and participate in sentencing.

Without casting aspersion on either the fairness or integrity of Northern Ireland's judiciary, there would be multiple benefits from the elimination of the current single-judge Diplock tribunal. When a defendant is denied a jury trial he is deprived of the right to have his fate decided by a cross-section of the community and to have the factual question of his guilt or innocence arrived at by a consensus of his peers. In Northern Ireland, this deprivation takes on special significance. To the Catholic minority the prolonged absence of trial by jury is but one more manifestation of their exclusion from the institutions of their own government, the perceived evils of which are exacerbated by a decisional process whose very fairness they suspect. Rightly or wrongly, this is a perception which is fueled by ongoing suspicions of case-hardening on the part of the judiciary and by the discrete, but intense, experience of the supergrass cases. A collegial court, while not a panacea, would reduce considerably these negative perceptions and would constitute a meaningful institutional advance as to both communal participation and consensus adjudication.

It is of considerable relevance that, in the Republic of Ireland, under the Offenses Against the State Act of 1939, scheduled offenses are also not tried by a jury but by the Special Criminal Court, comprised of three judges. Although the volume of scheduled offense cases is much less in the Republic and thus constitutes considerably less of a burden on the Republic's judicial personnel than would be the case in Northern Ireland, there would be great symbolic significance, especially to its Catholic population, in Northern Ireland's adoption of a judicial mechanism that would be similar to that employed in the Republic.

It is also important that in Northern Ireland there appears to be no opposition in principle to the creation of a plural tribunal. And if something along the lines of our first proposal were adopted, whereby the number of scheduled offense trials was significantly decreased, it would follow that there would be a commensurate reduction of the practical impediments to three-judge panels since judicial manpower would be more abundant.

Of the numerous variations for plural courts that we examined, the preferable one is that of three judges who participate fully in all phases of the trial, with the presiding judge ruling on evidentiary questions but subject to consultation with his colleagues when and if desired; the verdict should be unanimous and the judges should all participate in sentencing.

With respect to the actual conduct of the trial, the presiding judge should make the rulings on evidentiary matters as a matter of course. To require that consultation with his colleagues occur on every question that arises is impractical and unnecessary. It is enough that the presiding judge consult with his colleagues on difficult questions and that his colleagues have the right to offer their views. A verdict of guilt should be unanimous because one judge's doubt should be deemed the equivalent of a reasonable doubt and it would mirror, thereby, the requirement of unanimity for a jury's

verdict. Each judge should participate in sentencing because each judge's familiarity with the defendant throughout the trial is too valuable a perspective to be omitted from the sentencing process.

3. *The rule with respect to the admissibility of confessions in scheduled offense cases should be the same as that which governs all other cases in Northern Ireland.*

We perceive no legitimate basis for the existence of two different rules governing the admissibility of confessions. The existence of emergency conditions does not warrant a departure from the standard for admissibility which has long been part of the common law. Unlike the abrogation of the right to jury trial, the very operation of which is intertwined with the existing emergency, the standard for admissibility in former §8 of the EPA, as modified in article I, §5 of the 1987 Act, is a rule of evidence and has nothing to do with external conditions. Its existence stems from Lord Diplock's belief that the existing standard for admissibility was an impediment to convicting those charged with terrorist offenses. Acceptance, however, of such a premise does far more than accommodate to the exigencies of an emergency situation; it legitimizes a standard of proof that is fundamentally inconsistent with basic tenets of fairness and increases the likelihood of the admissibility of unreliable confessions.

Unlike the complexities which surround the jury trial issue, the case has never been made for lowering the threshold of admissibility so that all that is barred are statements obtained by "torture or inhuman or degrading treatment." Indeed, the resistance of the courts of Northern Ireland to such a standard, even in the face of its specific enactment by Parliament, is the strongest testament to the repudiation of its core principle.

The 1987 Act recognized this judicial act of repudiation of the Diplock formulation by providing that the courts retained inherent discretion to ignore it. We believe that Parliament

should have gone further by declaring that there was only one rule for admissibility in Northern Ireland because, when it is a matter of what evidence is admissible against a defendant, there cannot be different degrees of fairness.

4. *The provisions for "extra-judicial detention" should be repealed.*

Certain official committees that have studied emergency legislation in Northern Ireland have concluded that extra-judicial detention should be repealed.[178] For example, Sir George Baker stated:

> It has not been used for nine years and has been in limbo for over three. The argument that we may need it one day while understandable is difficult to reconcile with the fact that the security situation has improved steadily. If "doomsday" arrives in whatever form it will be the duty of the then Government to bring any necessary legislation before Parliament immediately.[179]

We concur in the judgment that this legislation, not used since 1975, should be repealed.

* * *

In this Report, we have attempted to present an accurate picture of the Northern Ireland criminal justice system and to urge certain reforms that we believe are warranted. It should be apparent that the problems that confront Northern Ireland are complex, rooted as they are not only in the country's historical antagonisms but also in the ongoing necessity to deal with terrorist activities. Nonetheless, even under the trying conditions that exist in Northern Ireland, we believe that progress in the improvement of its criminal justice system's sensitivity to individual rights is both desirable and feasible. We hope that this Report will make a meaningful contribution to that process.

