COUNCIL OF EUROPE

EUROPEAN COMMISSION
OF HUMAN RIGHTS

APPLICATION No. 332/57
LODGED BY
Gerard Richard LAWLESS
AGAINST THE
REPUBLIC OF IRELAND

REPORT
OF THE COMMISSION
(Adopted on 19th December 1959)

STRASBOURG

TABLE OF CONTENTS

		Pages
GENERAL INTRODUCTION		1
PART I - OUTLINE OF THE CASE (paras. 1-11)		4
PART II-HISTORY OF PROCEEDINGS (paras. 12-50)		11
Chapter I	Institution of proceedings (paras. 12-15)	11
	- Introduction and registration of the Application (para. 12)	11
	- Contents of the Application (para. 13).	11
	- Report of group of three members (para. 14).....	12
	- Communication of the Application to the Respondent Government (para. 15)	12
Chapter II	Examination of the admissibility of the Application by the plenary Commission (paras. 16-30)	13
	- Outline of proceedings (paras. 16-23)..	13
	- The submissions of the Parties on the question of admissibility (para. 24)...	14
	A. As regards the question whether or not the Applicant had exhausted domestic remedies under Article 26 of the Convention (para. 25)	15
	B. As regards the question whether or not the Application was an abuse of the right of tition within the meaning of Article 27, paragraph(2), of the Convention (para. 26).....	21
	C. As regards the question whether or not the Application was manifestly ill-founded within the meaning of Article 27, paragraph (2) of the Convention (para. 27)	23
	D. As regards the question whether or not, if the special measures of arrest and detention were found to	

./.

Pages

be in conflict with the provisions of the Convention, those measures were justifiable under Article 15 of the Convention (para. 28) 24

E. As regards the question whether or not the Applicant was precluded, by reason of Article 17 of the Convention, from invoking the provisions of the Convention (para.29) 27

-- Decision of the European Commission of 30th August 1958 on the admissibility of the Application (para. 30) 28

Chapter III - Proceedings before the Sub-Commission (paras. 31-50)..... 48

I. Appointment of the Sub-Commission (paras. 31-33) 48
II. Sessions and meetings (para. 34) 49
III. Examination of the Application with the Representatives of the Parties by means of written and oral pleasings (paras. 35-50).... 49

PART III - ESTABLISHMENT OF THE FACTS AND STANDP INT OF THE SUB-COMMISSION (paras. 51-146) 53

- Points at issue (para. 51) 53

Chapter I The question whether the measures of arrest and detention taken by the Respondent Government against the Applicant were in conflict with the Convention, in particular Articles 5, 6 and 7 (paras. 52-68) 54

A. The question whether there was a violation of Articles 5 and 6 of the Convention (paras. 52-64)

- Summary of submissions of the Parties to the Commission (para. 56) 57

./.

Pages

- Summary of submissions of the Parties to the Sub-Commission (paras. 57-63) 59

- Memorial of the Applicant (para. 58) 59
- Counter-Memorial of the Respondent Government (para. 59) 59
- Reply of Applicant (para. 60) 60
- Rejoinder of Respondent Government (para. 61) 61
- Examination by the Sub-Commission (para. 62) 61
- Oral hearing (para. 63) 62
- OPINION OF THE COMMISSION (para. 64) 62

B. The question whether there was a violation of Article 7 of the Convention (paras. 65-68) 65

- Memorial of the Applicant (para. 65) 65
- Counter-Memorial of Respondent Government (para. 66) 65
- Reply of Applicant (para. 67) 65
- OPINION OF THE COMMISSION (para. 68) 66

Chapter II Right of derogation under Article 15 of the Convention (paras. 69-115) 67

A. Introduction - The texts, the submissions of the Parties and the Commission's Decision of 30th August 1958 (paras 69-76)..... 67

- Legislation concerned (para. 71) 67
- Communication to the Secretary-General of the Council of Europe (para. 72) 68
- Arrest and detention of the Applicant (para. 73) 68
- Summary of submissions of the Parties to the Commission (para. 74) 69
- The European Commission's Decision of 30th August 1958 (para. 75) 69
- Consideration of the case by the Sub-Commission (para. 76) 70

./.

Pages

A. The question whether the Respondent Government was entitled to rely upon its letter of 20th July 1957 to the Secretary-General of the Council of Europe as constituting a notification to the Secretary-General within the meaning of Article 15, paragraph (1) of the Convention (paras. 77-80)..... 71

- Memorial of the Applicant (para. 77) 71
- Counter-Memorial of the Respondent Government (paras. 78-79) 72
- OPINION OF THE COMMISSION (para. 80) 73

B. The question whether there was in Ireland in July 1957 a 'public emergency threatening the life of the nation within the meaning of Article 15 paragraph (1) of the Convention (paras. 81-96) 76

