CONFIDENTIAL

E.R. 28 NOV 1985

I am concerned that the message in paragraph 4a is in the forefront of the minds of all those who are looking critically at the administration of justice in N.I. I fear it is all too often forgotten.
I commend this paper as a very good attempt to take an objective view of justice in N.I. Brian Blackwell 27/11

1. Mr Blackwell
2. Mr Innes

cc Mr Bell, SIL
Mr Jackson, PRBl
Mr McKillop, CJB

A CRITIQUE OF NORTHERN IRELAND JUSTICE

With apologies for the delay I attach a note which seeks to fulfil the original remit. It has "growed" since the first draft but I would need to know its precise purpose before I could prune it sensibly.

2. It seeks to be a "warts and all" look at the system of justice in Northern Ireland and to give a picture which even the Irish would have to accept as a realistic one. Although there are gaps (role of the DPP, coroner's courts etc) it touches on most of the criticisms which have been levelled at the system. Without being an apologia, I think it succeeds in putting across the general argument that the system is well-founded and would be difficult to improve upon.

David Hill

D J R HILL
Law and Order Division

26 November 1985

Enc

Note: I am not very happy with paragraph 4a; we are looking for a suitable quote to replace it but one which does not concede that we have adopted "repressive" measures.

CONFIDENTIAL

A CRITIQUE OF NORTHERN IRELAND JUSTICE

Introduction

Overall, Northern Ireland is a safer place to live than many areas of England and Wales. The number of recorded crimes per 1,000 people over the years 1981-84 was about the same as in Devon and Cornwall.

(recorded crimes per 1,000 people)	1981	1982	1983	1984
NI	40	40	41	43
D&C	38	35	43	

2. Crimes cleared as a proportion of those recorded have risen steadily over the past few years to a level of 31% in 1984. (37% in England and Wales). Clear-up rates for murder and attempted murder have increased to 57% and 44% respectively in 1984.

(clear up-rate - %)	1981	1982	1983	1984
NI	27	19	28	31
E&W	38	37	37	

3. Terrorist crime, as a percentage of total crime has dropped from about 33% in 1973 to 25% in 1976 and only 18% in 1983 and 1984.

Government Policy

4. The Government's security policy is to eradicate terrorism so that the people of Northern Ireland can pursue their various political, economic and social goals free from fear. The essence of the policy is to uphold wherever possible the normal rule of law and the administration of justice. It is sometimes alleged that the measures introduced to deal with terrorism have debased the whole judicial system in NI, but in practice the normal judicial system which incorporates all the highest standards of British justice continues to function as usual in respect of non-terrorist cases.

(cases disposed of on indictment in NI)	1982	1983	1984
Total	1182	1139	1085
Scheduled cases tried without a jury (%)	445 (37.6%)	285 (25%)	266 (24.5%)

Any improvements in the law in GB are quickly followed in NI.

E.R.

4a. It is a fundamental proposition of terrorist theory that a State's reaction to terrorism should be misrepresented for propaganda purposes as a self-initiating regime of repression. Those adversely affected by the State's measures can then be persuaded that the fault lies with the State, not the terrorists; and the tactic can be used to justify further terrorist acts and to win domestic and international support for the organisation concerned. This pattern has been followed in Northern Ireland with some success. Even though current anti-terrorist measures involve only the smallest divergences from normal British standards they continue to be the subject of sustained criticism. This is partly ill-informed, partly malicious and, on occasion, partly justified, but the underlying point which is often forgotten is that if there were no terrorism there would be no need for the security measures which have been introduced to help counter it.

5. In respect of terrorist-type offences, the judicial system in NI has indeed been amended slightly to enable it to cope with cases involving such offences. These amendments are kept under regular Parliamentary scrutiny; they are subject to independent review from time to time; they have been introduced and maintained in force on the recommendation of eminent jurists; and they are intended to interfere to the minimum possible extent with the operation of the normal judicial system. Although the British Government considers these amendments to be exceptional they are nevertheless entirely consistent with the UN Convenant on Civil and Political Rights (to which the UK is a full party) and the European Convention for the Protection of Human Rights (in respect of which the UK has accepted the compulsory jurisdiction of the European Court of Human Rights and the right of individual petition).