FOOTNOTES

[1] The first was a report of a mission to Chile. See, William D. Zabel, Diane Orentlicher and David E. Nachman, *Human Rights and the Administration of Justice in Chile: Report of a Delegation of the Association of the Bar of the City of New York and of the International Bar Association* (1987).

[2] William E. Hellerstein chaired the Executive Committee in 1986-87 and is Professor of Law at Brooklyn Law School; Robert B. McKay was President in 1984-86 and is Professor of Law at New York University School of Law; and Peter R. Schlam is a present member of the Committee on International Human Rights and a Manhattan attorney.

[3] The historical and background portions of this report draw heavily upon a memorandum Mr. Flaherty prepared for the members of the investigating panel and his 1986 monograph prepared for the Committee on the Administration of Justice, *"The Blessings of Liberty": An American Perspective on a Bill of Rights for Northern Ireland*.

[4] The numerous individuals and organizations that responded generously to our requests for guidance are identified in Appendix A. We owe a special debt of gratitude to Professor Kevin Boyle, Director of Article 19, who arranged a compact but extremely valuable schedule in London; to Mrs. Paddy Sloan, then Information Officer of the Committee on the Administration of Justice, who coordinated our visits in Belfast; and to Declan O'Donovan, Counsellor to the Department of Foreign Affairs in Dublin, who arranged the best possible use of our limited time.

We are also especially grateful to officials of the United States Government who provided insight from their unique vantage point, specifically Robert P. Myers, United States Consul General and Eleanor Raven-Hamilton, Vice Consul in Belfast (the only foreign consulate still in operation in that city); and United States Ambassador to the Republic of Ireland, Margaret Heckler.

[5] It was in one of these areas that a beautiful little girl of perhaps two or three years of age, milk bottle nipple in her mouth, threw a stone that hit our car. Did she know that we were outsiders, or is that a reflexive action for all youngsters in the area? See *Terror's Children; Mending Mental Wounds*, N.Y. Times, Feb. 24, 1987, reporting "new insights into the special emotional needs of violence scarred children."

[6] It is ironic that the religious discrimination that dates from this period should emanate from the same William who had promulgated the celebrated Rights of Englishmen after success in the "Glorious Revolution" of 1688-89.

[7] When we visited Belfast in May 1987, police and military officials were preparing for repetition of the parades and risk of violence on July 12, 1987. To minimize that risk, the police rerouted the parades to avoid predominantly Catholic districts.

[8] Northern Ireland has 17 seats in the United Kingdom Parliament. In the 1983 general elections 11 seats were captured by the Official Unionists, three by the Democratic Unionists, and one each by the SDLP, Sinn Fein and the Popular Unionist Party. At the special election in January 1986, one of those seats was lost to the SDLP, and support for Sinn Fein dropped by 25 percent, thus demonstrating a mild gain in support for the principle of cooperative negotiation with the Republic of Ireland. In the 1987 general election the SDLP won three seats, including one as the result of the defeat of Enoch Powell, a Unionist member of Parliament for 37 years.

[9] The current Northern Ireland Secretary is Tom King, and his deputy at the time of our visit was Nicholas Scott (also an elected member of Parliament). Following the recent general election in Britain, Mr. Scott has been replaced by John Stanley M.P. Both King and Stanley represent districts in England rather than Northern Ireland.

[10] The earlier version of the Emergency Provisions Act (EPA) dates to the end of Stormont in 1973. The Prevention of Terrorism Act (PTA) was first enacted in 1974 and, as periodically reenacted since, concerns terrorism more generally and applies to the entire United Kingdom.

[11] In 1977, Lord Justice McGonigal, in *R. v. McCormick*, (1977) N.I. 105, acknowledged that applicable law in Northern Ireland permitted wide latitude in obtaining a statement even to "a degree of physical violence." Boyle, Hadden and Hillyard, TEN YEARS ON IN NORTHERN IRELAND 48 (1980). He did state, however, that judges retained some measure of discretion to exclude evidence that was "in itself . . . suspect by reason of the method by which it was obtained." *Id.* at 48. Courts responded by excluding evidence in at least some cases in which serious maltreatment or trickery short of torture had been alleged. *Id.* at 48, 49. This matter is more fully discussed later in this report.

[12] Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland (referred to hereafter as the "Bennett Report") 24-32; 60-65 (1979).

[13] Review of the Operations of the Northern Ireland (Emergency Provisions) Act 1978 (1984), referred to hereafter as the "Baker Report."

[14] It is now accepted, and has been for several years, that the role of the army is to support the RUC and that the army will remain in that role in whatever numbers and for as long as required.

[15] Chief Constable's Annual Report (1987).

[16] A further grim statistic is that during the same period there were recorded almost 10,000 injuries among the RUC, army and UDR, as well as 20,000 civilian injuries, all ascribed to terrorist activities.

[17] The information in this section is taken from the Chief Constable's Annual Report for 1986 (published in April 1987).

[18] Section 13 of the Police Act (Northern Ireland) 1970 then required that, except in those cases where the Chief Constable is convinced that no criminal offense has been committed, the report of the investigation of a complaint against a police officer must be sent to the Director of Public Prosecutions.