- Memorial of the Applicant (para. 81) 76
- Counter-Memorial of the Respondent Government (para. 82) 77
- Reply of the Applicant (para. 83) 79
- Rejoinder of the Respondent Government (para. 84) 80
- Oral hearing of 17th to 19th April 1959 (paras. 85-88) 81
- OPINION OF THE COMMISSION (para. 89) 83
- INDIVIDUAL OPINIONS OF THE MEMBERS OF THE COMMISSION (paras. 90-96) 83
- OPINION OF MM. WALDOCK, BERG, FABER, CROSBIE and ERIM (para. 90) 83
- OPINION OF MM. SORENSEN and SKARPHEDINSSON (para. 91) 93
- OPINION OF M. EUSTATHIADES (para. 92) 94
- OPINION OF M. SUSTERHENN (para. 93)... 98
- OPINION OF M. DOMINEDO (para. 94) 102
- OPINION OF MME JANSSEN-PEUTSCHIN (para. 95) 104
- OPINION OF M. ERMACORA (para. 96) 105

./.

Pages

C. The question whether the special powers of arrest and detention exercisable under the 1940 Act were measures which were 'strictly required by the exigenvies of the situation' within the meaning of Article 15, paragraph (1) of the Convention (paras. 97-115) 106

- Memorial of the Applicant (para.97) 106
- Counter-Memorial of the Respondent Government (para. 98) 108
- Reply of the Applicant (para. 99).. 111
- Oral hearing of 17th to 19th April 1959 (paras. 100-106) 112
- OPINION OF THE COMMISSION (para.105) 119
- INDIVIDUAL OPINIONS OF THE MEMBERS OF THE COMMISSION (paras. 106-115) 119
- OPINION OF MR. WALDOCK (para. 106) 119
- OPINION OF M. SØRENSEN (para. 107) 136
- OPINION OF MM. BERG, PETREN, CROSBIE and SKARPHEDINSSON (para. 108) 139
- OPINION OF M. FABER (para. 109) ... 139
- OPINION OF M. EUSTATHIADES (para.110) 141
- OPINION OF M. SUSTERHENN (para. 111) 149
- OPINION OF M. DOMINEDO (para. 112) 161
- OPINION OF MME JANSSEN-PEUTSCHIN (para. 113) 161
- OPINION OF M. ERIM (para. 114)..... 161
- OPINION OF M. ERMACORA (para. 115) 162

Chapter III - Application of Article 17 of the Convention (paras. 116-141)..... 164

Introduction (paras. 116-122)..... 164

- Summary of submissions of the Parties to the European Commission(para.120) 165
- The European Commission's decision of 30th August 1958 (para. 121)... 166
- Consideration of the case by the Sub-Commission (para. 122)..... 166

./.

Pages

A. Was the Applicant at the time of his arrest on 11th July, 1957, and subsequent detention, a member of an unlawful organisation or group, or was the Applicant himself engaged in activity aimed at the destruction of the rights and freedoms set forth in the Convention? (paras. 125-138) 167

- Memorial of the Applicant (para. 123) 168
- Counter-Memorial of the Respondent Government (para. 124) 168
- Reply of the Applicant (para. 125).... 169
- Rejoinder of the Respondent Government (para. 126) 171
- Oral hearing of 17th to 19th April 1959 (paras. 127-137) 171
- Applicant's statement and replies to questions put by the President and Members of the Sub-Commission(para.128). 173
- Applicant's replies to questions put by the Attorney-General (para. 129)..... 174
- Applicant's replies to questions put by his own representatives (para. 130).... 176
- Evidence by Inspector McMahon and his replies to questions put by the President and Members of the Sub-Commission (para. 131) 177
- Replies of Inspector McMahon to questions put by the representatives of the Applicant and by the President and Members of the Sub-Commission (para.132) 179
- Replies of Inspector McMahon to questions put by the Attorney-General and by the President and Members of the Sub-Commission (para. 133) 180
- Submission by Mr. MacBride (para. 134) 180
- Observations of the Attorney-General (para. 135) 184
- Reply by Mr. MacBride (para. 136) 187
- Rejoinder by the Attorney-General (para. 137) 189
- OPINION OF THE COMMISSION (para. 138).. 190

B. Does the operation of Article 17 preclude an Applicant from invoking the provisions of Articles 5 and 6 of the Convention? paras. 139-141)..... 190

./.

Pages

- Memorial and Reply of the Applicant (para. 139) 190
- Counter-Memorial and Rejoinder of the Respondent Government (para. 140) 191
- OPINION OF THE COMMISSION (para. 141) 192

Chapter IV The question of any damages, compensation and costs to be awarded to the Applicant (paras. 142-146) 193

- The claim of the Applicant (para.142) 193
- Applicant's submissions as to calculation of damages and costs (para.143) 193
- Submissions of the Respondent Government on the question of damages and costs (para. 144) 195
- Sub-Commission's decision of 24th March 1959 (para. 145) 196
- OPINION OF THE COMMISSION (para. 146) 196