The Police

6. For better or for worse, the RUC has achieved complete operational independence under the law. This has been a constant objective of successive British Governments since 1970 and although it entails some drawbacks it does mean that the RUC is genuinely free of political control. This should be a source of reassurance to both parts of the community, though in practice neither has yet fully adjusted to the situation.

7. The security forces operate impartially against terrorists from either side of the community. Mainly because Loyalist terrorists have less support within their own communities the security forces have been relatively more successful against them. Although Loyalist paramilitaries currently account for only 10% of terrorist crime, they make up 30% of those charged with serious terrorist-type offences and 46% of the total prison population.

8. Since the ending of detention in 1975, no-one has been held in custody in Northern Ireland without being convicted or remanded by a court or arrested by the police in respect of substantive offences which they believe he may have committed. In the case of persons suspected of involvement in terrorist activity the police may hold them without charge (under the EPA) for 72 hours; or (under the PTA) for 48 hours, extendable by a period or periods of up to 5 days with the express authority of the Secretary of State separately given in

each case. The exercise of the latter power is subject to annual independent review.

9. Access to legal advice while in police custody can only be denied for stated reasons and with the authority of a senior officer, and must be granted after 48 hours (and at intervals of not more than 48 hours thereafter), though a senior officer may in certain stated circumstances direct that any discussions take place in the presence of a police officer.

10. The security forces in NI also have wide powers to stop, search and question; rights of entry and seizure; and the power to order crowds to disperse and to interfere with rights of property and with the highway. There is also a wide though time-limited power of arrest given to HM Armed Forces. The exercise of all these powers is subject to judicial review.

11. Similar powers [of detention] exist in the Republic; by virtue of Section 30 of the offences against the State Act 1939 any person suspected of involvement in the wide range of offences under the Act can be stopped, searched, arrested and held for up to 48 hours without warrant. This power in the Republic is subject to no review. Apart from this section, the powers of the Garda are rather more restricted than those of the RUC. In particular there are no specific powers of entry without warrant, although in respect of suspected offences against the State a warrant need only be issued by a Garda Chief Superintendent. There is no general power to stop and question, other than in the vicinity of a suspected scheduled offence. And the "catch-all" arrest power in Section 30 is linked to the suspected commission of a specific serious offence; it is thus narrower in scope than our Section 11 EPA power. (The Irish Defence Forces have no power to stop, search and arrest.)

12. Anyone detained by the police can apply for a writ of habeas corpus. He can also bring an action for false imprisonment. Those remanded by the courts must be produced at regular remand hearings. Persons remanded in custody, or bailed, are in due course committed for trial by a magistrate, who must first be satisfied that there is a prima facie case to answer. There is no question of anyone being detained or remanded without due cause. Only a small percentage of cases are not proceeded with.

13. It has sometimes been suggested that the police frequently use the power of arrest given by Section 12 of the PTA as a kind of "executive detention' to remove undesirable people from circulation at times of heightened community tension. This matter was considered by the Rt Hon Lord Jellicoe who reviewed the operation of the present Act's predecessor in February 1983. Dismissing the suggestion he commented as follows:-

> "I am satisfied on the basis of wide consultation, examination of individual cases, and the statistical evidence ... that in the great majority of cases arrests are made and extensions of detention sought under Section 12 because the police believe this to be necessary to prevent terrorist acts or to bring to justice those responsible for their commission."

14. Arrangements for the compensation of persons who have spent a period in custody following a wrongful conviction or charge have recently been reviewed and the Secretary of State has now agreed to be bound to accept the amount of compensation fixed by the Independent Assessor.

Complaints Procedure

15. The RUC are subject to a comprehensive complaints procedure which is in the process of being revised to bring it into line with the new arangements for England and Wales. Complaints against members of the Armed Forces are dealt with in the same way as complaints against any other member of the public, with the additional feature that they are also liable to disciplinary proceedings in respect of actions which might not be ordinary criminal offences.

16. Any death or injury caused by a member of the security forces is fully investigated by the RUC and a report submitted to the DPP for a direction on whether a prosecution should follow or not. In such cases, where a death has occurred, it would be inappropriate to hold an inquest until all possibility of criminal proceedings has been exhausted. Some recent trials have revealed evidence of an attempt by members of the RUC to suppress relevant evidence. The DPP requested the Chief Constable to investigate the matter and he invited a senior officer from another force to take it on; his report is currently with the Chief Constable.

