Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland

Chairman
LORD DIPLOCK

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COMMISSION ON LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND

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LORD DIPLOCK

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The Right Hon. SIR KENNETH YOUNGER

Secretary:

J. F. HALLIDAY, Esq.

Legal Secretary:

A. H. HAMMOND, Esq.

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CHAPTER 1

INTRODUCTION

To the Right Honourable William Whitelaw, M.C., D.L., M.P., *Her Majesty's Secretary of State for Northern Ireland.*

1. We were appointed to consider "what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations 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; and to make recommendations".

2. Our appointment followed upon the statement on security policy issued by the Northern Ireland Office on 22 September 1972, and was announced in full in a further statement on 18 October 1972. We held our first meeting on 20 October. Since then we have held a number of meetings, in private, during which we have heard evidence and discussed our findings.

3. From the outset we have treated our task as urgent. What we have learnt in the course of it about the conditions under which the ordinary criminal courts in Northern Ireland have to carry out their functions, and about the developments in the pattern of violence which have taken place even since we were appointed, has only served to increase our sense of urgency. It has not been any part of our function to inquire into individual complaints about the behaviour of members of the armed forces or the police in carrying out their duties of preventing and detecting terrorist crime or apprehending offenders. We are aware that complaints have been made. With violence so rife and political passions so strong we should have been surprised if they had not, whether with justification or for purposes of propaganda; but we have not invited particulars of these nor have any been volunteered in response to the invitation to submit written evidence to us contained in the statement of 18 October. We have confined our attention to the legal procedures which are, or could be made available, for dealing with terrorist activities. Unlawful abuses, by individual members of the security forces or the police, of any of the procedures which we recommend, if they should occur, would be criminal offences or civil wrongs. They can be dealt with by criminal and civil proceedings in the courts against the offenders themselves.

4. In fact we have received only three written representations. The bulk of our evidence has been oral and was taken from people with responsibility for the administration of justice in Northern Ireland, but we have also heard from representatives of the Civil and Armed Services. Almost all the evidence was heard in London, but our Chairman made two visits to

Northern Ireland, each lasting two days, during which he met members of the security forces on the ground. Like those who have been responsible for inquiries in the past in which there have been considerations of security, we do not intend to publish the evidence we have received nor the names of those who submitted it.

5. We are grateful to those who have given us the benefit of their advice and experience, and particularly to our Secretaries, Mr. J. F. Halliday of the Northern Ireland Office and Mr. A. H. Hammond of the Home Office. We have worked them hard to enable us to complete our Report within seven weeks of our being appointed. We owe a lot to them.

CHAPTER 2

SUMMARY OF CONCLUSIONS

6. Although in one sense there has been an intermittent state of emergency in Northern Ireland since it first became a separate province we regard the emergency which led to our appointment as that which has resulted from the escalation of terrorist activities since 1969. Our recommendations are intended to deal with this situation and to continue in effect only so long as it persists. Whether all of them should be so limited in duration is not for us to recommend.

7. In the following Chapters we have set out at greater length the conclusions which we have reached and the reasons for them. Those conclusions may be summarised as follows:

(*a*) The main obstacle to dealing effectively with terrorist crime in the regular courts of justice is intimidation by terrorist organisations of those persons who would be able to give evidence for the prosecution if they dared (paragraphs 12–20).

(*b*) This problem of intimidation cannot be overcome by any changes in the conduct of the trial, the rules of evidence or the onus of proof, which we would regard as appropriate to trial by judicial process in a court of law (paragraphs 21–26).

(*c*) Fear of intimidation is widespread and well founded. Until it can be removed and the personal safety of witnesses and their families guaranteed, the use by the Executive of some extra-judicial process for the detention of terrorists cannot be dispensed with (paragraph 27).

(*d*) Detention of terrorists is now subject to an extra-judicial process which provides important safeguards against unjust decisions; but however effective these may be in fact, they can never appear to be as complete as the safeguards which are provided by a public trial in a court of law (paragraphs 28–33).

(*e*) It is therefore necessary to consider whether any changes can be made in criminal procedure which, while not conflicting with the requirements of a judicial process, would enable at least some cases at present dealt with by detention to be heard in courts of law (paragraph 34).

(*f*) Recommended changes in the administration of justice, unless otherwise stated, apply only to cases involving terrorist crimes, defined as scheduled offences (paragraphs 6, 7, 114–119 and the Schedule).

(*g*) Trials of scheduled offences should be by a Judge of the High Court, or a County Court Judge, sitting alone with no jury, with the usual rights of appeal (paragraphs 35–41).

(*h*) The armed services should be given power to arrest people suspected of having been involved in, or having information about, offences and detain them for up to four hours in order to establish their identity (paragraphs 42–50).

(*i*) Bail in cases involving a scheduled offence should not be granted except by the High Court and then only if stringent requirements are met (paragraphs 51–57).

(*j*) The onus of proof as to the possession of firearms and explosives should be altered so as to require a person found in certain circumstances to prove on the balance of probabilities that he did not know and had no reason to suspect that arms or explosives were where they were found (paragraphs 61–72).

(*k*) A confession made by the accused should be admissible as evidence in cases involving the scheduled offences unless it was obtained by torture or inhuman or degrading treatment; if admissible it would then be for the court to determine its reliability on the basis of evidence given from either side as to the circumstances in which the confession had been obtained (paragraphs 73–92).

(*l*) A signed written statement made to anyone charged with investigating a scheduled offence should be admissible if the person who made it cannot be produced in court for specific reasons, and the statement contains material which would have been admissible if that person had been present in court to give oral evidence (paragraphs 93–100).

(*m*) A secure institution should be provided as a matter of urgency in order to accommodate, when the juvenile court so directs, people aged under 17 years who are remanded in, or committed to custody having been charged with or convicted of offences connected with terrorist activities (paragraphs 101–109).

(*n*) The grounds upon which a young person may be remanded or sentenced to prison should be extended so as to include cases in which the gravity of the offence makes confinement in any other place unsuitable (paragraph 110).

(*o*) The mandatory minimum sentence of six months in a remand home for riotous behaviour by juveniles should be removed, giving the court a discretion to pass such a sentence for less than six months (paragraph 111).

(*p*) The power of a juvenile court to sentence to a remand home for up to one month should be extended to enable such a sentence to be passed for any period up to six months (paragraph 112).

(*q*) The limitation on a court's power to sentence a juvenile to detention for such a period as it thinks fit only when the offence is one for which an adult might be sentenced to imprisonment for 14 years or more should be removed during the emergency (paragraph 113).

CHAPTER 3

SCOPE OF OUR INQUIRY

1. Our terms of reference require us to consider:

"What arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations 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; and to make recommendations."

2. Since we were appointed the power of the Executive to intern persons suspected of being involved in terrorist activities in Northern Ireland, under Special Powers Regulation 12, has been revoked. Detention in custody for more than 48 hours otherwise than as the result of trial and conviction in a court of law or pending such a trial, is now regulated by the Detention of Terrorists (Northern Ireland) Order 1972. Our recommendations can relate only to the future, not the past. So we regard our task as now being to consider whether there are any changes in the procedures for bringing criminals to trial, in the conduct of the trial itself or in the composition of the court of trial which could obviate or reduce the need to resort to detention under this new Order of individuals involved in terrorist activities.

3. "Terrorist acts" mentioned in our terms of reference we take to be the use or threat of violence to achieve political ends; and "terrorist activities" as embracing the actual use or threat of violence, planning or directing or agreeing to its use, and taking active steps to promote its use or to hinder the discovery or apprehension of those who have used or threatened it. All these have long been criminal offences under the ordinary law of the land. They are not new offences created specifically to deal with an emergency.

4. But although our concern is with criminal offences which form part of the general criminal law, we regard our present function as restricted to making recommendations to take effect only so long as the emergency which led to our appointment continues and applying only to a limited class of crimes. It does not fall within our responsibilities to recommend changes in the general criminal law or procedure of Northern Ireland. That would require longer consideration and wider consultation than the urgency of our task permits. It would in any event be better fitted to be undertaken by a more broadly constituted body than ourselves. This does not mean that changes which we propose for dealing with terrorist activities during the emergency are regarded by us as unsuitable for general application to all criminal offences in normal times. It means no more than that our recommendations are made without prejudice to future consideration of the question whether any of them is appropriate to be applied generally in the field of criminal law.

5. Although what distinguishes terrorist activities from other crimes involving acts or threats of violence is the motive that lies behind them, motive does not provide a practical criterion for defining the kinds of crime

with which we need to deal. The object of the terrorist organisations which concern us is to bring about political change in Northern Ireland by violent means; but terrorist organisations inevitably attract into their ranks ordinary criminals whose motivation for particular acts may be private gain or personal revenge. If those who commit such acts for non-political motives are associated with a known terrorist organisation, the effect on public safety and on public fear is no different because the motive with which they are committed is more base. We do not exclude these from the category of terrorist acts with which we are bound to deal.

6. We are driven therefore to classify the crimes to which our recommendations apply by reference to the legal definition of what constitutes the crime, and not by reference to the motives (which may be mixed) which led the offender to commit it. For this purpose we have taken those crimes which are commonly committed at the present time by members of terrorist organisations. Except where otherwise stated in later sections of this Report our recommendations apply to these crimes even though they may have been committed by criminals who are not connected with any terrorist organisation. They fall into seven broad categories:

(1) All offences under statutes relating to firearms or explosives or other devices used for destructive purposes.

(2) All robberies or assaults involving use of or threats to use firearms or other offensive weapons.

(3) Malicious damage to property by fire.

(4) Intimidation with intent to interfere with the course of justice.

(5) Riot and similar offences under statute.

(6) Other serious offences against person or property.

(7) Membership of an association which is unlawful under Special Powers Regulation 24A, and other serious offences under those Regulations.

Intended to be also included are conspiracies to commit offences in any of the first five categories, and the cognate crimes of attempting, procuring or being accessory to the commission of any of those offences.

7. We have endeavoured to set out in Parts I, II, and III of the Schedule to this Report a more specific list of offences intended by us to be embraced by these categories. Most of them are already distinct and separate offences at common law or under statutes; but in certain cases, which we have indicated in the Schedule, legislation would be needed to create a new sub-division of a wider generic offence to enable the particular offence to be identified as falling within the categories. We do not put forward this Schedule as final or definitive, nor is it intended to be immutable. Further research into the voluminous statute law of Northern Ireland may bring to light some omissions, and we have not sought to indicate to parliamentary draftsmen the precise language in which any legislation to give effect to our recommendations should be couched. But in any event, the Schedule is based upon the methods for achieving their objects which actually are being used by terrorist organisations at the present time. These have been affected by changes in terrorist tactics in the past;

they are liable to change in the future. We accordingly recommend that any list of offences to which proposals made in later sections of this Report are to apply, should be subject to amendment by statutory instrument as terrorist tactics change or experience shows the need for omissions or additions. We shall hereafter refer to offences from time to time included in the list as "Scheduled Offences".

8. We started our task by asking ourselves in what respects the normal criminal procedures used in Northern Ireland are inadequate in the present emergency to deal with those involved in terrorist acts. These procedures do not differ markedly from those followed in England and Wales though there are some differences in practical effect in the ways in which they are applied to which we draw attention in later sections of this Report.