[19] In addition, there were a number of internal disciplinary charges not relevant here.

[20] The Bennett Report, at 8.

[21] The Baker Report, at 11, 12.

[22] The Bennett Report, at 8.

[23] *Id.* at 9.

[24] The Baker Report, at 77.

[25] Criminal Law Act (Northern Ireland) 1967, §2(3-5).

[26] *Id.* §62(1).

[27] *See* Northern Ireland (Emergency Provisions) Act 1978, §13(1) and Northern Ireland (Emergency Provisions) Act 1987, §26(1) and Schedule 1.

[28] The list of scheduled offenses is set forth fully in Appendix C.

[29] *See* EPA 1987, §6.

[30] Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976, (1983), referred to hereafter as the "Jellicoe Report," at 9.

[31] Offenses under §§9, 10 and 11 of the PTA 1984 are scheduled offenses under the EPA 1978.

[32] PTA 1984, §19(2).

[33] Section 11 of the PTA proscribes withholding information relating to acts of terrorism. Prior to 1984 an offense under §11 was arrestable under §12 of the Act. Offenses under § 11 of the PTA are now arrestable under §26 of the Police and Criminal Evidence Act 1984 in Great Britain and under §13 of the EPA 1978 in Northern Ireland, but no longer arrestable under the PTA.

[34] PTA 1984, §14(1).

[35] Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland, (1972), referred to hereafter as the "Diplock Report," at 14.

[36] §12(4): A person arrested under this section shall not be detained in right of the arrest for more than forty-eight hours after his arrest, but the Secretary of State may, in any particular case, extend the period of forty eight hours by a period or periods specified by him.

(5) Any such further periods or periods shall not exceed five days in all.
(6) The following provisions . . . shall not apply to a person detained in right of the arrest . . .
(d) Article 131 of the Magistrates' Courts (Northern Ireland) Order 1981.

[37] Viscount Colville of Culross QC, Report on the Operation in 1986 of the Prevention of Terrorism (Temporary Provisions) Act 1984, at 12.

[38] Walsh, *The Use of the Acts in Northern Ireland*, in Scorer, Spencer & Hewitt, THE NEW PREVENTION OF TERRORISM ACT, at 66, 67 (1985).

[39] The Bennett Report, at 13, 23, 24.

[40] Walsh, *The Use of the Acts in Northern Ireland, supra*, at 66, 67.

[41] The Diplock Report, at 14.

[42] The Royal Commission Report on Criminal Procedure 7 (1981).

[43] Judges' Rules, Rule I (1978 version).

[44] Judges' Rules, Principle D.

[45] *Id.* Rule 3.

[46] The Bennett Report, at 25.

[47] Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 Hastings L. J. 1, 13 (1986).

[48] Judges' Rules, Principle C.

[49] Northern Ireland (Emergency Provisions) Act 1987, §15.

[50] PCEA §58.

[51] *Id.*

[52] PCEA §116(5).

[53] The Bennett Report at 138.

[54] *Id.* at 138, 139.

[55] 384 U.S. 436 (1966).

[56] *See, Edwards v. Arizona*, 451 U.S. 477 (1981).

[57] Quoted in Baker, *The Western European Legal Response to Terrorism*, 13 Brooklyn. J. Int. L. 1, 17 (1987).

[58] Walsh, THE USE AND ABUSE OF EMERGENCY LEGISLATION IN NORTHERN IRELAND 56 (1983).

[59] *Id.* at 57.

[60] The Bennett Report, at 33.

[61] The Jellicoe Report, at 30.

[62] *Id.* at 31.

[63] The Bennett Report, at 44, 45.

[64] *Id.* at 45.
[65] *Id.* at 48.
[66] The Jellicoe Report, at 33.
[67] *Id.* at 31.
[68] Walsh, "THE USE AND ABUSE OF EMERGENCY LEGISLATION IN NORTHERN IRELAND, *supra*, at 77.
[69] Professor Kevin Boyle (unpublished manuscript).
[70] Professor Kevin Boyle, Interview, May 18, 1987.
[71] Nicholas Scott, Interview, May 20, 1987.
[72] Barritt, NORTHERN IRELAND--A PROBLEM TO EVERY SOLUTION (1982).
[73] Much of the material in this section is contained in Dickson, THE LEGAL SYSTEM OF NORTHERN IRELAND (1984).
[74] In criminal cases an appeal to the House of Lords may be taken if the Court of Appeal certifies that a point of law of general public importance is involved and that it appears to the Court or to the House of Lords that the point is one which ought to be considered by the House.
[75] The High Court's three divisions—Chancery, Queen's Bench, and Family—deal exclusively with civil law matters.
[76] Dickson, "THE LEGAL SYSTEM OF NORTHERN IRELAND, *supra*, at 14.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 83.
[80] The Diplock Report, at 1.
[81] The other members of the Commission were Sir Rupert Cross, Vinerian Professor of English Law at Oxford University, Sir Kenneth Younger, a former Intelligence Corps major and George Woodcock, a former general secretary of the Trades Union.
[82] S. C. Greer and A. White, ABOLISHING THE DIPLOCK COURTS, 2 (1986).
[83] The Diplock Report, at 1.
[84] *Id.* at 3.
[85] *Id.* at 3,4.
[86] *Id.* at 17.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 25.
[90] *Id.* at 32.
[91] *Id.*
[92] Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland 10 (1975) (hereafter referred to as the "Gardiner Report").
[93] *Id.*
[94] *Id.* at 10-11.
[95] *Id.* at 10, 11.
[96] *Id.* at 11-15.
[97] *Id.* at 16. Section 6 was based on a recommendation of the Diplock Commission and its language had been tied specifically to Article 3 of the European Convention which states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
[98] *Id.* at 17.
[99] *Id.*