17. Despite the existence of these procedures for investigating the use of lethal force by the security forces and considering whether a prosecution would be justified, there is residual concern that the procedures are not effective in preventing deliberate killings by the security forces, or in establishing the facts of individual cases. There is also criticism of the length of time which it takes (especially in comparison with the Stephen Waldorf case) to reach decisions and, if appropriate, bring a person to trial. It has, however, so far proved impossible to devise any other system which would be as effective in investigating such an incident and establishing the facts in a way which is fair to both accused and aggrieved parties.

The Offences

18. Since the ending of detention persons may only be detained by the police or convicted in respect of substantive offences. No-one can be proceeded against in respect of his political opinions. The only new offences created by the EPA relate to proscribed organisations and proscription, as elsewhere in the world, is really no more than an evidential device. By proscription the Government effectively provides that the organisation concerned shall be deemed to be a criminal conspiracy to commit terrorist acts, thus doing away with the need to prove the necessary evidential chain in each individual case.

19. There are similar provisions in Irish law, though they are somewhat more wide-ranging in that they are designed to deal with a whole range of subversive activities, and not merely violent terrorism. For example, in the Republic it is an offence to usurp the function of government (s 6 OSA), or to obstruct by any form of intimidation any body carrying out any function of Government (s 7). There are stringent controls on the printing; possession etc of a wide range of "treasonable", "seditious" and "incriminating" documents (ss 10-14). "Secret societies" in the Police and Army are also illegal (s 16), as is the administering of unlawful oaths (s 17). Unauthorised military exercises are banned (s 15); in this latter case the burden of proof lies with the accused. Any public statement or demonstration aimed at interfering with the course of justice is also unlawful, as is the giving of false information (for example bomb hoaxes) aimed at disrupting the work of the security forces.

The remand stage

20. Although there are special provisions governing the grant of bail in scheduled cases the number of persons on bail at the time of trial in respect of such offences has been around 50% for the last few years:

% of person on bail at time of trial	1981	1982	1983	1984
Scheduled cases	40	52	48	56
Non-scheduled	87	86	89	83

21. The average period between first remand and trial for all persons tried in 1984 who were remanded in custody at the time the trial started was 37 weeks. (And even those tried in 1984 in respect of 'scheduled' offences who were remanded in custody at the time of the trial started had only been in custody, on average, for 44 weeks). Those average figures conceal very long delays in a few particularly complex cases: the majority of individuals concerned are brought to trial much more quickly than the average. Comparative figures for GB are not available except in respect of the period between committal and trial: in London in 1983 it took on average 25 weeks for someone newly-committed to come to trial; in NI, in respect of persons accused of scheduled offences, the average period was only 14 weeks, and non-scheduled cases were dealt with more quickly still.

22. Efforts to eliminate avoidable delays have included:
- the appointment of 12 new QCs
- the appointment of an additional County Court judge
- an increase in the establishment of the Office of the DPP
- the establishment of a presiding judge to oversee the listing of cases at the Belfast Crown Court
- an examination of procedures within the RUC and the office of the DPP, to facilitate the identification and disposal of cases which can be settled quickly.

23. The cases which have involved the longest delay have been those where the prosecution intended to offer the evidence of a former accomplice. In such cases the potential witnesses have to be tried and convicted before it would be proper for the RUC even to begin

taking statements from them, which inevitably imposes a much longer than normal waiting time on those remanded on the basis of such evidence. Such cases are also usually very complex and involve large numbers of defendants. (No advantage would be gained by trying them in smaller batches as the same evidence is usually at issue in each case; in any event such a procedure would greatly increase the waiting time before trial for those defendants who were not in the first batch).

24. Although it could not be precisely measured, the greater part of any delay in the final stages of a case is usually attributable to the defence. Most accused persons are arraigned reasonably soon after committal, indicating that the prosecution is ready to proceed, but the defence are often not ready to proceed until several further months have passed, due to excessive loading of work onto a small group of Counsel.

The Courts

25. The operation of the 'Diplock' courts enshrines a number of safeguards for the accused over and above his normal rights to trial in open court, to cross-examine witnesses, to be legally-represented at the State's expense and to be presumed innocent unless proved guilty beyond reasonable doubt. If he is convicted the judge is required to issue a detailed written judgement; there is no need for him to seek leave to appeal, against either verdict or sentence, to the normal 3-judge Appeal Court; and the Appeal Court, drawing on the written judgement, can consider issues of fact as well as issues of law. In the Republic, by contrast, although the Special Criminal Court consists of at least three judges and verdicts have to be supported by a majority, there is no disclosure of whether any verdict was unanimous, or of the opinions of individual members of the court.