9. Terrorist acts are not the monopoly of extremists on one side only of the dispute which has long divided Northern Ireland. We prefer to use the labels "Republican" and "Loyalist" rather than "Catholic" and "Protestant" to describe extremists of the rival factions, for the gulf between them is one of politics rather than one of creeds and the methods used by the extremists are equally abhorrent to Christians of both persuasions. Hitherto, however, the majority of terrorist acts about which the facts are known to the security authorities have been committed on the Republican side and by members of the Provisional or the Official IRA. There is a large and detailed fund of information about these upon which we have been able to rely as a factual basis for the conclusions that we have reached. We are satisfied as to its general accuracy, though in the over-riding interest of the safety of the public and of individuals there is much of it that cannot be disclosed.

10. Terrorist acts which can confidently be attributed to extremist organisations on the Loyalist side have so far been much less frequent. Although there have been ominous signs of increase even since the date of our appointment a similar volume of information about them has not been available to us. That is why in our study of the effects of terrorism upon the administration of criminal justice we have had to rely mainly upon what is known about Republican terrorism. But terrorism is terrorism; its baneful effects upon the administration of justice are much the same from whatever faction it springs.

11. We may say, in anticipation, that there are several respects in which the normal process by which criminals are brought to trial and tried in England as well as Northern Ireland are inappropriate to the circumstances in which terrorist crimes are being committed in the latter country. In later sections of this Report we shall deal with trial by jury (paragraphs 35 to 41), formalities of arrest (paragraphs 42 to 50), bail (paragraphs 51 to 57), onus of proof of possession of firearms and explosives (paragraphs 61 to 72), admissibility of confessions (paragraphs 73 to 92), and of written statements (paragraphs 93 to 100) and the special problems of young terrorist offenders (paragraphs 101 to 113). But what we there propose are palliatives, not cures. There is a fundamental problem which must first be faced.

CHAPTER 4

THE BASIC PROBLEM

Minimum Requirements of a Judicial Process

12. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms* (the "European Convention") to which the United Kingdom is a party, lays down certain minimum requirements for a criminal trial in normal times. Article 15 permits derogation from these requirements in time of public emergency threatening the life of the nation—a condition which we consider is unquestionably fulfilled in Northern Ireland at the present time. But if decisions as to guilt are to be made by tribunals, however independent or impartial, which are compelled by the emergency to use procedures which do not comply with these minimum requirements, we do not think that a tribunal which fulfils this function should be regarded or described as an ordinary court of law or as forming part of the regular judicial system or should be composed of judges who also sit in the regular criminal courts in Northern Ireland.

13. Northern Ireland has always been a province whose inhabitants have been sharply divided into two rival factions by differences of creed and politics. The judiciary has nevertheless managed to retain a reputation for impartiality which rises above the divisive conflict which has affected so many other functions of government in the province; and the courts of law and the procedures that they use have in general held the respect and trust of all except the extremists of both factions. We regard it as of paramount importance that the criminal courts of law and judges and resident

*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. Judgment shall be pronounced publicly but the Press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved 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;

(*e*) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

magistrates who preside in them should continue to retain that respect and trust throughout the emergency and after the emergency has come to an end. If anything were done which weakened it, it might take generations to rebuild, for in Northern Ireland memories are very long.

14. For this reason we would find ourselves unable to recommend any changes in the conduct of a criminal trial of terrorist offences in a court of law in Northern Ireland which would have the result that it no longer complied with the minimum requirements of Article 6 of the European Convention. Any changes in procedure which we propose for adoption by courts of law should, we think, fall within those minimum requirements. A just result may be obtainable by other methods but the use of these is not, we think, appropriate to an ordinary court of criminal law.

15. **The minimum requirements are based upon the assumption that witnesses to a crime will be able to give evidence in a court of law without risk to their lives, their families or their property. Unless the State can ensure their safety, then it would be unreasonable to expect them to testify voluntarily and morally wrong to try to compel them to do so.**

16. **This assumption, basic to the very functioning of courts of law, cannot be made today in Northern Ireland as respects most of those who would be able, if they dared, to give evidence in court on the trial of offences committed by members of terrorist organisations.**

The Effects of Intimidation

17. In Belfast and in Londonderry the IRA terrorist groups operate from those areas which are Republican strongholds. For a long time these were "No Go" areas into which neither the police nor the army entered. Since July 1972 the army have been able, at the cost of casualties, to maintain armed patrols in the streets, and to launch sporadic raids on premises to make arrests and to seize arms, explosives and other incriminating material. But they are not in a position to ensure the personal safety of individual citizens who reside in these areas or who have to pass regularly through them or near by. In the nature of things, it is the people who live in these areas who are most likely to have first-hand knowledge of who committed terrorist acts or planned and directed them. Yet these are the people who would put their lives, their families, their homes at greatest risk if it were suspected by members of the terrorist organisations that they had given information to the security authorities. The fear of revenge upon "informers" is omnipresent. It is not limited to urban areas. It extends to those who live in relative isolation in the country exposed to terrorist raids launched from across the border. It extends to all classes of society. It is not an idle or irrational fear. It is justified in fact by many well authenticated instances of intimidation, and not least by the example, familiar to all other potential witnesses, of a witness who was shot dead in his home in front of his infant child the day before he was due to give evidence on the prosecution of terrorists. Even where a terrorist crime is committed outside the more dangerous areas and in the presence of less vulnerable eye-witnesses the pervading atmosphere of fear leads them to profess their inability to identify the culprits or to give any other evidence in court which would

inculpate them. No one wants to take the risk of being "involved". In the result, with increasingly rare exceptions, the only kind of case in which a conviction of a terrorist can be obtained by the ordinary processes of criminal law is one in which there is sufficient evidence against the accused from one or more of three sources: (1) oral evidence by soldiers or policemen, whose protection can be more readily ensured; (2) physical evidence, such as finger-prints, and (3) an admissible confession by the accused.

18. Inability to prosecute in other cases does not mean that there is not a continuing flow of information to the security authorities about terrorist organisations and terrorist crimes—much of it anonymous but much too from known sources living within the Republican strongholds or even members of the IRA themselves. But this information is given only upon the understanding that the source will never be disclosed in any circumstances in which it could come to the ear of any member of the IRA. If there were any weakening of the implicit trust that this understanding would never be broken by the security authorities these sources of information would dry up. The intelligence which they provide is operationally essential to the army's role in protecting life and property from terrorist crimes, and in enabling them to arrest terrorists red-handed or in other circumstances in which a conviction can be obtained without calling oral evidence from witnesses who are not in the army or the police.

19. Although what we have so far described has been confined to the effects of Republican terrorism upon the ability of the prosecution to induce witnesses to terrorist crimes to give evidence in a court of law, we repeat that this is not intended to convey that there have been no terrorist activities in Northern Ireland by extremists on the Loyalist side nor that there is not risk of similar intimidation of potential witnesses from this source too. If Loyalist terrorism were to increase, this would extend the area of the problem, it would not change its character. *Mutatis mutandis* what we have said is likely to be equally true of terrorism by extremist groups operating from areas which are comparable strongholds of Loyalist opinion.

20. The minimum requirements that we have adopted as the criterion for criminal trial by a court of law, permit of hearings *in camera* where, *inter alia*, the interests of public order or national security so require. But even where the hearing takes place *in camera* they call for the accused to be informed *in detail* of the nature of the accusation against him and to examine or have examined witnesses against him. We have naturally considered whether any method could be devised whereby the identity of informants could be kept secret, while still enabling their evidence to be adduced in a court of law. The human difficulty is that nothing would convince them that there was no risk of their anonymity being betrayed. But we ourselves can find no practical way of keeping their identity secret if they gave evidence under any procedure which would fulfil the minimum requirements of trial to which we have just referred. One could contemplate the hearing of certain evidence *in camera* with the witness screened from sight, his name and address withheld, the exclusion of Press and public, and even without the physical presence of the accused himself. But at the

absolute minimum the lawyer of the accused would have to be present to hear the witness's evidence in chief and to cross-examine him and, for that purpose, to take instructions from the accused. Even if the witness's identity were not disclosed to the accused's counsel the details, elicited in cross-examination, of how the witness came to see or hear that to which he testified might often suffice to identify him to the accused. Apart from this, the accused's counsel would be gravely handicapped in testing the witness's credibility unless he were informed who the witness was. To disclose this to counsel but to prohibit him from communicating it to the accused would expose him to a conflict between his duty to his client and his duty to the State inconsistent with the role of the defendant's lawyer in a judicial process. In any event, in the current polarisation of political views in Northern Ireland no witness would believe that the lawyers defending a terrorist of either faction would not disclose to their client all they learnt about the identity of those who gave evidence against him.

Possible changes in the rules of evidence

21. We have considered whether the difficulties of proof resulting from the intimidation of those witnesses who would best be able to give direct oral evidence of the accused's involvement in terrorist activities could be overcome by changes in the rules of evidence or onus of proof which would dispose of the need to call them or to disclose their identity. The commonest offence committed by those who plan and direct but do not necessarily take part in terrorist acts is that of criminal conspiracy. This is also dealt with in Special Powers Regulation 24A. The Regulation makes it a criminal offence to become or remain a member of an organisation named in it as an "unlawful association" or to do anything to promote its objects. The organisations listed are those which advocate the use of violence for political ends. Among others, they include the IRA (both Official and Provisional) and a Loyalist terrorist organisation, the Ulster Volunteer Force (UVF). The Secretary of State has power to add to the list or to remove organisations from it. Persons who join an association which advocates the unlawful use of violence by its members, however laudable the political ends sought to be achieved by this means, thereby become parties to an agreement for the unlawful use of violence. The mere fact of doing so makes them guilty of a well-established crime at common law—that of criminal conspiracy. Provided that the power to name organisations as "unlawful associations" for the purpose of the Regulation is not abused by the Secretary of State, the Regulation does not extend the ambit of the common law offence of criminal conspiracy. The practical effect of listing a particular organisation as an "unlawful association" is evidential. It relieves the prosecution of the necessity to prove in court each time that an individual member of one of the named organisations is charged that its objects or the means by which it seeks to attain them are unlawful. On a charge of criminal conspiracy at common law, the evidence to establish this, though it be common knowledge, would have to be repeated in each case brought before the courts. The Regulation has one other effect upon the way in which an offence can be proved. This applies only when documents relating to an "unlawful association" are found in the possession of the accused or on premises in his occupation or control

or at which he is found or has resided. Once this has been proved, the onus of proving that he is not a member of the association is cast upon the accused. Apart from this the Regulation does nothing to facilitate proof by the prosecution by evidence which establishes beyond reasonable doubt that the accused was in fact a member of the " unlawful association ".