[100] *Id.* at 21.
[101] The Baker Report, at 1.
[102] *Id.* at 139.
[103] *Id.* at 29, 30.
[104] *Id.* at 30.
[105] *Id.* at 39.
[106] *Id.* at 52.
[107] *Id.* at 27.
[108] *Id.* at 27-30. It should be noted that Sir George expressed considerable skepticism about the value of jury trials in any case, pointing to their diminished use in civil cases and to their absence in terrorist trials in the Republic of Ireland. *Id.*
[109] *Id.* at 33, 34.
[110] *Id.* at 36, 37.
[111] *Id.* at 37.
[112] *Id.* at 38.
[113] *Id.*
[114] *R. v. McCormick,* (1977) N.I. 105; *R. v. Milne,* (1978) N.I. 110.
[115] The Baker Report, at 56-57. Specific reference was made to the opinion of the Lord Chief Justice in *R. v. Halloran,* (1979) NIJB (CA): "This Court finds it difficult in practice to envisage any form of physical violence which is relevant to the interrogation of a suspect in custody and which, had it occurred, could at the same time leave a court satisfied beyond reasonable doubt in relation to the issue for decision under Section 6 (now Section 8)."
[116] *Id.* at 39.
[117] *Id.* at 140.
[118] See, e.g., Boyle, Hadden, and Hillyard, TEN YEARS ON IN NORTHERN IRELAND (1980); Walsh, THE USE AND ABUSE OF EMERGENCY LEGISLATION IN NORTHERN IRELAND (1983); S. C. Greer and A. White, ABOLISHING THE DIPLOCK COURTS (1986); Korff, THE DIPLOCK COURTS IN NORTHERN IRELAND: A FAIR TRIAL? Studie en informatie centrum mensenrechten No. 3 (1984) [An analysis of the law, based on a study commissioned by Amnesty International].
[119] We also observed a morning's taking of testimony at the Crumlin Road Courthouse in what is commonly known as "the Maze Prison Escape Trial." Eighteen defendants, several of whom are recognized leaders of the I.R.A., were charged with the crime of escape and various assaults and several were charged with the murder of one guard who died in the course of the escape. Two of the defendants were extradited from The Netherlands on condition that they not be charged with a crime greater than attempted murder. It would be inappropriate to draw any conclusions about the workings of the Diplock Courts on the basis of only a few hours of observation. But it should be said that there was nothing in that brief experience which contradicted any of the impressions which we had formed up to that time nor those which developed later. We thought the work of the barristers on both sides of the case was highly skilled and effective and we were impressed with the manner in which the Lord Chief Justice conducted the proceedings.
[120] Korff, THE DIPLOCK COURTS IN NORTHERN IRELAND: A FAIR TRIAL?, *supra*, at 13.
[121] Boyle, Hadden and Hillyard, TEN YEARS ON IN NORTHERN IRELAND, *supra*, at 58.
[122] *Id.* at 62.
[123] *Id.* at 61.
[124] *Id.* at 62.

[125] *Id.*

[126] *See, e.g.*, Walsh, THE USE AND ABUSE OF EMERGENCY LEGISLATION IN NORTHERN IRELAND, *supra,* at 94; S. C. Greer and A. White, ABOLISHING THE DIPLOCK COURTS, *supra,* at 22, 23.

[127] The Baker Report, at 37.

[128] S. C. Greer and A. White, ABOLISHING THE DIPLOCK COURTS, *supra,* at 79, 80.

[129] *Id.* at 80.

[130] Standing Advisory Commission on Human Rights (S.A.C.H.R.), *Annual Report for 1985-86,* 59. The Commission was established in 1973 and is charged with the responsibility of reporting annually on the status of human rights in Northern Ireland. See, Northern Ireland Constitution Act 1973, §20(7).

[131] Id. at 58, 59.

[132] *See, e.g.*, Jackson, *Three Judge Courts in Northern Ireland, A Paper Prepared for the Standing Advisory Committee on Human Rights,* in Annex A to the S.A.C.H.R. Report for 1985-86 at 70-72.

[133] Boyle, Hadden and Hillyard, TEN YEARS ON IN NORTHERN IRELAND, *supra,* at 80-81.

[134] S.A.C.H.R. Report, *supra,* at 60, 61.

[135] S. C. Greer and A. White, ABOLISHING THE DIPLOCK COURTS, *supra,* at 10.

[136] Dickson, THE LEGAL SYSTEM OF NORTHERN IRELAND, *supra,* at 83, 84.