PART IV - FRIENDLY SETTLEMENT (paras. 147-155) 197

- The Applicant's suggestion for a friendly settlement (para. 147) 197
- The Sub-Commission's meeting of 23rd March 1959 (para. 148) 197
- The position of the Respondent Government (para. 149) 197
- Decision of the Sun-Commission of 20th April 1959 (para. 150)..... 198
- The Applicant's reply (para. 151) 198
- The Respondent Government's reply para. 152) 199
- Further comments by the Parties (para. 153) 199
- Subsequent action by the Sub-Commission and position of the Parties (para. 154) 200
- CONCLUSION BY THE SUB-COMMISSION AND BY THE COMMISSION (para. 155) 200

GENERAL INTRODUCTION

The subject of this Report is Application No. 332/57 lodged by Mr. Gerard LAWLESS against the Government of the Republic of Ireland. The Report has been drawn up by the European Commission of Human Rights in pursuance of Article 31 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4th November 1950, and is now transmitted to the Committee of Ministers and Respondent Government in accordance with paragraph (2) of that Article. It has not been transmitted to the Applicant.

The purpose of the Report, as set out in paragraph (1) of Article 31 is, in a case where no friendly settlement is reached:

(1) to establish the facts, and

(2) to state an opinion as to whether the facts found disclose a breach by the Respondent Government of its obligations under the Convention.

The Commission has, in accordance with Rule 66 of its Rules of Procedure, first considered it necessary to set out the history of the proceedings from the lodging of the Application until the adoption of the present Report.

In this connection, it is recalled that the Convention defines the proceedings as beginning with the consideration by the Commission of the question of the admissibility of the Application. Article 29 of the Convention provides that, as soon as an application has been declared admissible and accepted, the functions of the Commission under Article 28, namely to ascertain the facts and seek a friendly settlement, shall be performed by a Sub-Commission, composed of seven members of the Commission. The Sub-Commission, on the one hand, established the facts and, on the other hand, found that a friendly settlement between the Parties was not possible. The present Report described the activities of the Sub-Commission in carrying out these two functions.

It was then necessary for the Commission to carry out its two-fold duty in accordance with Article 31 of the Convention:

./.

(1) As regards the establishment of the facts of the case, the Commission has relied upon the written pleadings submitted by the Parties both before and after the Commission's decision on the admissibility of the case, and on the two oral hearings of the Parties and certain witnesses.

These written and oral pleadings being very extensive, the information and arguments contained in them have as far as possible been rationalised and condensed in the present Report.

The full texts of the written pleadings with their numerous annexes and the verbatim records of the oral hearings together with the documents handed in as exhibits are held in the archives of the Commission and are available if required.

(2) The opinion of the Commission has been set out at the end of each Chapter in Part III of this Report which deals with the establishment of the facts in regard to the various points at issue. Statements of individual opinions of certain members of the Commission who have exercised their right under Article 31, paragraph (1) of the Convention and Rule 67 of the Rules of Procedure are also to be found at the end of each Chapter of Part III.

At its 20th Session, held at Strasbourg from 14th to 19th December 1959, the Commission considered the Sub-Commission's Report. It confirmed the finding of the Sub-Commission(1) that there did not appear to be a sufficient basis for a friendly settlement between the Parties. It accordingly proceeded to draw up the present Report which it adopted on 19th December 1959.

./.

(1) See paragraph 155

The following members were present:

Professor C. TH. EUSTATHIADES, acting as President (1)

Professor C.H.M. WALDOCK,
M. P. BERG,
M. P. FABER,
M. L.J.C. BEAUFORT,
M. F.M. DOMINEDO,
Professor A. SUSTERHENN,
M. S. PETREN,
Mme. G. JANSSEN-PEVTSCHIN,
Professor M. SØRENSEN,
Mr. J. CROSBIE,
M. F. SKARPHEDINSSON,
Professor N. ERIM,
Professor F. ERMACORA.

./.

(1) Professor Waldock, President of the Commission, had been appointed by the Applicant as member of the Sub-Commission. Mr. Crosbie had similarly been appointed by the Respondent Government.

PART I

OUTLINE OF THE CASE

The following appears to be the outline of the case as it has been presented by the Parties in their written pleadings and in their oral submissions to the European Commission of Human Rights and the Sub-Commission later set up to deal with the case.

1. The Applicant is a builder's labourer, born in 1936, who normally lives with his family in Dublin.

2. He was first arrested with three other men on 21st September 1956, at Keshcarrigan, Co. Leitrim, having been found in possession of certain firearms including a Thompson machine-gun and ammunition. He admitted on that occasion that he had taken part in an armed raid when guns and revolvers had been stolen. He was subsequently charged on 18th October with unlawful possession of firearms under the Firearms Act, 1925, and under Section 21 of the "Offences Against the State Act, 1939", (hereafter referred to as the "1939 Act").

The Applicant was sent forward, together with the other accused for trial to the Dublin Circuit Criminal Court which, on 23rd November 1956, acquitted him of the charge of unlawful possession of arms. The trial Judge had directed the jury that the requirements for proving the accused's guilt had not been satisfied in that it had not been conclusively shown that no competent authority had issued a firearms certificate authorising him to be in possession of the arms concerned.