22. We have therefore considered whether any additional evidential provision could be incorporated in Regulation 24A to solve the problem. In particular we have examined the practical value in Northern Ireland of a provision that evidence by a police officer of high rank of his belief that the accused was a member of the association should be evidence that the accused was in fact a member so as to cast upon him the onus of proving the contrary. This would satisfy the requirements of the European Convention if the police officer were obliged to answer questions on behalf of the accused as to the grounds of his belief in order to ascertain what weight could be attached to it in the face of a denial of his membership by the accused himself. This may well be possible elsewhere than in Northern Ireland. Unless the accused were aware of what it was he was actually alleged to have done to give rise to the belief that he was a member of the association, his own denial on oath would be likely to be the only means open to him to prove the negative fact that he was not a member. The need to preserve the lives of those who had provided the information upon which the police officer's belief was founded in our view makes it impracticable under existing conditions in Northern Ireland to permit the only kind of investigation of its validity which would be useful unless that investigation could be conducted in the absence of the accused and of his lawyers and without informing the accused of any matters which might reveal the sources from which information had been obtained about what the accused had actually done. But an investigation undertaken under those conditions would not satisfy the requirements. In the special and unique circumstances of intimidation now prevailing in Northern Ireland, we feel reluctantly compelled to reject any evidential solution on these lines as inappropriate to be applied in a regular court of criminal law.

23. Subject to technical rules about the admissibility of confessions which we discuss in a later section of this Report, it requires no express provision to entitle a court of law to draw, from statements made by the accused himself, or from his own conduct, the inference that he was a member of an unlawful association. This is part of the ordinary law of evidence. If the inference is a reasonable one, the statement or conduct of the accused from which it can be drawn, when proved, is " evidence " of his membership. But the fact that there is some " evidence " which points to the guilt of the accused is not enough to justify his conviction in a court of law. It must be strong enough to remove all reasonable doubt. So unless the *only* reasonable inference which can be drawn from his statement or conduct in the absence of any other fact to explain it is that he was a member of the unlawful association, proof of the statement or conduct is not of itself sufficient to justify his conviction.

24. An alternative approach which we have considered is to provide, by amendment to Regulation 24A, that certain kinds of conduct by an accused shall, unless the contrary is shown, be " proof " that he is a member

of an unlawful association. This would have the advantage of making it incumbent on the accused, if he is to avoid conviction, to go into the witness-box himself to give an explanation of his conduct which is consistent with his innocence and to be cross-examined about it. The difficulty is to define conduct, which could be proved by witnesses not vulnerable to intimidation, to which such a provision could fairly be applied. Regulation 24A already makes it an offence to do any act with a view to promoting or calculated to promote the objects of an unlawful association. Such conduct as contributing to or collecting funds for the association, inviting persons to become members of it, speaking in support of it or distributing statements or propaganda on its behalf, is already a substantive offence in its own right. Nothing we think is gained by making it also *prima facie* " proof " that he is also a member of the association.

25. There are two other kinds of conduct, not already covered by the Regulation to which we have given close consideration as the possible subject matter of an evidential provision such as that mentioned. The first is attendance at meetings of an unlawful association. In principle we see no objection to making attendance at a meeting of an unlawful association proof of membership, unless the contrary is shown. But in practice we doubt whether under the conditions now existing in Northern Ireland this would have much effect. Meetings are clandestine. Because of fear of intimidation of witnesses or compromise of sources of intelligence, it would not be possible to prove the attendance of the accused or the character of the meeting by calling as witnesses other persons who attended it. The attendance of the accused at the meeting might be proved by army or police witnesses who had observed him entering or leaving it, or by his being found there when it was raided by the Security Forces. But it would still be necessary to prove the character of the meeting and to do this would risk disclosure of intelligence sources. Though we would otherwise be willing to recommend a legislative provision on these lines, we do not think that it would provide any real solution to the problem of proving membership of a terrorist organisation.

26. Secondly, we considered whether it would be practicable to provide by legislation that the mere omission by the accused to deny a published report that he was a member of an unlawful association should be proof of his membership, unless the contrary were shown. The ordinary law of evidence allows such an inference to be drawn if it is proved that the report was drawn to his attention in circumstances in which the only natural thing for him to do, if it were false, would be to deny it. But to go further and to provide that the inference of membership *must always be drawn* from any such omission, unless the accused proves that he is not a member, seems to us to present great practical difficulties. There is the difficulty of defining what would constitute a published report so as to raise the presumption. A report might be published in a national newspaper or a radio or television programme or it might be made in a local newspaper circulating in an area in which the accused did not reside or even in one of the broadsheets published by an extreme Republic or Loyalist faction. Even if the provision were limited to reports published in national newspapers or on radio or television there would be difficulties in defining what kind of denial would suffice to rebut the presumption. Would it be necessary for the denial to

be made in writing to the publisher or would it be sufficient that the accused had denied it orally to some one or more of his friends? We can find no solution to these practical difficulties which could ensure that justice was done to all persons accused of the offence of becoming or remaining members of an unlawful association. In the result we are unable to recommend any change in the existing onus of proof of that offence under Regulation 24A, by reason of the fact that the accused has been referred to in a published report as being a member of an unlawful association named in that Regulation.

The need for detention

27. We are thus driven inescapably to the conclusion that until the current terrorism by the extremist organisations of both factions in Northern Ireland can be eradicated, there will continue to be some dangerous terrorists against whom it will not be possible to obtain convictions by any form of criminal trial which we regard as appropriate to a court of law; and these will include many of those who plan and organise terrorist acts by other members of the organisation in which they take no first-hand part themselves. We are also driven inescapably to the conclusion that so long as these remain at liberty to operate in Northern Ireland, it will not be possible to find witnesses prepared to testify against them in the criminal courts, except those serving in the army or the police, for whom effective protection can be provided. The dilemma is complete. The only hope of restoring the efficiency of criminal courts of law in Northern Ireland to deal with terrorist crimes is by using an extra-judicial process to deprive of their ability to operate in Northern Ireland, those terrorists whose activities result in the intimidation of witnesses. With an easily penetrable border to the south and west the only way of doing this is to put them in detention by an executive act and to keep them confined, until they can be released without danger to the public safety and to the administration of criminal justice.

28. Deprivation of liberty as 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. Lawyers, particularly English and Irish lawyers, tend to assume that the only safe evidence on which to convict a man upon a criminal charge is that which is admitted and elicited in accordance with the technical rules of procedure which are at present used in English and Northern Irish criminal courts and are stricter in favour of the accused than those followed in the Courts of other countries in Europe. But in fact there may be material available to the security authorities which would carry complete conviction as to the guilt of the accused to any impartial arbiter of common sense, although it is based on statements by witnesses who cannot be subjected to questioning by lawyers on behalf of the accused or even produced for examination by the arbiter himself.

29. If there is any process by which members of terrorist organisations can be identified with certainty their detention in custody does not involve the punishment of an innocent man, or even one who is guilty of what could properly be called only a "political crime". It means depriving of his liberty albeit by an extra-judicial process, a criminal who has committed an offence which has been punishable by the common law of England and Northern Ireland for upwards of two centuries before the current emergency arose.

30. Although everyone who by virtue of his membership of such an organisation agrees to do anything to encourage or assist in the use of violence in the attainment of its political ends becomes a party to the crime of conspiracy, there may be varying degrees of culpability between different parties to the conspiracy depending upon the role which each has agreed to play in the organisation and upon what, if anything, each has in fact done in performance of his agreement. In the case of an ordinary trial in a court of law upon a charge of criminal conspiracy at common law or of the similar statutory offence under Regulation 24A account can be taken of the extent of the culpability of the individual accused, in the sentence imposed upon him by the court. This need not necessarily involve imprisonment. In the case of detention under the new Detention of Terrorists (Northern Ireland) Order, 1972, however, the only equivalent of punishment which a Commissioner or the Detention Appeal Tribunal can sanction is deprivation of liberty. On the other hand, mere membership of an "unlawful association" does not result in the member being liable to be subject to a detention order. The Commissioner or Tribunal must be satisfied that the detainee has been personally concerned in the use or attempted use of violence for political ends or the direction, organisation or training of others for the purpose of using violence for those ends, and also that his detention is necessary for the protection of the public. That is a much more stringent test of culpability than that required to be satisfied in order to convict a person of the offence of becoming or remaining a member of an "unlawful association" under Regulation 24A.

31. The identity and functions of the responsible officers of many of the operational "battalions" and "companies" in which Provisional IRA, at any rate, is organised are widely known. They can often be verified by the security forces from a plurality of reports obtained from separate sources independent of one another and by statements elicited from self-confessed members of the Provisional IRA. It is possible that some of the information obtained is wrong. Its probative value is cumulative and derives from such opportunity there may be to check and cross-check information from one source by similar information from other sources, to eliminate the possibility of collusion between different informants or the possibility that information coming from a plurality of informants personally unknown to one another can yet be traced back to a single common source.

32. It is now recognised by those responsible for collecting and collating this kind of information that when internment was re-introduced in August, 1971, the scale of the operation led to the arrest and detention of a number of persons against whom suspicion was founded on inadequate and inaccurate information. Such evidence as we have heard leads us

to believe that the security authorities have learnt the lessons of this experience and that the danger of their recommending detention on inadequate evidence is now greatly reduced. We think, however, that it is a valuable safeguard against abuse of the power of detention that under the new Order the security authorities' case against a suspected terrorist has to be submitted to the consideration of some independent and impartial person or tribunal before any final decision to keep him in detention is reached. We have no reason to think that since the original Advisory Committee to hear applications for release from internment was first set up in September, 1971, there has been any intentional misuse of the powers of detention by the security authorities in Northern Ireland upon whose advice the Executive has to rely in taking the initial step. But those human beings charged with the task of suppressing terrorist organisations and preventing and detecting terrorist crimes are working under tremendous pressure, often in personal peril. It is only natural that occasional errors of judgment may be made as to the probative strength of the material inculpating a particular suspect. If these occur the best corrective is to bring to bear upon the case fresh minds not subject to similar pressures or perils. The very fact that those responsible for obtaining and collating the inculpatory material know that they will be called upon to justify its sufficiency is in itself a strong deterrent to their acting on suspicions which cannot be supported by convincing facts.

33. Nevertheless, however slight the risk of mistake by the Commissioners and the Detention Appeal Tribunal appointed under the Detention of Terrorists (Northern Ireland) Order, their proceedings must of necessity take place in private and the reasons which in the current atmosphere of terror make it impossible to call witnesses to testify in open court are likely to deprive these tribunals too of the opportunity of questioning the actual persons from whom information inculpating the detainees was obtained, although they may have an opportunity, not available to an ordinary court of law, of learning from those by whom information about the accused was obtained, facts which bear upon the reliability of their sources but which could not safely be disclosed in the presence of the accused or his lawyers. Even these facts, however, must fall short of disclosing the actual identity of the source. We recognise that the procedures available to these tribunals can never appear to be as complete a safeguard that none but the guilty will be deprived of their liberty, as in the safeguard which is provided by a public trial in a court of law, at which the actual witnesses can be produced in person and their evidence tested by cross-examination on behalf of the accused.

34. That is why although we are satisfied that public safety will still require resort to detention by extra-judicial process, we have thought it our duty to consider to what extent changes in criminal procedures which do not conflict with the minimum requirements to which we think criminal courts of law in Northern Ireland ought to continue to adhere, would enable some crimes which can at present be dealt with only by detention to be disposed of by public trial in courts of law. These we discuss in the succeeding sections of this Report.