26. The rules of evidence in Diplock courts vary slightly from the normal rules in respect of (a) the possession of proscribed articles, and (b) statements by the accused. The rules of evidence related to possession have many parallels in UK-wide legislation and leave the courts with full discretion. The rules on the admissibility of 'confessions' in 'scheduled' cases were introduced to counter a far too liberal interpretation in NI of the common law

rules on the admissibility of confessions. Similar statutory guidelines have now been introduced in Great Britain by the Police and Criminal Evidence Act 1984.

27. The Northern Ireland courts, unlike those in the Republic, are not allowed to draw any adverse inference from an accused person's silence when questioned about an offence or charged or informed by the police that he may be prosecuted. Nor is there any relaxation of the normal rules of evidence in respect of alleged membership of a proscribed organisation; in the Republic the word of a senior police officer Superintendent would, unless contested, be sufficient to secure a conviction for membership. Under Section 24 of the Republic's Offences Against the State Act 1939, possession of an "incriminating" document is also deemed to be evidence that a person is a member of an unlawful organisation.

28. Cases in which the prosecution proposes to rely heavily on the evidence of a former accomplice are relatively infrequent but the DPP and the courts in NI treat them in exactly the same way as would the DPP and the courts in England and Wales. The DPP would almost certainly only direct a prosecution if there was substantial supporting, though not strictly corroborative, evidence; its admissibility would be subject to the same tests as would be applied by the courts in Great Britain, and indeed in the Republic of Ireland; and it is for the courts to determine what weight to give it. In practice the Northern Ireland courts have shown that they are very reluctant to convict on the basis of uncorroborated evidence from a former accomplice. So that the court can be assured if necessary that there are no improper pressures on a former accomplice witness, any undertakings given to him must be disclosed to the defence; if charges are to be brought against the former accomplice he must be tried and sentenced before giving evidence against others, so that there is no possibility of a deal being struck; and if it is decided - in the public interest - to grant him immunity from prosecution in return for an undertaking to give evidence, the immunity is granted in advance and unconditionally so that even if he retracts his evidence he still walks free.

29. In practice the vast majority of persons appearing before 'Diplock' courts charged with scheduled offences plead guilty, and acquittal rates have always been similar to those of jury courts.

The judiciary

30. As to the judiciary, which operates the criminal justice system in Northern Ireland it has shown itself over the past years to be committed to upholding the highest standards of British justice.

31. There is an imbalance in the religious composition of the judiciary. Of the 9 Supreme Court judges only 2 are Roman Catholic; and only 1 of the 12 County Court judges is Roman Catholic (though another is married to a Catholic). However 8 of the 16 Resident Magistrates are Catholic and between 1/3 and 1/2 of the lay panel of the juvenile court are Roman Catholic. One reason for the overall imbalance is intimidation: since the Lord Chancellor became directly responsible for the NI Court Service in 1974 he has made strenuous efforts to improve the balance by offering posts to suitably qualified Catholic barristers and solicitors. (And potential lay JPs have to state their religion as part of an explicit attempt to correct the traditional religious imbalance among JPs). However, very few Catholics apply for, or accept, judicial posts, because of intimidation. Two Catholic judges have been murdered by Republican terrorists, as has one Catholic Resident Magistrate; another was severely injured and his daughter murdered on the way home from Mass. There have been numerous other attacks on Catholic members of the judiciary and cases of lesser harassment. That the Republican terrorists single out Catholic members of the judiciary is demonstrated by the fact that only one Protestant judge has been murdered.

32. There are many examples of cases where the NI courts have demonstrated a determination to uphold a strict interpretation of the law whatever the circumstances. The classic case is the acquittal of BROPHY of the La Mon House murders: although he admitted to the judge on the voir dire that he was a member of PIRA, the NI Court of Appeal and House of Lords held that his admission could not be treated as evidence of his guilt. The acquittals handed down in 'supergrass' trials and the acquittal on appeal of Dominic McGLINCHEY are other examples.