3. The Applicant was again arrested in Dublin on 14th May, 1957, under Section 30 of the 1939 Act, on suspicion of engaging in unlawful activities. A sketch map for an attack of certain frontier posts between the Irish Republic and Northern Ireland was found on him and two other compromising documents were found in his house. He was charged:

(a) with possession of incriminating documents contrary to Section 12 of the 1939 Act;

./.

(b) with membership of an unlawful organisation, namely the Irish Republican Army (hereafter referred to as the "I.R.A.") contrary to Section 21 of the 1939 Act.

On 16th May 1957, the Applicant was brought before the Dublin District Court together with three other men who were also charged with similar offences under the 1939 Act. The Court convicted the Applicant on the first charge and sentenced him to one month's imprisonment, but acquitted him on the second charge. The Court record showed that the second charge was dismissed 'on the merits' of the case but no official report of the proceedings appears to be available. The reasons for the Applicant's acquittal are disputed by the Parties. He was released on or about 16th June 1957, after having served his sentence in Mountjoy Prison, Dublin.

4. The "Offences Against the State (Amendment) Act 1940" (hereafter referred to as the "1940 Act") providing for powers of detention, had been brought into force on 8th July 1957, by a Proclamation made on 5th July 1957. The Applicant was re-arrested on 11th July 1957, at Dun Laoghaire when about to embark on a ship for England and was detained for 24 hours at the Bridewell Police Station in Dublin, under Section 30 of the 1939 Act, as being a suspected member of an unlawful organisation, namely the I.R.A.

Detective-Inspector McMahon, who had arrested the Applicant, told the Applicant on the same day that he would be released provided that he signed an undertaking in regard to his future conduct. No written form of the undertaking proposed was put to the Applicant and its exact terms are in dispute between the Parties. In any event, the Applicant refused to agree to sign an undertaking.

On 12th July 1957, the Chief Superintendent of Police, acting under Section 30, Sub-section 3 of the 1939 Act, made an order that the Applicant be detained for a further period of 24 hours expiring at 7.45 p.m. on 13th July 1957.

5. At 6 a.m. on 13th July 1957, however, before the Applicant's detention under Section 30 of the 1939 Act had expired he was removed from the Bridewell Police Station and transferred to the Military Prison in the Curragh, Co. Kildare (known as the "Glass House"). He arrived there at 8 a.m.

on the same day and was detained from that time under an Order made on 12th July 1957, by the Minister for Justice under Section 4 of the 1940 Act. Upon his arrival at the "Glass House" he was handed a copy of the above-mentioned Detention Order in which the Minister for Justice declared that the Applicant was, in his opinion, engaged in activities prejudicial to the security of the State and ordered his arrest and detention under Section 4 of the 1940 Act.

From the "Glass House" the Applicant was transferred on 17th July 1957, to a camp known as the "Curragh Internment Camp" which forms part of the Curragh Military Camp and Barracks in Co. Kildare, and, together with some 120 other persons, was detained there without charge or trial until 11th December 1957, when he was eventually released.

6. On 16th August 1957, the Applicant had been informed that he would be released provided he gave an undertaking in writing "to respect the Constitution of Ireland and the laws" and not to "be a member of, or assist, any organisation which is an unlawful organisation under the Offences Against the State Act, 1939". The Applicant declined to give this undertaking.

7. On 8th September 1957, the Applicant exercised the right conferred upon him by Section 8 of the 1940 Act to apply to have the continuation of his detention considered by a special Commission (hereafter referred to as a "Detention Commission") set up under the same Section of that Act. He appeared before that Commission on 17th September 1957, and was represented by Counsel and solicitors. The Detention Commission which was sitting for the first time made certain procedural rulings and adjourned until 20th September.

On 18th September 1957, however, the Applicant's Counsel also made an application to the Irish High Court, under Article 40 of the Irish Constitution, for a Conditional Order of Habeas Corpus ad subjiciendum. The object of these proceedings was that the Court should order the Commandant of the Detention Camp to bring the Applicant before the Court in order that it might examine and decide upon the validity of his detention. A Conditional Order of Habeas Corpus would have the effect of requiring the Commandant to 'show cause' to the Minister for Justice why he should not comply with that Order.

./.

The Conditional Order was granted on the same date and was served on the Commandant giving him a period of 4 days to 'show cause'. It was also served upon the Detention Commission. The Detention Commission sat on 20th September 1957, and decided to adjourn the hearing sine die pending the outcome of the Habeas Corpus application.

8. The Applicant then applied, by a motion to the High Court, to have the Conditional Order made 'absolute' notwithstanding the fact that the Commandant of the Detention Camp had in the meanwhile 'shown cause' opposing this application. The Commandant had, in this connection, relied upon the Order for the Applicant's detention which had been made by the Minister for Justice.

The High Court sat from 8th to 11th October 1957 and heard full legal submissions made by Counsel for both parties. On 11th October it gave judgment allowing the 'cause shown' and revoking the Conditional Order of Habeas Corpus which it had previously granted to the Applicant.