CHAPTER 5

MODE OF TRIAL

35. Hitherto serious terrorist crimes, as well as other crimes, have been all tried by jury. It is fair to say 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. But an important factor in the absence of perverse convictions has been the readiness of the judge in Northern Ireland, even before the present emergency, to withdraw the case from the jury if he himself has any doubt as to the guilt of the accused. This power appears to us to have been exercised in recent months in Northern Ireland much more widely than it would be by any judge in England. In cases in which it is used its effect is to substitute for trial by jury, trial by judge alone.

36. The rational basis of trial by jury is that a citizen should be tried by 12 of his fellow citizens selected at random. This is not practicable in the case of terrorist crimes in Northern Ireland. The threat of intimidation of witnesses which we have already described extends also to jurors, though not to the same extent. It is a serious one, particularly to those who live 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. A frightened juror is a bad juror even though his own safety and that of his family may not actually be at risk. This has made it necessary in cases of this kind, either by choice of venue or use of challenge by the prosecution to pick the jurors from some different area where they are less vulnerable to intimidation. Because of the way in which "Catholics" and "Protestants" are concentrated geographically this results in its being composed predominantly of "Protestants", of whom the great majority have Loyalist sympathies. The converse might apply to the trial of Loyalist terrorists if the threat of Loyalist intimidation were to become widespread. But this is only one of the factors which militate against truly random selection. Apart from the fact that Protestants outnumber Catholics by about two to one, the property qualification for jury service is more likely to be possessed by Protestants than Catholics. Finally, the right to peremptory challenge of individual jurors has traditionally been exercised by accused persons more vigorously in Northern Ireland than in England. So has the corresponding right of the prosecution. With the exacerbation of partisan feeling by the emergency, both are exercised even more extensively than before. This we think cannot be avoided. The result of all these factors is that juries who have tried Republican terrorists, who until recently have been almost the only detected perpetrators of terrorist crimes, have been juries the great majority, if not all, of whom have been Protestants.

37. While the danger of perverse convictions by partisan juries can in practice be averted by the judge, though only at the risk of his assuming to himself the role of decider of fact, there is no corresponding safeguard in a jury trial against the danger of perverse acquittals. If circumstances arose in which there were a significant proportion of unjust acquittals the

need to make use of detention instead of trial by jury in a court of law would grow. We think that matters have now reached a stage in Northern Ireland at which it would not be safe to continue to rely upon methods hitherto used for securing impartial trial by a jury of terrorist crimes, particularly if the trend towards increasing use of violence by Loyalist extemists were to continue. The jury system as a means for trying terrorist crime is under strain. It may not yet have broken down, but we think that the time is already ripe to forestall its doing so.

38. We recommend that for the Scheduled Offences in Parts I and II trial by judge alone should take the place of trial by jury for the duration of the emergency. So should it for offences in Part III in respect of which the Director of Public Prosecutions (DPP) has issued his certificate. Though this is not our reason for recommending it, an incidental benefit should be to shorten trials so as to enable more cases to be dealt with by the same number of judges and to reduce the current delay between committal and trial. Certain of the other changes in the procedure for dealing with Scheduled Offences which we propose later could also be applied more easily if the trial were by judge alone.

39. We have considered carefully whether trial without a jury of cases on indictment ought to be undertaken by a single judge or by two or more sitting together. We think that in any event the jurisdiction should be confined to those judges who are already qualified to sit on trials upon indictment and are experienced in this class of judicial work; that is to say, members of the Court of Appeal and the High Court and Judges of the County Courts. The total strength of the Appeal and High Court benches is seven. There are the same number of County Court Judges. This, in itself, would render impracticable trial by a plurality of judges in any significant number of cases—and terrorist crime at present constitutes the bulk of the calendar of indictable crime. But we should in any event recommend trial by a single High Court Judge or, in the less serious cases, by a single County Court Judge, in preference to a collegiate trial. Non-jury trials in civil actions are always conducted by a single judge alone. Our oral adversarial system of procedure is ill-adapted to the collegiate conduct of a trial of fact. In criminal proceedings, in particular, immediate rulings on admissibility of evidence and other matters of procedure have constantly to be made by the single judge when sitting with a jury. It would gravely inconvenience the progress of the trial and diminish the value of oral examination and cross-examination as a means of eliciting the truth, if a plurality of judges had to consult together, albeit briefly, before each ruling was made.

40. The existing rights of appeal should apply to the decision of a judge sitting alone. If our proposal for trial of certain classes of cases by a judge alone is adopted, we think that it is best left to the Northern Irish judiciary to evolve an appropriate form of judgment to be delivered when the judge's finding of guilty or not guilty is pronounced. We do not think that it need be long or incorporate a summary of the evidence he has heard. It should however state, however briefly, the various issues in the case to which he has applied his mind so as to indicate for the assistance of the Court of Criminal Appeal how he has directed himself upon the law relating to the offence with which the accused is charged.

41. If our proposal is adopted for trials upon indictment, the mode of trial, *viz.* trial by judge alone or trial by jury, will depend upon whether or not the offence with which the accused is charged is a Scheduled Offence. We do not think that counts for Scheduled and non-Scheduled Offences should be joined in the same indictment; but there are cases in which the law permits conviction of a lesser offence than that stated in the indictment. It should be made clear in any legislative provision designed to give effect to our recommendation that the jurisdiction of a judge sitting alone to try a charge of a Scheduled Offence extends to convicting the accused of any lesser offence of which he could be convicted on that indictment, even though that lesser offence is not included in the Schedule.

CHAPTER 6

ARREST

42. The law of arrest in Northern Ireland, as in England, requires that a person who is arrested should be made aware of the fact that he is under arrest and also should be informed promptly of the reason why he is being arrested. In normal times arrests are in practice made by police officers trained in the necessary formalities and are effected in circumstances where there is no difficulty in complying with them. If a person arrested is not informed promptly of the reason for his arrest or is informed of the wrong reason his arrest is unlawful and so is any physical restraint or threat of restraint used to prevent his escape. The consequence of this is not only that the arrestor renders himself liable to a civil action for damages for false imprisonment by the person whom he has arrested, but also that any physical restraint he uses to prevent that person escaping amounts to a criminal offence of assault on the part of the arrestor himself. Furthermore any reasonable force which that person uses to effect his escape is lawful and those who assist him to do so do not commit any offence themselves.

43. The requirement that a person arrested should be informed of the reason for his arrest is an appropriate safeguard of the liberty of the subject in normal times when arrests can be made by trained police officers, without hindrance by bystanders, of persons found at the scene of a crime or whose identity is known to them. But this is very different from the only way in which the arrest of most terrorists can be effected in extremist strongholds in Northern Ireland.

44. Here it is not practicable in present conditions for the initial arrest of a suspected terrorist to be made by a police officer. It can only be made by soldiers either when in the course of an armed patrol they believe they recognise a wanted man in the streets or in a passing vehicle or when, as a result of information received, they conduct a surprise search of premises on which terrorists are thought to be present. In the latter case there are often a number of people on the premises whose identities are not known to members of the search party. In either case the arrest is liable to be hindered by crowds of sympathisers, including women and children, hurling stones and other missiles and possibly carried out under fire from snipers.

45. It is, we think, preposterous to expect a young soldier making an arrest under these conditions to be able to identify a person whom he has arrested as being a man whom he knows to be wanted for a particular offence so as to be able to inform him accurately of the grounds on which he is arresting him. It is impossible to question arrested persons on the spot to establish their identity. In practice this cannot usually be ascertained until they have been taken to the safety of battalion headquarters. Even here it may be a lengthy process, as suspects often give false names or addresses or, giving their true names, which are often very common ones, assert that some relation or other person of the same name is the real person who is " wanted " for a particular offence. It is only when his identity has been satisfactorily established that it is possible to be reasonably certain of the particular ground on which he was liable to arrest and to inform him of it.

46. Yet the courts in Northern Ireland apply the ordinary common law rules as making it necessary for the soldiers who first apprehend the suspect to inform him accurately of the ground on which he is being arrested. The courts have treated mistakes as to this as rendering the arrest unlawful; with the serious legal consequences to which we have already drawn attention.

47. The difficulties which confront the ordinary soldier are further increased by the fact that there are alternative powers under which army personnel may make arrests. The first is conferred by Special Powers Regulation 10. This is arrest of a person for the purpose of interrogation and authorises his being kept in detention for not more than 48 hours. The person arrested need not himself be suspected of an offence but he must be an identified person whom the army has been specifically authorised by the RUC to arrest. The second is conferred directly on army personnel by Regulation 11 (1). It authorises the arrest of persons suspected of four different alternative offences. As a result it has been found necessary to issue all soldiers with a card setting out five different grounds for arrest from which they have to select, under the conditions already described, the correct formula to use on arresting an unidentified person "lifted" (to use the soldier's own word) in suspicious circumstances. The penalty for any mistake is to make the arrest unlawful.

48. We are satisfied that this is a serious handicap to the security forces in performing their difficult and dangerous duty of protecting the life and property of innocent citizens in Northern Ireland. Reluctant though we are to propose any curtailment, however slight, of the liberty of any innocent man we think that it is justifiable to take the risk that occasionally a person who takes no part in terrorist activity and has no special knowledge about terrorist organisations should be detained for such short time as is needed to establish his identity, rather than that dangerous and guilty men should escape justice because of technical rules about arrest to which it is impracticable to conform in existing circumstances.

49. We accordingly recommend that steps should be taken by legislation

(1) to confer upon members of the armed services:

(*a*) Power to arrest without warrant and to remove to any police station or to any premises occupied by the armed forces any person suspected of having committed or being about to commit any offence, or having information about any offence committed or about to be committed by any other person; and

(*b*) Power to detain any such person in custody for a period of not more than four hours for the purpose of establishing his identity.

(2) It should be an offence to refuse to answer or to give a false or misleading answer to any question reasonably put for that purpose by a member of the armed forces or a police officer.

(3) Arrest and detention for up to four hours under the above powers should not be unlawful by reason of the fact that no reason was given or a wrong reason given for the arrest.

(4) A person arrested or detained under the above powers should be deemed to be in lawful custody, so as to make it an offence to resist arrest or to escape from custody or to aid or abet any person attempting to resist or to escape.

50. Nothing that we propose to simplify the formalities of arrest by members of the armed services should be understood as countenancing any relaxation of their common law obligation to use no more than that amount of force that is reasonably necessary in all the circumstances to effect the arrest and hold the arrested person in custody. We contemplate that when the arrested person's identity has been established satisfactorily, he should be released unless wanted by the police either on suspicion of having himself committed an offence or for interrogation as a person suspected of having knowledge of any terrorist organisation or activities. If it is intended to keep him in custody on either grounds he should be re-arrested either by the military police or by a police officer and informed of the ground for his further detention in custody. Our proposal does not involve that questioning prior to re-arrest should be directed to any other purpose than establishing the identity of the person arrested.

CHAPTER 7

BAIL

51. In Northern Ireland applications by a person charged with a criminal offence for release on bail pending committal or trial are made in the first instance to a court of summary jurisdiction, which for this purpose may consist of a Resident (*i.e.* professional) Magistrate (RM) or a Justice of the Peace. The latter is a layman but, unlike an English JP, he has no jurisdiction to try cases. His jurisdiction is limited to dealing with applications for remands. There is no appeal from a decision to grant a remand on bail. There is, however, what is in effect, though not in form, an appeal from the refusal of bail by a court of summary jurisdiction. It takes the form of a direct application for bail to a High Court Judge.