[137] Joint Conference on the Administration of Justice, *The Administration of Justice in Northern Ireland,* 14, 15 (1981).

[138] D. Walsh, *Civil Liberties in Northern Ireland,* National Council on Civil Liberties Review of 1984, 326 (1984).

[139] *The Administration of Justice in Northern Ireland, supra,* at 14, 15.

[140] The Baker Report, at 40, 140.

[141] Sarah Spencer, General Secretary, National Council for Civil Liberties, Interview, May 18, 1987.

[142] The Bennett Report, at 10.

[143] Walsh, THE USE AND ABUSE OF EMERGENCY LEGISLATION IN NORTHERN IRELAND, *supra,* at 44.

[144] Boyle, Hadden and Hillyard, TEN YEARS ON IN NORTHERN IRELAND, *supra,* at 38. The authors recount that:

During 1972 in a number of test cases the judges held that confessions obtained during prolonged interrogation were involuntary and therefore inadmissible. In *R. v. Flynn and Leonard* the Lord Chief Justice described the detention centre at Holywood as 'a set-up officially organised and operated to obtain information . . . from persons who would otherwise have been less than willing to give it,' he went on to say that in general 'admissions made by persons under this type of interrogation in this setting will often fail to qualify as voluntary statements.' A substantial number of other prosecutions were abandoned by the Director of Public Prosecutions on the ground that confessions obtained in such circumstances were unlikely to be held admissible. (footnotes omitted).

[145] *R. v. Corey,* (1973), not apparently reported until 1979 NI 49.

[146] (1977) N.I. 105.

[147] *Id.* at 111.

[148] (1979) 2 NIJB (CA).

[149] (1980) N.I.91.

[150] 1987 N.I. ____, (slip. op. at 16, 19, January 21, 1987).

[151] *R. v. Corey, supra,* (1979) N.I. 49.

[152] Boyle, Hadden and Hillyard, TEN YEARS ON IN NORTHERN IRELAND, *supra,* at 49.

[153] *R. v. McCormick, supra,* (1977) N.I. 105.

[154] Korff, THE DIPLOCK COURTS IN NORTHERN IRELAND: A FAIR TRIAL?, *supra,* at 60, 61.

[155] National Council for Civil Liberties, *Briefing on the Northern Ireland (Emergency Provisions) Bill 1986,* 4 (December, 1986).

[156] Korff, THE DIPLOCK COURTS IN NORTHERN IRELAND: A FAIR TRIAL?, *supra,* at 66.

[157] *Id.* at 69.

[158] *Id.*

[159] Gifford, SUPERGRASSES, 4 (1984).

[160] S. C. Greer and A. White, ABOLISHING THE DIPLOCK COURTS, *supra,* at 19.

[161] British Information Services, *Northern Ireland: Converted Terrorists* 1 (November, 1983).

[162] S. C. Greer, *The Supergrass: A Coda,* Fortnight, 7 (March, 1986).

[163] S. C. Greer and A. White, ABOLISHING THE DIPLOCK COURTS, *supra,* at 19.

[164] British Information Services, *Northern Ireland: Diplock Courts and the Use of Uncorroborated Evidence,* 1 (March 31, 1986).

[165] S. C. Greer, *Civil Liberties in N. Ireland: From Special Powers to Supergrasses,* Fortnight 4 (February 18, 1985).

[166] Gifford, SUPERGRASSES, *supra,* at 8.

[167] S. C. Greer, *Civil Liberties in Northern Ireland, supra,* at 5.

[168] S. C. Greer, *The Supergrass: A Coda, supra,* at 8.

[169] Korff, THE DIPLOCK COURTS IN NORTHERN IRELAND: A FAIR TRAIL?, *supra,* at 93.

[170] It is noteworthy that the U.S. Supreme Court has held that the equal protection clause of the Fourteenth Amendment is not violated when a state denies some of its citizens the right to jury trial based on geographical differences within the State itself. *Salsburg* v. *Maryland,* 346 U.S. 545, 551-52 (1954). The vitality of this decision, however, is questionable since it predates the Court's rulings holding applicable to the states the Sixth Amendment's jury trial guarantee. See, *Duncan* v. *Louisiana,* 391 U.S. 145 (1968). See also, *Baldwin* v. *New York,* 399 U.S. 66 (1970).

[171] The United Kingdom government has in the past availed itself of these derogation clauses over Northern Ireland. No derogation at present exists, however, for the government's obligations under either treaty.

[172] Korff, THE DIPLOCK COURTS IN NORTHERN IRELAND: A FAIR TRIAL?, *supra,* at 94-95.

[173] *Id.* at 100.

[174] The information in the above paragraph comes from Dickson, THE LEGAL SYSTEM OF NORTHERN IRELAND, *supra,* at 17-20 (1984).