9. On 14th October 1957, the Applicant appealed to the Supreme Court against this decision of the High Court. The Supreme Court, which is the final court of appeal in Ireland in regard to Habeas Corpus proceedings, sat from 21st to 31st October and the case was fully argued before it by Counsel for the Applicant and for the Irish Government. In particular, arguments were submitted in regard to the application of the Convention of Human Rights which came into force on 3rd September 1953, and which was ratified by Ireland on 25th February 1953. The Supreme Court reserved its decision until 6th November and on that date it confirmed the decision of the High Court and dismissed the Applicant's appeal. It gave its reasoned judgment on 3rd December 1957.

The main grounds of the Supreme Court Judgment were as follows:

(a) the 1940 Act, when in draft form as a Bill, had been referred to the Supreme Court for decision as to whether it was repugnant to the Irish Constitution. The Supreme Court had decided that it was not repugnant and Article 34 (3) 3 of the Constitution declared that no Court had competence to question the constitutional validity of a

law which had been approved as a Bill by the Supreme Court (1).

(b) The Oireachtas (i.e. the Parliament), which was the sole legislative authority, had not introduced legislation to make the Convention of Human Rights part of the municipal law of Ireland. The Supreme Court could not, therefore, give effect to the Convention if it should appear to grant rights other than, or supplementary to, those contained in Irish municipal law. The Executive in the domestic forum could not be estopped from relying upon the domestic law. The Court took no position on the question of whether estoppal might operate as between the High Contracting Parties to the Convention. That being so, the Court did not find it necessary to examine the question whether circumstances existed which would justify derogation under Article 15 of the Convention or whether the 1940 Act violated the Convention.

./.

(1) The 1939 Act had been in force since it was passed on 14th June 1939. When enacted, it contained in Part VI powers giving the Government the right, in certain circumstances, to arrest and detain persons. The High Court, however, subsequently delivered a judgment ordering the release of certain persons who had been detained under the 1939 Act which was then submitted to the Supreme Court for a decision as to its constitutionality. In December, 1939, the Supreme Court declared that the Act was constitutional except for the provisions of Part VI which it found to be repugnant to the Constitution. Accordingly, Part VI of the 1939 Act was repealed.

At the beginning of 1940, powers similar to those contained in Part VI of the 1939 Act were embodied in a new Act already referred to as the "1940 Act". This Act, as a Bill, was declared constitutional by the Supreme Court on 9th February, 1940. Under this Act it required a Proclamation by the Government to bring into force the powers of arrest and detention contained in the Act and this Proclamation, as mentioned above, was made on 5th July, and published on 8th July 1957.

(c) The appellant's period of detention under Section 30 of the 1939 Act was due to expire at 7.45 p.m. on 13th July 1957 At that time he was already being detained under another warrant issued by the Minister for Justice and his detention without release was quite properly continued under the second warrant.

(d) The appellant had not established a prima facie case in regard to his allegation that he had not been told the reason for his arrest under the Minister's warrant. An invalidity in the arrest, even if established, would not, however, have rendered his subsequent detention unlawful whatever rights it might otherwise have given the appellant under Irish law.(

(e) The appellant had been detained by virtue of the Minister's warrant. The appellant had now submitted that the High Court was wrong in law in not holding that the Minister should have supported his warrant by an affidavit setting out his reasons for ordering the detention of the appellant.

The Court could, under the Habeas Corpus Act, 1816, enquire into the bona fides of a detention order but, in this case, the bona fides of the Minister was not challenged. The Court had already decided, when considering the 1940 Act as a Bill, that it had no power to question the opinion of a Minister who issued a warrant for detention under Section 4 of that Act.

(f) The appellant's application for an enquiry into his continued detention was still before the Detention Commission. The appellant now alleged that the Commission had failed properly to discharge its functions in a number of matters affecting his rights. He stated that he was therefore deprived of his only safeguard against indeterminate imprisonment, that he was no longer legally detained and should be released.

The appellant in the habeas corpus proceedings before the High Court had challenged the legality of the constitution of the Detention Commission. Even if it was shown that the Commission's rulings on various procedural matters were wrong, that would not make the

appellant's detention unlawful nor would it provide a basis for an application for habeas corpus. Section 8 of the 1940 Act showed that the Commission was not a court and an application before it was not a court proceeding but no more than an inquiry of an administrative character.

10. In the meanwhile, the Applicant had on 8th November 1957, filed his Application with the European Commission of Human Rights. This Application was registered on 12th November 1957.

11. Following the dismissal of the Applicant's appeal by the Supreme Court, the Detention Commission, after notifying the Applicant's solicitors, continued its hearing on 6th and 10th December 1957.

During these proceedings the Applicant filed a document dated 10th December 1957, as an Affidavit denying various allegations which had been submitted in the Police Report as part of the grounds for his detention. The Attorney-General, appearing on behalf of the Respondent Government, although he objected to the Affidavit being treated as sworn evidence, did not oppose the reading of it to the Detention Commission as an unsworn document. This document was accordingly read to the Detention Commission by the Applicant's Counsel.