52. Resident Magistrates sitting in the same court day after day are in the front line of danger among the judiciary. Of the four RMs who sit in Belfast, one has been shot and very seriously wounded. Attempts have been made to bomb the homes of others, in two cases successfully. Justices of the Peace live in the communities served by the court in which they sit. They are exposed to similar risks and, even more than Resident Magistrates, are subject to local pressures.

53. The grant or refusal of bail is a matter of discretion in the sense that it depends upon the appreciation by the individual RM or JP to whom the application is made of the weight to be attached to the information then available to him as establishing one or other of the grounds which are treated in Northern Ireland as justifying remand in custody. There is thus room for variation in practice between one RM or JP and another, even in ordinary times when they are not subject to the fears, tensions and pressures resulting from the present emergency. Furthermore, the practice of the courts in Northern Ireland differs from that of the courts in England in restricting the grounds for refusal of bail to two. The first is that there is a likelihood that the accused, if released, would not present himself for trial. The second is that there is a likelihood that if at liberty he would interfere with witnesses for the prosecution. The onus of establishing one or other of these grounds lies upon the prosecution at the time of the application, which may take place at an early stage in their enquiries. The likelihood that if at liberty the accused will continue to commit other offences is, surprisingly, not treated by the Northern Irish courts, at any rate avowedly, as a ground for refusal of bail, although it is one of the commonest grounds upon which bail is refused in England. The logical justification for this is that the police ought to be, and are, able themselves to prevent him from committing any further crimes. But this is wholly unrealistic as respects terrorist crimes today.

54. In the result bail is granted in Northern Ireland much more freely and indiscriminately than it is currently granted in England, and this even in the most serious of terrorist offences and sometimes in circumstances where it seems inconceivable that it would be granted by an English court; for a

resolute member of a terrorist organisation is, of all criminals, most likely to continue his participation in its criminal activities if he is at liberty, and, for the reasons stated at the outset of our Report, the risk which he runs of the Crown being able to produce witnesses willing to testify in any court of law to his participation are reduced to a minimum by the fear of reprisals. It not only has a serious effect upon the morale of the troops to see a known terrorist, whom they have arrested, perhaps at the risk of their own lives, the week before, walking the streets, a free man in the area from which he has been operating, but it also exposes the public to further risk from terrorist outrages which we regard as quite unjustifiable.

55. We consider that so long as the current emergency continues the only remedy for this state of affairs is to provide by legislation that in respect of persons charged with any Scheduled Offence in Part I or II:

(1) remand in custody by courts of summary jurisdiction should be mandatory;

(2) bail should only be granted by a judge of the High Court upon the application of the person charged;

(3) bail should be refused unless the judge is satisfied:

(*a*) that there is no risk that if the applicant is released from custody pending his trial (i) he will fail to surrender to his bail at the time and place fixed for his trial, OR (ii) there will be any interference by him or on his behalf with any witness for the prosecution, OR (iii) he will commit any criminal offence: AND ALSO

(*b*) that either (i) exceptional hardship would be caused to the applicant if he were to be detained in custody or (ii) he has been held in custody for not less than 90 days and has not yet been committed for trial or, having been committed for trial, he has been held in custody for not less than 90 days thereafter;

(4) the judge should have power to impose conditions upon any grant of bail.

This would also apply to offences in Part III in respect of which the DPP had issued a certificate.

56. The most serious offences to which we recommend that this provision should apply *in toto* are listed in Part I of the Schedule of Offences. As respects the offences listed in Part II bail should be granted if the judge is satisfied of the matters mentioned in 3 (*a*) alone. There would be no obligation on the applicant to satisfy him of the matters set out in 3 (*b*) (i) or (ii).

57. In 3 (*b*) (ii) we have provided for a maximum period of remand in custody of 90 days before committal and another 90 days after committal before the applicant is relieved of the obligation of satisfying the judge of exceptional hardship. Owing to congestion of the courts' calendar of indictable offences due to terrorist activities, five months is currently the *average* interval between charge and trial. But we would hope that arrangements could be made to give priority to committal and trial of prisoners held in custody over those admitted to bail, so that this period could be reduced.

CHAPTER 8

THE CONDUCT OF THE TRIAL

58. Although to substitute for trial by jury trial by judge alone would reduce the risk that an impartial trial of offences arising out of terrorism could not be obtained in courts of law, it would do nothing in itself to solve the problem of intimidation of witnesses, which restricts the terrorist crimes which can be brought to trial to those in which the guilt of the accused can be established by the oral evidence of army or police witnesses, physical evidence or an admissible confession by the accused. If the number of cases in which this could be done were increased the need to make detention orders in respect of those who actually commit terrorist crimes would be correspondingly reduced.

59. There are two technical rules of English and Northern Irish criminal law and procedure which greatly enhance the difficulty of obtaining convictions of guilty men in the exceptional circumstances which now exist in Northern Ireland. They relate to the onus of proof of possession and to the admissibility of confessions. We call them "technical rules" because they are peculiar to English law and legal systems which derive from it. No similar rules are to be found in legal systems based on the civil law which are in force in other European countries nor are they called for to satisfy the requirements of the European Convention. But they are also technical in a much more fundamental sense: they are not essential for the protection of the innocent. They are both aspects of the right of the accused not to give any explanation of his conduct either at his trial or before it. But we are convinced that as they are currently applied by the Courts in Northern Ireland they result in the acquittal of significant numbers of those who are undoubtedly guilty of terrorist crimes.

60. The knowledge that the application of these rules is likely to result in the acquittal of an arrested person whom the security authorities know to be a dangerous terrorist from information obtained from other witnesses who cannot be produced in court because of intimidation, makes it necessary to fall back upon detention in cases where a conviction could have been obtained as a result of a fair trial in open court in accordance with a procedure which in the emergency which now exists in Northern Ireland any fair-minded man in England or elsewhere in Europe would regard as just and as appropriate to a court of law.

Onus of proof of possession

61. We would not seek to abrogate the rule that on a criminal charge the prosecution must prove its case or, as it is expressed in Article 6(2) of the European Convention: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". This rule is not breached by a provision that upon proof by the prosecution of particular facts capable of implicating the accused in the offence with which he is charged the onus shall lie upon him to furnish an explanation of them which is consistent with his innocence. There are examples on the statute books, most of them relating to offences in which the intent with which a particular

act was done by the accused or the fact that the purpose for which it was done was unlawful, is a necessary ingredient of the offence. Upon proof by the prosecution that the accused did that act the onus is cast upon the accused to prove that his intent was not that described in the offence but was a lawful one.

62. The principal weapons of terrorism in Northern Ireland are firearms, explosives and incendiary devices. Sometimes it is possible for the security forces to catch red-handed a terrorist when he is using them. But many terrorist activities take place at night, immediate capture of the terrorist is hindered by rioting crowds, by sympathisers, and reliable identification by army witnesses is extremely difficult. Because of this the commonest charges which can be brought against terrorists and proved by army or police witnesses are of being in possession of firearms, ammunition or explosives, etc. These charges arise out of the discovery of these lethal objects by the army or the police in the course of searches of premises or vehicles or as a result of stopping people in the streets for questioning.

63. Legislation in the United Kingdom as well as in Northern Ireland has long provided that if the accused is found to be in possession of firearms or explosives the onus of proving that he had them for a lawful purpose shall lie on him.

64. The practical effect of these provisions upon the conduct of the trial is that once possession of the lethal object by the accused is proved by the prosecution it becomes incumbent on the accused in order to escape conviction, to go into the witness box himself and explain the circumstances in which he came to be in possession of the lethal object and satisfy the court that this was for some lawful purpose. He may succeed or fail in doing this. If he succeeds he is, quite rightly, entitled to acquittal. If he vouchsafes no explanation or one which when tested by cross-examination the court does not believe, he is convicted. In this respect we see no need to alter the present law.

65. But this still leaves the whole onus of proof of "possession" upon the prosecution. Possession of an object in criminal law involves two elements (1) the physical presence of the object in a place where the person accused of being in possession of it is able to exercise control over it; and (2) knowledge on the part of the accused of its actual presence, or knowledge of the likelihood of its being present coupled with a deliberate refraining from finding out for certain whether or not it is.

66. No difficulty arises in proving the first element by the evidence of army or police witnesses who conducted the successful search. But in the circumstances in which firearms and explosives are found in the current emergency in Northern Ireland, proof by the prosecution of the necessary element of knowledge is often impracticable under the existing law.

67. Arms, ammunition and explosives are usually found concealed in vehicles in which several people are travelling, on premises which several people occupy, or dropped or discarded by one of a group of people found in the street at night by an army patrol. The circumstances are such that it is probable that all of them knew of the presence of the lethal object. It is certain that at least one of them did. All that is not certain is which of

them knew. All doubt might be resolved if each were called upon to give an explanation of the circumstances in which he came to be where he was in relation to the object found and as to his means of knowledge of its presence there, and his explanation was exposed to the test of cross-examination.

68. Yet, as the law now stands, all are entitled to be acquitted at the conclusion of the prosecution's case without any one of them ever going into the witness box, though it may be certain that this involves the acquittal of at least one guilty man. This has been the ground upon which judges in Northern Ireland in cases of these kinds have ruled that there was no case fit to go to the jury as against any one of the accused.

69. A striking illustration is provided by a case in which a gun was found in the bedroom in which three brothers slept. It was hidden under some male clothing on top of a chest of drawers. All three brothers were in the room when the gun was discovered by the police. All three disclaimed any knowledge of its presence. At the trial of the three accused the judge allowed the prosecution's case to go to the jury. None of the accused gave evidence in his own defence, so none could be cross-examined. Each elected to make an unsworn statement from the dock. It is a matter of no surprise that the jury convicted all three of them. The Court of Criminal Appeal set aside the convictions on the ground that there was in law not sufficient evidence against any one of the accused to justify his allowing the case to go to the jury.

70. While so much suffering is caused to innocent citizens by terrorist use of firearms and explosives in Northern Ireland, we do not think it tolerable that the scales should be weighted so heavily in favour of guilty men. The remedy which we recommend to deal with the three common types of cases of arms, ammunition or explosives is an amendment of the existing law so as to provide that arms, ammunition or explosives found on any premises shall be deemed to be in the possession of the occupier of those premises and of any person residing at or found on those premises at the time of the discovery unless he proves that he did not know and had no reason to suspect that any arms, ammunition or explosives were there. A similar provision is required in respect of persons present in any vehicle which contains arms, ammunition or explosives. To meet the case of firearms or explosives being discarded by an unidentified member of an identifiable group of persons in the street, a provision is required that any person found in the company of any other person who is carrying arms, ammunition or explosives shall be deemed to be in possession of them unless he proves that he did not know and had no reason to suspect that such other person was carrying them.

71. The effect of this change in the law would be to make it incumbent upon persons in the categories mentioned to go into the witness box and give an explanation of their own conduct and the reasons for their lack of knowledge or suspicion of the presence of the lethal objects that were found. If the explanation given by any one of them, after being tested by cross-examination, satisfied the court that it was more likely to be true

than not he would be entitled to be acquitted. If it did not or if he refused to proffer any explanation he would be convicted. This would leave untouched the common law defence that the accused was acting under duress: that he was compelled to store the lethal objects against his will by imminent threats to his safety or that of his wife or family.