33. On the other hand some judges are perceived to be 'soft' on members of the security forces who may be prosecuted, or to be particularly hard on Republican terrorists. It is alleged that the

listing of cases has been arranged to ensure that members of the security forces are tried by 'sympathetic' judges. The obiter dicta of L J Gibson in the trial of members of the RUC for the alleged murder of suspected terrorists in South Armagh in late 1982 may have reinforced such perceptions, but the furore which those remarks aroused in legal circles is itself clear evidence that they were unusual and widely seen to be improper. Judge Gibson's subsequent "clarification" was an unexceptionable statement of the attitude which judges should adopt in such circumstances.

Prisons

34. The Prison system in NI is almost all modern and the facilities are good. Unlike prison systems in the rest of the British Isles there is virtually no overcrowding. There are around 2,000 prisoners in NI in 6 establishments, having fallen steadily from a peak of around 3,000 in 1978. A very much higher proportion of the total than in GB (25% as against 5%) are serving life imprisonment or detention during the Secretary of State's pleasure (the equivalent of a life sentence where a person was under 18 at the time of a murder).

35. The most difficult problems of the NI prisons over the last 10-12 years all arise from the same basic phenomenon; that of dealing, in an ordinary prison situation and under ordinary prisons legislatiion, with a population consisting of a majority (at present about two-thirds) of prisoners whose offences were committed on behalf, or at the behest of, terrorist organisations, both Republican and Loyalist, and who, with varying degrees of commitment, retain their links with those organisations. These prisoners seek to justify their offences on the grounds that they were committed for a political cause - either to drive the British out of Ireland or as part of what they would see as an understandable response to extreme violence on the Republican side. They have consistently sought recognition as political prisoners and to be treated differently from what they call "ordinary criminals". Against this background it is not surprising that prisons have been a regular focus of conflict and protest.

36. The prison regime in NI is a good one and compares favourably with those available elsewhere in the British Isles. All prisoners

get 50% remission unless any is forfeited under Prison Rules for a disciplinary offence. Prisoners may wear either their own clothes or a mixture of their own and prison issue civilian-type clothing. Good arrangements exist for pre-release home leave, for compassionate home leave and for Christmas home leave. There are more than adequate facilities for letters, open visits, parcels, association and recreation. The prison medical service is administered by the DHSS and all prisons except Armagh have full-time medical officers with adequate back-up. Armagh is covered by a local GP. There are extensive arrangements for education (ranging from remedial to Open University) and vocational training. Work is also available to the majority of sentenced prisoners. There are virtually no complaints about remand or ordinary prison conditions or treatment.

37. The most controversial current issue is the strip-searching of female prisoners at Armagh. The procedures in Northern Ireland are similar to those in use in Great Britain, no male officer is ever present and the searches are carried out less frequently than in GB, despite the fact that Northern Ireland has a much higher proportion of prisoners sentenced or charged with very serious offences. The Government has a duty to take all practicable and reasonable steps to ensure the safe custody of prisoners, the safety of staff and the security of the prison; if, for example, as a result of the introduction of explosives, prisoners or staff were killed or injured, it might well be argued that the authorities had not fulfilled their statutory duty. Strip searches are carried out by many other prison authorities including in the Republic and are recognised to be a necessary and justifiable precautionary measure. The present search arrangements preserve and respect the dignity of the individual as far as is consistent with the requirement to preserve the security and safety of all those in Armagh prison.

Royal Prerogative

38. The Secretary of State has power to recommend remission of a prisoner's sentence to effect his early release using the Royal Prerogative of Mercy. This is only done in exceptional circumstances as it cannot be used to undermine the authority of the courts. However it has been used recently in some cases where mercy rather than justice was the over-riding consideration.

	1982		1983		1984	
	Scheduled Offences	Non-Scheduled Offences	Scheduled Offences	Non-Scheduled Offences	Scheduled Offences	Non-Scheduled Offences
Total proceeded against	793	1199	638	1231	507	1121
No pleading guilty (%)	640 (80%)	1054 (88%)	464 (72%)	1055 (85%)	426 (84%)	926 (82%)
No pleading not guilty (%)	153 (20%)	145 (12%)	174 (28%)	176 (15%)	81 (16%)	195 (18%)
No acquitted	49	81	61	92	43	96
% acquitted	7%	7%	10%	8%	9%	9%