The Attorney-General then stated that, if the Applicant was prepared to give an undertaking before the Detention Commission that he would not engage in any unlawful activity within the meaning of the 1939 and 1940 Acts, he would recommend to the Minister for Justice that the Applicant be released forthwith. He did not require the undertaking to be in writing, provided that it was given personally by the Applicant before the Detention Commission. The Applicant agreed to this proposal provided that the Attorney-General would undertake to re-investigate certain allegations made against him before the Detention Commission. The Attorney-General indicated that he would take this course and the Applicant gave the following verbal undertaking to the Detention Commission: "I hereby undertake that I will not engage in any illegal activities under the Offences Against the State Acts, 1939 and 1940."

On the following day, 11th December 1957, the Minister for Justice made an Order under Section 6 of the 1940 Act under which the Applicant was released on the same date.

PART II

HISTORY OF PROCEEDINGS

Chapter I - INSTITUTION OF PROCEEDINGS

12. Introduction and registration of the Application

The Applicant's Statement of Complaint and Claim was submitted to the European Commission by his solicitor, Mr. P.C. Moore of Dublin under cover of a letter dated 8th November 1957. It was registered on 12th November 1957, under File No. 332/57 in the special register kept by the Secretariat of the Commission.

13. Contents of the Application

The Applicant alleged that he had been arrested and detained on 11th July 1957, under the 1939 Act, that on 13th July 1957, his detention was continued under an order of the Minister of Justice under the 1940 Act, and that he was still in detention at the Curragh Internment Camp near Dublin without ever having been brought to trial. He contended that his detention was in violation of the Convention and accordingly claimed:

(a) his release from detention;

(b) payment by the Respondent Government of compensation and damages in regard to his detention;

(c) payment by the Respondent Government of all costs incidental to the proceedings instituted by the Applicant before the Irish Courts and before the European Commission.

By letter of 16th December 1957, the Applicant's solicitor notified the Secretariat that the Applicant had on 11th December been released from detention but that he intended to maintain his claims under (b) and (c) above.

The Applicant in his later pleadings submitted further details as to the basis of his claim and his calculation of damages. These Particulars appear in Part III, Chapter IV of this Report.

./.

14. Report of group of three members

A group of three members (MM. Faber, Crosbie and Brim) considered the Application on 16th December 1957 and made a report to the European Commission.

15. Communication of the Application to the Respondent Government

On 18th December 1957, the European Commission, under the presidency of Professor C.H.M. Waldock, considered the report of the group of three members and decided:

(a) to give notice, in accordance with Rule 45, paragraph 3 (b) of its Rules of Procedure, to the Respondent Government of the Application and to invite that Government to submit within a period of six weeks its observations in writing on the admissibility of the Application;

(b) to make it clear to the Respondent Government that its decision under (a) did not prejudice any decision it might take on admissibility;

(c) to adjourn the examination of the Application until its next plenary session.

The Secretariat accordingly communicated the Application on 19th December to Mr. Woods, the Irish Permanent Representative at the Council of Europe, and invited the Respondent Government to submit its above-mentioned observations before 30th January 1958.

Chapter II - EXAMINATION OF THE ADMISSIBILITY OF THE APPLICATION BY THE PLENARY COMMISSION

16. Outline of proceedings

On 27th January 1958, the Respondent Government submitted its Observations in writing on this Application. On 29th January 1958, the Applicant's solicitor informed the Secretariat that Messrs. Sean MacBride, Thomas J. Conolly and Seamus Sorahan had been retained as Counsel.

17. On the instructions of the President of the European Commission (Order of 31st January 1958), the Observations of the Respondent Government were sent to the Applicant's solicitor who was invited to submit a Reply before 25th February, a date which was later extended at his request to 11th March 1958.

18. The Applicant did not avail himself of this extension and his Reply was submitted on 21st February 1958. It was sent to the Respondent Government on 26th February, with a request that the latter should submit before 27th March, any further Observations which it might wish to make.

19. The Respondent Government submitted its further Observations on 27th March 1958, which were forwarded to the Applicant's solicitor for information on 8th April. The latter was invited to submit before 6th May any replies which he desired to make to the particular questions contained therein.

20. On 12th May, the Applicant's solicitor replied not only to the particular questions but also generally to the Observations.

21. On 14th May, the President of the European Commission made an Order that the Parties, in accordance with Rule 46, paragraph 1, of the Rules of Procedure, be invited to appear before the Commission on 19th June 1958, in order to make oral explanations on the question of the admissibility of the Application.

22. The oral hearing took place on 19th and 20th June and the Parties were represented as follows:

For the Applicant:

Mr. Sean MacBride	-	Senior Counsel
Mr. Thomas J. Conolly	-	Senior Counsel
Mr. Seamus Sorahan	-	Barrister-at-Law
Mr. Ciaran McAnally	-	Solicitor

For the Respondent Government

Mr. Aindrias O Caoimh	- Senior Counsel Attorney-General
Mr. Donough O'Donovan	- Chief State Solicitor
Mr. Brian Walsh	- Senior Counsel
Mr. Anthony Hedderman	- Barrister-at-Law
Mr. Sean Morrissey	- Barrister-at-Law
Mr. Thomas J. Coyne	- Secretary, Department of Justice
Mr. Thomas Woods	- Irish Permanent Representative to the Council of Europe Agent for the Respondent Government

23. At the conclusion of the oral hearing on 20th June 1958, a Statement of Claim, representing a final statement of the Applicant's Conclusions, was filed on behalf of the Applicant in accordance with the suggestion made by the President of the Commission to the Applicant's Counsel.