72. What we recommend falls far short of the creation of an "absolute offence". It is not unfair in the present emergency to require people to take reasonable precautions to avoid getting involved with terrorists in their activities. We are satisfied that the change in the law as to the onus of proof which we propose is the least drastic remedy for its manifest existing defects. We do not think that there is any serious risk that it would result in the conviction of any innocent man especially as, if our previous recommendation is accepted, the trial will be by judge alone. We believe that it will facilitate the conviction of the guilty and in this way reduce the need to resort to the alternative of detention.

Admissibility of confessions

73. The highly technical rules of English law upon the admissibility in evidence of statements made by the accused before his trial have their origin at a period when the accused was prohibited from giving evidence at his own trial. In this respect the law in England was not altered until 1898 and it continued to apply in Northern Ireland until as late as 1930.

74. To the ordinary man it would seem that the most cogent evidence that a person had done that which he was accused of doing was his own admission that he had done it, unless there were some reason to suppose that he was inculpating himself falsely. All over the world courts act on this assumption daily when they convict the accused upon his own plea of guilty.

75. A plea of guilty is an inculpatory admission made by the accused directly to the court that tries him. If he does not plead guilty and the prosecution calls witnesses to prove that the accused made an inculpatory admission before the trial, there are two matters for enquiry at the trial itself which are relevant to the guilt of the accused. The first is whether the alleged inculpatory admission was in fact made. The second is whether, if it was made, there is any reason to suppose that the accused was inculpating himself falsely.

76. These are the two questions which the jury have to decide in every case in which an alleged confession by the accused is adduced in evidence against him. There may be no dispute about them; but if there is any challenge by the accused upon either, the whole of the circumstances in which the confession was made are investigated in open court. Witnesses who heard or recorded the confession are called by the prosecution and exposed to cross-examination on behalf of the accused; the accused himself can give evidence on oath of his own version of the matter and is in turn subject to cross-examination. He can call witnesses, if there are any, to support him. Decisions on this kind of issue are of daily occurrence in criminal trials in England. Juries, and magistrates in summary cases, do not usually find

any difficulty in determining whether there is any reasonable doubt either that the alleged confession was in fact made (*i.e.* that the accused has not been "verballed") or that it was true. If they have any doubt on either of these matters their duty is to resolve it in favour of the accused.

77. We do not suggest any alteration in this practice. If the accused wishes to complain that he was "verballed" or induced by any means whatever to say something inculpatory of himself which was not true, he should be entitled to ventilate in open court the circumstances in which the alleged confession was obtained. This is the best safeguard against possible abuse of their powers of questioning by the police or by the army.

78. The ability of the accused to challenge effectively the reliability of the prosecution's evidence about a confession alleged to have been made by him was severely handicapped so long as the law prohibited him from giving evidence on oath in his own defence. He was restricted to making an unsworn statement from the dock. Since his version of the matter was not backed by the sanction of an oath nor subject to the test of cross-examination, it was unlikely to carry the same weight with the jury as sworn evidence to the contrary given by witnesses for the prosecution. In the result this period saw a development of the law which had the effect of interposing a preliminary question to be decided by the judge before evidence of a disputed confession was admitted before the jury at all. Unless the judge ruled that the confession was "admissible" it never went before the jury for them to decide whether it was reliable evidence of the accused's guilt. If he did rule that it was "admissible", it still remained for the jury to determine the two questions relevant to the accused's guilt, *viz.* whether the alleged confession was in fact made and, if so, whether there was any reason to suppose that the accused was inculpating himself falsely.

79. No doubt in origin the concept of "admissibility" was introduced to compensate the accused for the handicap under which he then laboured in challenging the reliability of an alleged confession as evidence of his guilt. It was designed to prevent confessions ever going before the jury at all if they had been obtained in circumstances in which there was any risk that they might be untrue. But as the law has developed since this handicap on the accused has been removed, the test of "admissibility" of confessions has become subject to a number of technical rules which are no longer directed to the question whether a confession is reliable evidence of the guilt of the accused. These technical rules are the result in part of judicial decisions of the courts in England and in Northern Ireland in particular cases, and in part of the so-called "Judges' Rules", which now differ in the two countries.

80. Judicial decisions first introduced and later refined the legal concept of "voluntariness". Today it bears a highly technical meaning. Its origin dates back to the 18th century before the formation of a regular police force charged with the duty of detecting and preventing crime. Its original purpose was to exclude false confessions extorted by threats or promises of favours if the accused would confess to being guilty. As it developed, however, the risk that the confession might be false ceased to play a significant part in the concept. If applied in strict accordance with certain judicial dicta on

this topic—which it seldom is in practice in English courts—it would operate to exclude all statements made by the accused after anything had been said or done which might be likely to make him more willing to disclose truthfully what he had done than to keep quiet about it.

81. This is also reflected in the Judges' Rules as they were adopted in England up to 1964. This version of the Judges' Rules, though it has been changed in England, is still followed in Northern Ireland. The rules deal primarily with the questioning of suspects after they are in custody and are designed to discourage this. If applied strictly they would have the effect of rendering inadmissible any statement made by the accused after his arrest unless it was volunteered by him upon his own initiative without any persuasion or encouragement by anyone in authority.

82. Guilty men do not usually do this. If left to themselves they would prefer to remain silent. The rigour of the Judges' Rules about questioning suspects after they are in custody was modified in England, though not in Northern Ireland, in 1964. In practice a way round had been found in both countries by questioning at the police station suspects who had not been formally arrested but were euphemistically described as " helping the police in their enquiries ". The fact that it was incredible that a confession only obtained at the end of several sessions of prolonged questioning would have been volunteered at the outset by the subject of his own initiative was not in practice treated by the judges as rendering it " inadmissible ".

83. Today in Northern Ireland in the case of terrorist crimes the only opportunity of questioning suspects arises after they have been arrested, generally by the army, under the powers of arrest conferred by Regulations made under the Special Powers Act. Incontrovertibly they are in custody when questioned and the Judges' Rules currently in force in Northern Ireland apply to the manner in which they are questioned. Although not strictly rules of law but rules of general guidance from which the judge who tries a case has a discretion to depart, they appear to have been applied in Northern Ireland with considerable rigidity as if they were a statutory requirement from which no departure is permissible. In a recent decision the Court of Criminal Appeal of Northern Ireland has ruled that the mere creation by the authorities of any " set-up which makes it more likely that those who did not wish to speak will eventually do so ", renders involuntary and therefore inadmissible in a court of law any confession subsequently made even though the actual statement sought to be relied upon was made in writing after the accused had been expressly cautioned and notwithstanding that its contents are such that no man who was not guilty could have had knowledge of the facts that it discloses.

84. If human lives are to be saved and destruction of property prevented in Northern Ireland, it is inescapable that the security authorities must have power to question suspected members of terrorist organisations. Only the innocent will wish to speak at the start. The whole technique of skilled interrogation is to build up an atmosphere in which the initial desire to remain silent is replaced by an urge to confide in the questioner. This does not involve cruel or degrading treatment. Such treatment is regarded by those responsible for gathering intelligence as counter-productive at any rate in Northern Ireland, in that it hinders the creation

of the rapport between the person questioned and his questioner which makes him feel the need to unburden himself. But as the rules as to admissibility of confessions have been interpreted in Northern Ireland the mere fact that the technique of questioning is designed to produce a psychological atmosphere favourable to the creation of this rapport is sufficient to rule out as evidence in a court of law anything which the accused has said thereafter.

85. This has two consequences. The first is that it prevents those interrogated from being brought to trial for self-acknowledged crimes. The security authorities thus have no alternative but to order their detention without trial. This leaves the reliability of their confessions, if disputed, to be considered in private by Commissioners appointed under The Detention of Terrorists (Northern Ireland) Order, 1972. The second is that if the suspect does dispute that he made an alleged confession or that he was induced, by ill-treatment or any other means, to inculpate himself falsely, he is deprived of the opportunity of having his allegations investigated in a public hearing by a court of law with all the safeguards of confrontation and cross-examination of witnesses which a criminal trial provides.

86. We would not condone practices such as those which are described in the Compton Report (Cmnd. 4823) and the Parker Report (Cmnd. 4901) as having been used in the crisis resulting from the simultaneous internment of hundreds of suspects in August 1971. The use of any methods of this kind have been prohibited for many months past. As already mentioned they are, in any event, now regarded as counter-productive. Certainly, the official instructions to the RUC and the army are strict. So are the precautions taken to see that they are strictly observed. There is stationed on permanent call at the centre where suspects are questioned by the police an army medical officer who is not attached to any of the operational units stationed in Northern Ireland, but is sent out on a rota from England for a period of four to six weeks. He conducts a thorough medical examination of each suspect on arrival in the absence of the police and a similar examination at the conclusion of the questioning. He informs the suspect that if he wishes he will be allowed to see the doctor at any time while he is at the centre. The possibility of ill-treatment which injures the suspect physically or mentally going undetected by the doctor is remote. We should make it clear that in drawing attention to these safeguards we are not suggesting that the Royal Ulster Constabulary are using methods of interrogation which we ourselves should regard as at all improper having regard to the gravity of the situation with which they are faced.

87. We consider that the detailed technical rules and practice as to the "admissibility" of inculpatory statements by the accused as they are currently applied in Northern Ireland are hampering the course of justice in the case of terrorist crimes and compelling the authorities responsible for public order and safety to resort to detention in a significant number of cases which could otherwise be dealt with both effectively and fairly by trial in a court of law.

88. We have considered the draconian remedy, that all inculpatory admissions alleged to have been made by the accused should be "admissible" in evidence, and that a court of law should confine its

attention to the two questions relevant to the guilt of the accused, *i.e.* whether the alleged admission was in fact made and, if so, whether the circumstances in which it was made give any reason to suppose that the accused may have been inculpating himself falsely. The logic of this solution is that the function of a court of law is to determine whether the accused is truly guilty of the offence with which he is charged. Its function is not to discipline the police force, over which it has no direct powers of control, by the indirect method of letting a guilty man go free to commit further crimes against public order and safety. In the case of a hardened terrorist this is a likely result of this method of marking the court's disapproval of the behaviour of the police.

89. Nevertheless, we think that logic ought to yield to the consideration that the reputation of courts of justice would be sullied if they countenanced convictions on evidence obtained by methods which flout universally accepted standards of behaviour. We consider therefore that although the current technical rules, practice and judicial discretions as to the admissibility of confession ought to be suspended for the duration of the emergency in respect of Scheduled Offences, they should be replaced by a simple legislative provision that:

(1) Any inculpatory admission made by the accused may be given in evidence unless it is proved on a balance of probabilities that it was obtained by subjecting the accused to torture or to inhuman or degrading treatment; and

(2) The accused shall not be liable to be convicted on any inculpatory admission made by him and given in evidence if, after it has been given in evidence, it is similarly proved that it was obtained by subjecting him to torture or to inhuman or degrading treatment.