[175] The antecedents of the Agreement commenced in 1983-84, with an understanding by the SDLP of Northern Ireland and the three principal parties of the Republic to hold a series of public meetings to reassess the Nationalist position on the Northern conflict. The four parties together represent over 90 percent of the nationalist population of Ireland and almost three-quarters of the island's total population. The public inquiry, called the New Ireland Forum, first met in Dublin at the end of May 1983; during the next 11 months it held 13 public sessions and 28 private sessions, received more than 300 written submissions, took oral testimony

from 31 individuals and groups, and commissioned four papers. The final report, perhaps predictably, recommended a united Ireland, but also indicated a willingness to consider other options. Despite British rejection of that solution, and initial resistance even to further consultations, talks between Prime Ministers Thatcher and FitzGerald in mid-1985 led to negotiations for the Anglo-Irish Agreement. See Shannon, *The Anglo-Irish Agreement*, Foreign Affairs 850, 857-64 (Spring 1986).

[176] Not surprisingly, when the Conference met in Belfast, at Stormont Castle, extraordinary security precautions were taken, including the unannounced arrival by helicopter of the visitors from the Republic and from Westminster. Fifteen hundred security personnel were on hand to protect against attempted disruption.

[177] An Extradition Act was approved on December 1, 1987, which is to be followed by Ireland's ratification of the European Convention on the Suppression of Terrorism.

[178] Shannon, *The Anglo-Irish Agreement*, Foreign Affairs *supra*, at 870 (Spring 1986).

[179] The Gardiner Report, at 55; the Baker Report, at 71.

[180] The Baker Report, at 71.

APPENDIX A

PERSONS INTERVIEWED IN CONNECTION WITH THIS REPORT

NYC—April 28:

Diane Orentlicher
Lawyers Committee for Human Rights
New York City

NYC—May 11:

Jim Flavin, Consul General of Ireland
James Farrell, Vice Consul of Ireland
New York City

Janet McIver
British Consulate
New York City

London—May 18:

Professor Kevin Boyle
Director, Article 19
London

Sarah Spencer, General Secretary
National Council for Civil Liberties
London

Sarah Hoey
Cobden Trust
London

Halya Gowan
Amnesty International
London

Colin J. Walters
Felicity Clarkson
Police Department
Home Office
London

Leah Levin
Justice
London

Belfast—May 18:

Mrs. Paddy Sloan, Information Officer
Committee on the Administration of Justice
Belfast

Prof. S. Brice Dickson, Chairman, CAJ and
Faculty of Law, Queen's University
Belfast

May 19:

The Hon. Lord Chief Justice, Lord Lowry
Belfast

The Hon. Lord Justice James Michael Anthony Nicholson
Belfast

Robert Myers
Consul General for the United States
Eleanor Raven-Hamilton
Vice Consul
Belfast

Northern Ireland Association of Socialist Lawyers
Norman Shannon, Solicitor
Marge Davison, Barrister
Eileen McLarnon, Solicitor
Petra Sheils, Barrister
Joseph Stewart, Solicitor
Belfast

May 20:

Michael McAtamney, O.B.E. LL.B.
Deputy Chief Constable
Wiliam McGookin, O.B.E.
Chief Information Officer
Royal Ulster Constabulary
Belfast

Nicholas Scott, M.P.
Deputy Secretary of State for Northern Ireland
Belfast

Charles Hill, Q.C.
Michael Lavery, Q.C.
Belfast

May 21:

Sir Barry Shaw
Public Prosecutor
Belfast

Quinton Oliver
Northern Ireland Council for Voluntary Action
Belfast

Queen's University Faculty of Law
Dean Judith Eve
Professor William David Trimble
Professor Desmond S. Greer
Professor Colin M. Campbell
Professor S. Brice Dickson (also above)
Professor Jagat Narain
Professor John E. Standard
Belfast

John O'Hara
Chairman
John R. Fisher
Secretary
Standing Advisory Commission on Human Rights
Belfast

Professor Tom Hadden
Member of the Standing Advisory Commission on Human Rights
Queen's University
Faculty of Law
Belfast

Committee on the Administration of Justice
Mrs. Paddy Sloan (see above)
Professor S. Brice Dickson (see above)
Stephen Livingstone
Patricia Johnston
Dominie Grates
Kevin Smyth
Dorall Murphy
Peter Tennant
James Dego
Steve M. Brode

Dublin—May 22:

Declan O'Donovan
Counsellor
David Donoghue, First Secretary
Neill Gurgess—Assistant Secretary,
Department of Foreign Affairs
Dublin

Eamonn M. Barnes
Director of Public Prosecutions
Dublin

Joseph Brosnan, Q.C.
Dublin

Sean Hurley
Director, Police Complaints Office
Dublin

Hon. Ronan Keane, President
William Binchey
Law Reform Commission
Dublin

Matthew Russell
Attorney General's Department
Dublin

Ambassador Margaret Heckler
John Horner, Asst. to the Ambassador
U.S. Embassy
Dublin

APPENDIX B

NUMBER OF INJURIES IN NORTHERN IRELAND AS A RESULT OF TERRORIST ACTIVITY 1968-1987

	RUC	ARMY	UDR	CIVILIAN
1968	379	—	—	—
1969	711	54	—	—
1970	191	620	—	—
1971	315	381	9	1,887
1972	485	532	36	3,813
1973	291	525	23	1,812
1974	235	453	30	1,680
1975	263	151	16	2,044
1976	303	242	22	2,162
1977	183	168	15	1,017
1978	302	127	8	548
1979	165	132	21	557
1980	194	53	24	530
1981	332	112	28	878
1982	99	80	18	328
1983	142	66	22	280
1984	267	64	22	518
1985	115	20	13	468
1986	622	45	10	773
1987 to 30 April	78	33	5	198
TOTAL	5,972	3,858	322	19,488

APPENDIX C

NORTHERN IRELAND (EMERGENCY PROVISIONS) ACT 1978

Section 30.