24. The Submissions of the Parties on the question of Admissibility

The Respondent Government in its written and oral pleadings raised certain objections to the admissibility of the Application and the Applicant in his written and oral pleadings challenged the validity of these objections. The points at issue were as follows:

A. whether or not the Applicant had exhausted domestic remedies under Article 26 of the Convention.

B. whether or not the Application was an abuse of the right of petition within the meaning of Article 27, paragraph (2) of the Convention.

C. whether or not the Application was manifestly ill-founded within the meaning of Article 27, paragraph (2) of the Convention.

D. if the special measures of arrest and detention were found to be in conflict with the provisions of Articles 5 and 6 of the Convention, whether or not those measures were justifiable by reference to Article 15 of the Convention.

E. whether or not the Applicant was precluded, by reason of Article 17 of the Convention, from invoking the provisions of the Convention.

A.

25. As regards the question whether or not the Applicant had exhausted domestic remedies under Article 26 of the Convention

The Respondent Government alleged that, in addition to the remedy in habeas corpus which was exhausted by the Applicant, there were the following remedies available to the Applicant and that at the time when the Application was filed these remedies had not been exhausted:

(a) By way of the Detention Commission set up under Section 8 of the 1940 Act;

(b) By way of giving an 'undertaking' to respect the Constitution and the laws and not to be a member of any unlawful organisation;

(c) By an action for damages in respect of the Applicant's detention from approximately 6 a.m. to 8 a.m. on 13th July 1957.

(a) The Detention Commission set up under Section 8 of the 1940 Act

The Respondent Government's submissions were as follows:

(i) that recourse to the Detention Commission was an effective remedy. It consisted of persons of high status who had no inducement to act in favour of, rather than against, the Government. The Commission was bound to report to the Government if it was satisfied that the detention was groundless. The Commission decided that it had no power to administer an oath but did not decide that it had no power to examine witnesses. It had in fact examined a Chief Superintendent of the Garda Siochana who had been cross-examined by Applicant's Counsel and it had in general conducted a very wide enquiry on the Applicant's case. If it had failed to carry out its legal functions, the High Court would have compelled it to do so by a writ of Mandamus or other form of proceedings;

(ii) that the Applicant did not apply promptly to have his detention reviewed by the Detention Commission which had been set up on 16th July 1957. He had applied on 8th September, although every person on being detained was informed as to his right to review;

(iii) that the Applicant, when filing his Application before the Commission of Human Rights on 8th November 1957, had not exhausted all domestic remedies as his application before the Detention Commission was still pending; it had only been adjourned because the Applicant had decided to proceed by Habeas Corpus proceedings.(1)

The Applicant's submissions were as follows:

(i) that the Attorney-General had stated that the Detention Commission was merely an administrative body and it had been so found by the Supreme Court. It consisted of three members appointed and removable at will by the Government. It made certain rulings which deprived it of any judicial character e.g. that it had no power to administer an oath and, therefore, to examine witnesses; that it could sit in public or private as it wished; that it was not bound by any rules of evidence or such rules as normally govern judicial proceedings. The Detention Commission had no power to recommend compensation. Admittedly a writ of Mandamus could compel the Detention Commission to perform its statutory duty but the courts could not, under Irish procedure, quash findings of the Commission or forbid their continuation under writs of Certiorari or Prohibition The 1940 Act did not provide that the Detention Commission had to inform an applicant of its findings but the Commission need only transmit to the Government a report which 'might never see the light of day'.

./.

(1) Observations of 27th January 1958, particular observations, paragraphs 6 (c), 7 (2); Observations of 25th March 1958, paragraphs 3 (viii) to (xiv); Record of oral hearing of 19th-20th June 1958, pages 56, 60 to 63, 103.

The Irish Supreme Court was the final Court of Appeal and had not said in its judgment that the Applicant should have continued before the Detention Commission. The latter had no power to report upon the legality of a detention but could only state whether it considered there were grounds for its continuation;

(ii) that he applied on 8th September 1957, to have his continued detention reviewed by the Detention Commission. The Commission had only been set up on 16th July 1957, and the Applicant had asked to consult his solicitor on 1st August;

(iii) that the Applicant had not gone before the Detention Commission as a domestic remedy but only with the intention of minimising damages.(1)

(b) By way of giving an 'undertaking' to respect the Constitution and the laws and not to be a member of any unlawful organisation

The Respondent Government's submissions were as follows:

(i) that the Applicant had failed to give an undertaking to respect the Irish Constitution and laws and not to engage in any illegal activities. He had been invited to do so immediately after his arrest on 11th July 1957. Although there was no Statute which compelled the Government to release a person upon giving such an undertaking, the Prime Minister had announced publicly in July 1957 that anyone who did so would be released;

./.