90. In recommending this exception to the admissibility of confessions we have adopted the wording of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is a simple concept which we do not think the judiciary in Northern Ireland would find it difficult to apply in practice. It would not render inadmissible statements obtained as a result of building up a psychological atmosphere in which the initial desire of the person being questioned to remain silent is replaced by an urge to confide in the questioner, or statements preceded by promises of favours or indications of the consequences which might follow if the person questioned persisted in refusing to answer. Such matters, of course, might affect the reliability of the confession as establishing the guilt of the accused and should be fully investigated on that issue. They would not affect its initial admissibility in evidence unless they could be fairly regarded as so outrageous as to amount to torture or to inhuman or degrading treatment.

91. We do not think that with human life and property so gravely at risk any fair-minded man would consider that in the present emergency the police who are charged with the detection of crime should be discouraged from creating by means which do not involve physical violence, the threat of it or any other inhuman or degrading treatment, a situation in which a guilty man is more likely than he would otherwise have been to overcome his initial reluctance to speak and to unburden himself to his questioners.

92. If our recommendation is accepted that trial of Scheduled Offences should be by judge alone, there may be cases where it will be necessary for the judge to see the statement itself in order to decide whether an allegation by the accused that it was obtained by subjecting him to treatment of the prohibited kinds is true. If in the result he reaches the conclusion that the statement ought not to be admitted the judge should have a discretion to order a new trial before another judge in any case where he felt that his knowledge of the contents of the statement would handicap him in forming an opinion whether the other evidence against the accused was sufficiently strong in itself to establish guilt.

Admissibility of Signed Statements

93. In the dreadful case to which we referred earlier in our Report of the witness who was murdered the day before he was due to give evidence at the trial of three men charged with a terrorist offence, he had already given evidence in the committal proceedings and this had been incorporated in a written deposition signed by him. Under long-established law in Northern Ireland this was admissible in evidence at the trial. As a result, the accused were convicted and the murder failed in one of its objects though it succeeded in its other and wider object of deterring potential witnesses in other terrorist crimes from coming forward. But it would have succeeded in both its objects if it had been committed earlier and the available statement signed by the victim had been one made to the police in the course of their investigations and not yet embodied in a deposition taken at the committal proceedings themselves. This would not have been admissible in evidence in criminal proceedings in Northern Ireland as the law now stands.

94. This is because the so-called "rule against hearsay", which has been abolished in civil proceedings in both England and Northern Ireland, still applies in criminal proceedings in both countries. Proposals to modify it in criminal cases also in England have been recently made by the Criminal Law Revision Committee (Cmd. 4991) but these have not yet been debated in Parliament.

95. As already stated we have thought it right to confine our attention to the particular problems created in Ireland by the existing emergency and to limit our recommendations to changes in the administration of justice which are needed to enable more terrorist crimes to be effectively tried in courts of law instead of being dealt with by detention.

96. Without prejudice to the possibility of a broader modification of the rule against "hearsay" in all criminal proceedings at some future date, we think that a minimum but immediate alteration is needed to meet the problem that witnesses to terrorist crimes may be killed or so injured as to be incapable of coming to court, or may flee from Northern Ireland or go into hiding in fear for their own safety, with the result that it is impracticable to produce them to give oral evidence in court.

97. What we recommend is that it should be provided by legislation that:

(1) Any signed written statement, if made by any person to a police officer or member of the armed forces or other person charged with

the duty of investigating offences or charging offenders, in the course of investigating any crimes or suspected crime which is a Scheduled Offence, should be admissible as evidence of any fact stated therein of which direct oral evidence by the maker of the statement would be admissible, if it is shown that the maker of the statement:

(*a*) is dead or is unfit by reason of his bodily or mental condition to attend as a witness; or

(*b*) is outside the Province and it is not reasonably practicable to secure his attendance, or

(*c*) all reasonable steps have been taken to find him, but he cannot be found.

(2) The weight to be attached to a statement admitted under (1) should be a matter for the court of trial.

98. We have limited our recommendation to signed written statements by identified persons. This limits any risk of misreporting of any oral statement made. The limitation to statements made to police officers etc., engaged in the investigation of crime is designed to secure that the maker should be aware at the time of making it that it was made on a serious occasion and was likely to lead to his being required to confirm it on oath in open court. The provision that the statement should only be admissible as evidence of matters of which direct oral evidence by the maker would be admissible excludes all matters not within his own direct knowledge; that is to say it excludes everything that any laymen would regard as hearsay, though as used by lawyers the expression "hearsay" has a wider technical meaning which embraces all statements, even though written, which are not made or confirmed to a court of law orally and upon oath.

99. We think that this change in the law would be most conveniently applied in a trial by a judge alone; since he is more experienced than a jury may be in weighing the probative value of statements which *ex hypothesi* cannot be subject to the test of cross-examination. If our recommendation for suspending trial by jury in the case of the Scheduled Offences is adopted, the recommendation will only apply in cases of trial by judge alone or by a Resident Magistrate.

100. Whatever merits there may be in a wider relaxation of the rule against hearsay in criminal cases generally, we do not think that it would help to solve the special problems caused by terrorist activities. To estimate the probative value of a statement made by a person who is not called as a witness at the trial it is necessary to know who and what manner of man he was, to whom and in what circumstances the statement was made, what opportunities the maker had of seeing or hearing accurately each of the incidents that his statement records. The only reason why the witness cannot be called to give oral evidence in person is to prevent disclosure of these very matters to the accused lest they be passed on to other terrorists who are still at liberty. To relax the rule against hearsay does not solve these problems which are special to terrorist crimes in Northern Ireland.

CHAPTER 9

YOUNG TERRORISTS

101. One of the most troubling features of the present situation is the use made of the young by terrorist organisations to aid them in carrying on their activities and to hamper the work of the security forces.

102. This is primarily an urban problem. With the breakdown of law and order in the Republican strongholds in Belfast and Londonderry, the youngsters who live there have been growing up in an environment of violence and destruction. To them a battlefield is always at their door. So long as this environment endures it is, we think, inevitable that youngsters will need little persuasion to join in disorderly gangs roaming the streets and taking advantage of any opportunity to attack the troops patrolling those areas with stones and other missiles. They are used as willing tools by members of terrorist organisations to act as a living screen for gunmen, to draw security forces into ambushes and to create disorder to hamper them in making arrests.

103. The youngsters who take part in this kind of activity are often more adventurous than delinquent. In normal times they would be unlikely to get into trouble with the law at all. But they make the task of the security forces immensely difficult and increase significantly the risk to their lives. These youngsters present one kind of problem.

104. But there is also another which is different in kind. The Provisional IRA has frequently used boys aged 14 to 16 years to carry out serious acts of terrorism. Such youths have been known to shoot with intent to kill and to plant lethal explosives. So long as these are at liberty they are a direct menace to human life.

105. The Children and Young Persons Act (Northern Ireland) 1968, contains elaborate provisions for dealing with criminal offences by children (aged from 10 to 13 years) and young persons (aged from 14 to 16 years). Proceedings against young persons are initiated in a Juvenile Court composed of a Resident Magistrate and two lay members. On a charge of any indictable offence other than murder it may commit the young person for trial by a regular higher criminal court or, with the consent of both the young person and the prosecution, may try the case itself. The Act contemplates the existence of a variety of institutions (in addition to prison and Borstal) of different kinds to which young persons can be remanded pending trial *viz.* remand homes, special reception centres, remand centres) or to which they can be sentenced after a finding of guilt (*viz.* training schools, remand homes, attendance centres and young offenders centres). These provisions are substantially the same as those in force in England before the passing of the Children and Young Persons Act, 1969.

106. We do not find it useful to discuss these provisions in detail because in fact, apart from prison, there are in existence only two institutions, a training school for Catholic boys and a training school for Protestant boys, to which young male offenders below the age of 17 can be remanded pending

trial or sentenced on trial. These do duty for all the various other institutions contemplated by the Act. Neither training school is secure. They were not intended to be. There is nothing to prevent anyone absconding. To make them secure or to attach a security block to either of them would frustrate the purpose for which they were primarily intended—to train and rehabilitate children who are the victims of parental neglect or of bad environment.

107. The only secure institution available for a young person on remand pending trial is a prison. He may only be remanded to a prison if the Juvenile Court certifies that he is of so unruly a character that he cannot be safely committed to a training school or so depraved that he is not fit to be detained there. A young person may only be sentenced to prison after a finding of guilt on a similar certificate by the sentencing court. On conviction on indictment for murder or for an offence punishable in the case of an adult with imprisonment for 14 years or more he may be sentenced to be detained, which in practice means imprisoned, though except in a case of murder this can only be done if the sentencing court is of opinion that there is no other suitable way of dealing with him.

108. The consequences of the lack of any secure establishment other than an ordinary adult prison for the reception of young persons on remand pending trial are, in our view, little short of disastrous in the present emergency. Unless the remanding court takes the drastic and undesirable step of remanding him to prison and certifying to his unruly or depraved character (which is often an inapt description of the kind of youth who is not a gunman but commits offences of disorderly conduct directed against army patrols) a young person must be remanded to a training school from which there is nothing to prevent his absconding. This happens with alarming frequency. So it does, though not to the same extent, to those sent to a training school after trial and sentence. Apart from the bad effect upon the absconder himself who thereafter has to "go on the run", it damages the morale of the troops to know that there is back on the streets, within a day or two after they have arrested him at considerable personal risk, a young person who at very least was attacking them with non-lethal weapons or, at worst, whom they believe had been shooting at them with intent to kill.

109. We understand that there are long-term plans to build a Young Offenders Centre with secure accommodation for 35 boys aged 16 and over but this is not due to be completed until 1976. We are frankly appalled at the apparent lack of any sense of urgency. The need is immediate for a secure unit capable of accommodating up to 100 young persons aged from 14 to 16 years on remand and after sentence. We find it difficult to credit that temporary accommodation of this kind could not be prepared in a matter of weeks rather than years. However makeshift, it would in our view be better than leaving courts who have the responsibility of remanding or sentencing a young person who is being used to assist terrorist activities or is committing terrorist acts himself, with no choice except to send him to a training school from which he can immediately escape or to a prison in which he will be confined with adult offenders many of whom are members of terrorist organisations themselves.

110. We recognise that there are two classes of youthful offenders, the adventurous and the hardened, to whom we referred at the beginning of this section of our Report. It would be much better for them not to be confined in the same secure institution, but it may not be practicable to provide two. If this cannot be done in the immediate future we think that the grounds upon which the court is empowered to remand or sentence a young person to prison should be extended to enable them to do so in cases where they were of opinion that the gravity of the offence with which he was charged made him unsuitable for confinement in any other establishment. The Juvenile Court could then use its discretion in balancing the respective disadvantages of allowing him to associate with less hardened young offenders at the secure unit for young persons or allowing him to associate with more hardened adult offenders in prison.

111. With regard to those young persons who do not themselves commit terrorist acts, but play a part in creating disorders associated with terrorist activities, their degree of involvement may vary considerably. It would, we think, be a policy of despair to compel juvenile courts to treat them all on the same footing. The court ought to have a wide discretion to distinguish between one case and another. At present there is a mandatory minimum sentence of six months' detention in a training school for riotous behaviour—one of the commonest offences by young persons. For those, not the ring-leaders but the easily led, a shorter punishment may provide a sufficient lesson not to do it again. We recommend that this minimum should be removed.