SCHEDULE 4

THE SCHEDULED OFFENCES

PART I

SUBSTANTIVE OFFENCES

Common law offences

1. Murder, subject to note 1 below.
2. Manslaughter, subject to note 1 below.
3. The common law offence of riot.
4. Kidnapping.
5. False imprisonment.
6. Assault occasioning actual bodily harm, subject to note 1 below.

1861 c. 97.

Malicious Damage Act 1861

7. Offences under section 35 of the Malicious Damage Act 1861 (interference with railway).

1861 c. 100.

Offences against the Person Act 1861

8. Offences under the following provisions of the Offences against the Person Act 1861, subject as mentioned below.—

(a) section 4 (conspiracy, etc. to murder) subject to note 2 below;
(b) section 16 (threats to kill) subject to note 2 below;
(c) section 18 (wounding with intent to cause grievous bodily harm) subject to note 2 below;
(d) section 20 (causing grievous bodily harm) subject to note 2 below;
(e) section 28 (causing grievous bodily harm by explosives);
(f) section 29 (causing explosion or sending explosive substance or throwing corrosive liquid with intent to cause grievous bodily harm);
(g) section 30 (placing explosive near building or ship with intent to do bodily injury).

1883 c. 3.

Explosive Substances Act 1883

9. Offences under the following provisions of the Explosive Substances Act 1883—

(a) section 2 (causing explosion likely to endanger life or damage property);
(b) section 3 (attempting to cause any such explosion, and making or possessing explosive with intent to endanger life or cause serious damage to property);

(c) section 4 (making or possessing explosives in suspicious circumstances).

Northern Ireland (Emergency Provisions) Act 1978

Prison Act (Northern Ireland) 1953

SCH. 4
1953 c. 18 (N.I.).

10. Offences under the following provisions of the Prison Act (Northern Ireland) 1953, subject to note 2 below,—

(a) section 25 (being unlawfully at large while under sentence);
(b) section 26 (escaping from lawful custody and failing to surrender to bail);
(c) section 27 (attempting to break prison);
(d) section 28 (breaking prison by force or violence);
(e) section 29 (rescuing or assisting or permitting to escape from lawful custody persons under sentence of death or life imprisonment);
(f) section 30 (rescuing or assisting or permitting to escape from lawful custody persons other than persons under sentence of death or life imprisonment);
(g) section 32 (causing discharge of prisoner under pretended authority);
(h) section 33 (assisting prisoners to escape by conveying things into prisons).

Firearms Act (Northern Ireland) 1969

1969 c. 12 (N.I.).

11. Offences under the following provisions of the Firearms Act (Northern Ireland) 1969—

(a) section 1(1) (possessing, purchasing or acquiring firearm or ammunition without certificate);
(b) section 2(1), (2), (3) or (4) (manufacturing, dealing in, repairing, etc., firearm or ammunition without being registered);
(c) section 3 (shortening barrel of shotgun or converting imitation firearm into firearm);
(d) section 4(1) (manufacturing, dealing in or possessing machine gun, or weapon discharging, or ammunition containing, noxious substance);
(e) section 14 (possessing firearm or ammunition with intent to endanger life or cause serious damage to property);
(f) section 15 (use or attempted use of firearm or imitation firearm to prevent arrest of self or another, etc.);
(g) section 16 (carrying firearm or imitation firearm with intent to commit indictable offence or prevent arrest of self or another);
(h) section 17 (carrying firearm, etc. in public place) subject to note 3 below;
(i) section 19 (possession of firearm or ammunition by person who has been sentenced to imprisonment, etc., and sale of firearm or ammunition to such a person);
(j) section 19A (possessing firearm or ammunition in suspicious circumstances).

Northern Ireland (Emergency Provisions) Act 1978

SCH. 4
1969 c. 16 (N.I.).

Theft Act (Northern Ireland) 1969

12. Offences under the following provisions of the Theft Act (Northern Ireland) 1969, subject to note 4 below,—

(a) section 8 (robbery);
(b) section 10 (aggravated burglary).

1969 c. 29 (N.I.).

Protection of the Person and Property Act (Northern Ireland) 1969

13. Offences under the following provisions of the Protection of the Person and Property Act (Northern Ireland) 1969—

(a) section 1 (intimidation);
(b) section 2 (making or possessing petrol bomb, etc. in suspicious circumstances);
(c) section 3 (throwing or using petrol bomb, etc.).

1971 c. 70.

Hijacking

14. Offences under section 1 of the Hijacking Act 1971 (aircraft).

1975 c. 59.

15. Offences in Northern Ireland under section 2 of the Criminal Jurisdiction Act 1975 (vehicles and ships).

1976 c. 8.