112. The secure unit which we recommend would presumably be officially classified as a "remand home". The maximum period for which a young person may be committed to a remand home by a Juvenile Court (except where the mandatory sentence provisions apply) is one month. We recommend that it should be extended to six months. The Juvenile Court would then have the discretion to sentence a young person convicted of riotous or disorderly behaviour to be detained for any period not exceeding six months to a remand home and to decide whether the appropriate remand home should be a training school or the new secure unit.

113. As respects a young person found guilty on indictment of more serious terrorist acts the sentencing court should have the discretion to sentence him to be detained in the new secure unit, under whatever name it may be described for this purpose, or in prison for such period as it thinks fit. The restriction of this power to offences which if committed by an adult are punishable by imprisonment for fourteen years or more excludes possession of firearms in suspicious circumstances and other serious terrorist crimes. We recommend that for the duration of the emergency this restriction should be withdrawn.

CHAPTER 10

THE SCHEDULED OFFENCES

114. The offences listed in the Schedule are those to which our recommendations as to BAIL, MODE OF TRIAL and the CONDUCT OF THE TRIAL are intended to apply. The list is subject to the qualifications mentioned in paragraph 7 of this Report: that it is not put forward as final or definitive and should also be subject to amendment by statutory instrument if terrorist tactics should change. The Schedule is intended to apply only during the period of the emergency which has led to our appointment: that is to say, for as long as the prevalence of violence in pursuit of political aims results in the intimidation of witnesses and so prevents the prosecution from calling them to give evidence in a court of law where there is any risk that their identity may become known. Whether any of our recommendations as to the CONDUCT OF THE TRIAL should remain in force thereafter, we do not regard as being a matter on which we are required to express any view.

115. The offences listed (other than riotous behaviour) are all triable upon indictment. Those marked with an asterisk may also be tried summarily if both the accused and the prosecution consent. Our recommendations as to MODE OF TRIAL, *viz.* by a High Court or County Court Judge sitting without a jury, apply only to trials on indictment. We do not propose any change in the existing system for allocating cases for trial on indictment between the Commission in Belfast, the County Assizes and the County Courts. Our recommendations as to the CONDUCT OF THE TRIAL apply to summary trial as well as to trial on indictment.

116. Our recommendations as to MODE OF TRIAL and the CONDUCT OF THE TRIAL apply to all offences listed in Parts I and II of the Schedule. The distinction between them affects only the question of BAIL. Most of them are already statutory offences under existing Statutes which contain a sufficiently precise definition of the offence to which our recommendations are intended to apply. But in certain cases, *viz.* robbery (under S. 8 of the Theft Act (Northern Ireland) 1969), wounding with intent, causing grievous bodily harm and causing actual bodily harm (under SS. 18, 20 and 47 of Offences against the Person Act, 1861) and causing malicious damage (under S. 51 of the Malicious Damage Act 1861), the statutory definition of the offence does not distinguish between cases in which explosives, firearms or other offensive weapons or incendiary devices are used for the purpose of committing the offence and cases where they are not. It is only the former type of case which we recommend for inclusion in Part I of the Schedule. Where this feature is absent, the offences should be in Part III. Legislation will be needed to carve out of the general offences a separate statutory offence of which the use of one or other of these means forms part of the definition. We have indicated in the Schedule where this will be necessary. Similarly the offence of intimidation under S. 1 of the Protection of Person and Property Act (Northern Ireland) 1969 is only included in the Schedule where its purpose is to pervert the course of justice.

117. In Part III of the Schedule we have listed the more serious offences involving the use or threat of violence to the person or the destruction of property, where these are not associated with the use of explosives, firearms or other offensive weapons or incendiary devices. While some of these may be planned or committed by members of terrorist organisations, others may be wholly unconnected with terrorist activities. In the latter case there is no need for the offence to be subject to the emergency procedures as to MODE OF TRIAL and the CONDUCT OF THE TRIAL which we have already recommended for all offences listed in Parts I and II. We recommend that these emergency procedures should apply to offences listed in Part III only in cases in which the Director of Public Prosecutions certifies that the charge is one which is fit to be dealt with under the emergency procedures. The issue of this certificate can take place at any time up to the commencement of the committal proceedings in a case to be tried on indictment or the commencement of the trial itself in a case to be tried summarily. By that time at the latest the DPP should have become sufficiently apprised of the facts relevant to the issue of a certificate. We contemplate that he would issue it only in cases where he had reason to suppose that terrorist activities were involved. But he should be under no legal obligation to state any reasons. His certificate should be conclusive.

118. Our recommendations as to BAIL must take effect at an earlier stage than our recommendations as to MODE OF TRIAL and the CONDUCT OF THE TRIAL. For this reason they present a rather different problem. Applications for bail can be made as soon as the accused has been charged and before the police investigations have been completed or the papers submitted to the DPP. We do not think that our recommendations as to BAIL should apply to the offences listed in Part III of the Schedule unless and until the DPP has issued his certificate that the charge is one which is fit to be dealt with under the emergency procedures. When such a certificate has been issued the offence, if murder or attempted murder, would be treated for the purpose of BAIL as if it were included in Part I of the Schedule and, if any other offence, as if it were included in Part II.

119. In all cases of charges of offences listed in Part I and II of the Schedule, our recommendations as to BAIL would apply as soon as the accused had been charged. As we have already stated in paragraph 49, the obligation upon the accused to satisfy the judge either that exceptional hardship would be caused to him if he were detained in custody or that he had been held in custody for the period there mentioned would apply only to the offences listed in Part I and to any murder or attempted murder in respect of which a certificate had been issued by the DPP. It would not apply to those listed in Part II or to offences, other than murder, listed in Part III in respect of which a certificate had been issued. But in all other respects the recommendations would apply to all offences listed in Part I or II and to certificated offences listed in Part III.

SCHEDULED OFFENCES

PART I

1. Explosives

(*a*) *Explosive Substances Act 1883*

(i) S. 2—Causing explosion likely to endanger life or property;

(ii) S. 3—Attempting to do act mentioned in S. 2 or being in possession of explosive for that purpose;

(iii) S. 4—Making or being in possession of explosives under suspicious circumstances;

(iv) S. 5—Being an accessory.

(*b*) *Offences Against the Person Act 1861*

(i) S. 28—Causing grievous bodily harm by explosives;

(ii) S. 29—Causing explosion or sending explosive substance or throwing corrosive liquid with intent to cause grievous bodily harm;

(iii) S. 30—Placing explosives near building or ship with intent to do bodily injury;

(iv) S. 64—Making or possessing explosives, etc., for purpose of committing indictable offence.

(*c*) *Malicious Damage Act 1861*

*(i) S. 9—Destroying or damaging house by explosives (while person inside);

*(ii) S. 10—Attempting to destroy building with explosives;

(iii) S. 45—Place or throw explosives by or at ship with intent to damage it.

(*d*) *Protection of the Person and Property Act (NI) 1969*

*(i) S. 2—Making or possessing petrol bombs;

(ii) S. 3—Throwing, etc., petrol bombs.

2. Firearms

Firearms Act (NI) 1969

*(i) S. 3—Shortening barrel of shotgun or converting imitation firearm into firearm;

*(ii) S. 4—Manufacture, dealing in or possession of prohibited weapons and ammunition, *i.e.* automatic weapons and poisonous gas and the like;

(iii) S. 14—Possession of firearm or ammunition with intent to endanger life or cause serious injury to property;

(iv) S. 15—Use or attempted use of firearm to resist arrest;

(v) S. 16—Carrying firearm with criminal intent;

(vi) S. 17—Carrying loaded firearm in public place;

* See paragraph 115.

*(vii) S. 19—Possession of firearms by person who has been sentenced to preventive detention or corrective training for three years or more or sale of firearms to such a person;

(viii) S. 19A—Possession of firearms or ammunition in suspicious circumstances.

3. Robbery or assault with firearm or offensive weapon

(*a*) *Theft Act (N.I.) 1969*

(i) S. 8—Robbery, **provided that firearm or offensive weapon is used;**

(ii) S. 10—Aggravated burglary.

(*b*) *Offences Against the Person Act 1861*

(i) SS. 18 (wounding with intent),* 20 (grievous bodily harm) and* 47 (actual bodily harm), **provided that offences caused by firearm or offensive weapon.**

4. Arson and malicious damage by fire

Malicious Damage Act 1861

*(*a*) SS. 1 to 7—Setting fire to various buildings;

*(*b*) SS. 16 to 18—Setting fire to corn;

*(*c*) S. 51—Malicious damage generally, **provided that it is caused by fire.**

5. Regulations made under Civil Authorities (Special Powers) Act (N.I.) 1922

*(*a*) Reg. 22—Contravention of requirement not to collect etc. information about police;

*(*b*) Reg. 24A—Membership of unlawful association;

*(*c*) Reg. 25—Interference with telephone apparatus;

*(*d*) Reg. 26—Possession of ciphers and codes without lawful excuse which may be prejudicial to preservation of peace etc.;

*(*e*) Reg. 27—Injury to railways etc.;

*(*f*) Reg. 29—Endangering safety of police by discharging firearm or otherwise;

*(*g*) Reg. 31—Possession of offensive weapon.

6. Riotous behaviour

Malicious Damage Act 1861

*(i) S.11—Rioters demolishing building;

*(ii) S. 12—Rioters injuring building, machinery etc.

7. Intimidation

*S.1 of the Protection of the Person and Property Act (N.I.) 1969, **provided that its object is to pervert the course of justice.**

8. Attempts etc.

Any attempt or conspiracy or incitement to commit or offence of aiding and abetting any of the above offences.

PART II

9. Firearms Act (N.I.) 1969

*(*a*) S. 1—Possessing, purchasing or acquiring firearms or ammunition without firearms certificate;

*(*b*) S. 2—Business and other transactions with firearms or ammunition;

(*c*) S. 18—Trespassing with firearm on land.

10. Regulations made under Civil Authorities (Special Powers) Act (N.I.) 1922

*(*a*) Reg. 9—Damage or interference with road block;

*(*b*) Reg. 38—Failure of persons constituting assembly which may lead to public disorder to disperse when ordered to do so.

11. (*a*) *Common law offence of riot*

(*b*) *Riotous behaviour*

Section 9, Criminal Justice Act (Northern Ireland) 1968.

12. Attempts etc.

Any attempt or conspiracy or incitement to commit or offence of aiding and abetting any of the above offences.

PART III

13. Murder

14. Other serious offences against person or property where no firearm or offensive weapon is used

(*a*) *Offences Against Person Act 1861*

(i) SS. 18 and 20;

(ii) S. 21—Attempting to strangle or choke in order to commit indictable offence;

(iii) S. 22—Unlawfully administering drugs in order to commit indictable offence.

(*b*) *Theft Act (N.I.) 1969*

(i) S. 8—Robbery;

(ii) S. 9—Burglary.

(*c*) *Malicious Damage Act 1861*

*(i) S. 14—Injuring goods and machinery;

(ii) SS. 19 to 49—Miscellaneous offences of damage to various things *e.g.* trees, bridges, cattle, telegraph poles;

*(iii) S. 51—Malicious damage generally.

15. Attempts etc.

Any attempt or conspiracy or incitement to commit or offence of aiding and abetting any of the above offences.

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