Prevention of Terrorism (Temporary Provisions) Act 1976

16. Offences under the following provisions of the Prevention of Terrorism (Temporary Provisions) Act 1976—

(a) section 9 (breach of exclusion orders);
(b) section 10 (contributions towards acts of terrorism);
(c) section 11 (information about acts of terrorism).

S.I. 1977/42b. (N.I. 4).

Criminal Damage (Northern Ireland) Order 1977

17. Offences under the following provisions of the Criminal Damage (Northern Ireland) Order 1977, subject to note 2 below—

(a) Article 3(1) and (3) or Article 3(2) and (3) (arson);
(b) Article 3(2) (destroying or damaging property with intent to endanger life);
(c) Article 4 (threats to destroy or damage property);

(d) Article 5 (possessing anything with intent to destroy or damage property).

S.I. 1977/1249. (N.I. 16).

Criminal Law (Amendment) (Northern Ireland) Order 1977

18. Offences under Article 3 of the Criminal law (Amendment) (Northern Ireland) Order 1977 (bomb hoaxes), subject to note 2 below.

This Act

19. Offences under the following provisions of this Act—

(a) section 21;
(b) section 22;
(c) section 23;
(d) paragraph 13 of Schedule 1.

Northern Ireland (Emergency Provisions) Act 1978

NOTES

SCH. 1

1. Murder, manslaughter or an assault occasioning actual bodily harm is not a scheduled offence in any particular case in which the Attorney General for Northern Ireland certifies that it is not to be treated as a scheduled offence.

2. An offence under—

1861 c. 100.

(a) section 4, 16, 18 or 20 of the Offences Against the Person Act 1861; or

1953 c. 18 (N.I.)

(b) section 25, 26, 27, 28, 29, 31, 32 or 33 of the Prison Act (Northern Ireland) 1953; or

S.I. 1977/426 (N.I. 4).

(c) Article 3, 4 or 5 of the Criminal Damage (Northern Ireland) Order 1977; or

S.I. 1977/1249 (N.I. 16).

(d) Article 3 of the Criminal Law (Amendment) (Northern Ireland) Order 1977.

is not a scheduled offence in any particular case in which the Attorney General for Northern Ireland certifies that it is not to be treated as a scheduled offence.

1969 c. 12 (N.I.).

3. An offence under section 17 of the Firearms Act (Northern Ireland) 1969 is a scheduled offence only where it is charged that the offence relates to a weapon other than an air weapon.

1969 c. 16 (N.I.).

4. Robbery and aggravated burglary are scheduled offences only where it is charged that an explosive, firearm, imitation firearm or weapon of offence was used to commit the offence; and expressions defined in section 10 of the Theft Act (Northern Ireland) 1969 have the same meaning when used in this note.

PART II

INCHOATE AND RELATED OFFENCES

20. Each of the following offences, that is to say—

(a) aiding, abetting, counselling, procuring or inciting the commission of an offence specified in Part I of this Schedule (hereafter in this paragraph referred to as a "substantive offence");
(b) attempting or conspiring to commit a substantive offence;

1967 c. 18 (N.I.)

(c) an offence under section 4 of the Criminal Law Act (Northern Ireland) 1967 of doing any act with intent to impede the arrest or prosecution of a person who has committed a substantive offence;
(d) an offence under section 5(1) of the Criminal Law Act (Northern Ireland) 1967 of failing to give information to a constable which is likely to secure, or to be of material assistance in securing the apprehension, prosecution or conviction of a person for a substantive offence.

shall be treated for the purposes of this Act as if it were the substantive offence.

PART III

EXTRA-TERRITORIAL OFFENCES

21. Any extra-territorial offence as defined in section 1 of the Criminal Jurisdiction Act 1975.

APPENDIX D

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Committee Report
Protracted Trial Parts

by THE COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION

The Uniform Civil Rules for the Supreme Court and the County Court provide, as one of the exceptions to the rule of random selection of judges to hear cases, that the Chief Administrator may authorize the establishment of certain separate categories of actions and proceedings "for assignment to judges specially assigned to hear such actions or proceedings", one of such categories being "actions requiring protracted consideration". Section 202.3 (c) (2). The Uniform Rules go on to provide that, with respect to this as well as any other such special categories, assignment of cases within each such category should be random as among the judges assigned to hear cases in that category. *Ibid.* The Uniform Rules further provide that the Chief Administrator may authorize the assignment of "one or more special reserve trial judges" who may be "assigned matters for trial in exceptional circumstances where the needs of the courts require such assignment". Section 202.3(c) (3).

The foregoing are the only provisions of the Uniform Rules specifically addressed to the question of special assignments for protracted or unusually complex litigation. Of course, there is nothing to prevent the Chief Administrator from taking into account the general complexity of cases in a particular category, such as matrimonial actions, medical malpractice actions, tax assessment review proceedings, and condemnation actions,[1] in determining what special categories of cases are to be appoved for assignment to one or more specialized judges.

In fact, New York County is the only one of the five counties in New York City in which a special category has been established for actions requiring protracted consideration. Of the four other counties, Kings County has five parts devoted solely to medical malpractice cases, but no other part is specifically