(1) Statement of Complaint and Claim of 8th November 1957 para. 12, and Schedule No. 1 pages 8 to 12; Reply of 21st February 1958, Mr. McAnally's annexed affidavit, paragraphs 14 to 18, 24; further Reply of 12th May 1958, para. 4; Record of oral hearing pp. 6, 85 to 88, 106

(ii) that the Government decided in August 1957 to alter the form of undertaking as it considered detained persons might object to the words "to uphold the Constitution." On 16th August, the Applicant was informed in writing that he would be released if he gave an undertaking in an amended form, but he again refused to do so;

(iii) that the Applicant, as he himself had described, had finally, on 10th December 1957, signed an undertaking before the Detention Commission not to engage in any illegal activities within the meaning of the 1939 and 1940 Acts and had been consequently released on 11th December 1957. The form of undertaking which he had signed was substantially the same as that which he had refused to sign on 11th July. He had not said on 11th July that he objected to the form of undertaking proposed, but would be prepared to give some other undertaking as to his future conduct. This had only arisen at the suggestion of the Attorney-General. In his affidavit of 21st February, 1958 he had not referred to any difference between the two forms of undertaking.(1)

The Applicant's submissions were as follows:

(i) that such an undertaking was not a domestic remedy within the meaning of the Convention;

(ii) that on 11th July, 1957 he had been told that he would be released if he signed an undertaking to respect the Irish Constitution and the laws but that he had refused to do so as he had certain objections to the Constitution and the laws;

./.

(1) Observations of 27th January, 1958, paragraph 23; particular observation, paragraphs 3, 4 and 6; Observations of 25th March, 1958, paragraph 3 (xi - xiv); oral hearing of 19th to 20th June, 1958, Verbatim record, pages 56, 57, 61, 64, 65, 96 to 98, 100, 101.

(iii) that the signing of that undertaking to respect the laws would have prevented him from applying to the Human Rights Commission because his application was based on the invalidity of those laws and their incompatibility with the Convention;

(iv) that, on 10th December 1957, he finally signed an undertaking not to engage in any illegal activities within the meaning of the 1939 and 1940 Acts. He had signed this on condition that his case would be re-investigated and that was the first occasion on which he had been invited to sign an undertaking in such terms;

(v) that 'the right to personal liberty cannot be subject to exaction of any condition which a Government or police officer may seek to impose without a legal authority.' There was no legal sanction entitling the Government to subordinate personal liberty to such conditions. There was no guarantee for the person signing an undertaking that he would not be subject to re-arrest. It had been decided in the American Supreme Court that the right to a passport could not be made subject to the signing of an undertaking (Kent v. John Foster Dulles; Briehl v. John Foster Dulles, published in the London Times of 17th June, 1958). A fortiori the right to liberty could not be subjected to such a condition.(1)

./.

(1) Reply of 21st February 1958, paragraph 23; Applicant's affidavit of 21st February, paragraphs 11 to 15, 17; Mr. McAnally's affidavit of 21st February, paragraphs 30 to 37; further Reply of 12th May, 1958 paragraph 10; Oral hearing of 19th to 20th June, 1958, Verbatim record, pages 11 to 15, 29 to 31, 88 to 90, 93 to 95.

(c) Action for damages in respect of the Applicant's detention from approximately 6 a.m. to 8 a.m. on 13th July, 1957

The Respondent Government submitted:

(i) that the Applicant was detained in the Bridewell Prison from 11th to 13th July 1957, under Section 30 of the 1939 Act. At about 6 a.m. on 13th July he was removed to a Military Detention Prison known as "The Glass House" at the Curragh Military Camp where he arrived at about 8 a.m. He was then handed an order for his arrest and detention made under Section 4 (4) of the 1940 Act;

(ii) that the Applicant could have maintained an action concerning that period which, although admittedly short, formed part of the period covered by the Application. Having regard to the lack of merits of the Application, the Respondent Government was entitled to take all technical points and to insist upon its argument that the Applicant had, in this connection, not exhausted all the domestic remedies available to him. (1)

The Applicant admitted that he could have maintained an action for false imprisonment for that period of two hours but that it had not been considered worth while. (Verbatim record of oral hearings 19th to 20th June 1958).

./.

(1) Observations of 27th January 1958, particular observations, paragraphs 2.6 to 2.8; Verbatim record of oral hearings 19th to 20th June, 1958 pages 65, 66, 69, 90, 103, 104.

B.

26. As regards the question whether or not the Application was an abuse of the right of petition within the meaning of Article 27, paragraph (2), of the Convention

The Respondment Government submitted that:

(i) the Application was an abuse of the right of recourse under Article 25 and subversive of the Convention. It was clearly made for the purpose of publicity and propaganda. The Applicant could have obtained his release by giving an undertaking and the fact that he did not do so and was now maintaining an action for damages showed that his object was publicity, particularly as until 21st February 1958, he had given no reason for his refusal;

(ii) the Applicant had openly flouted the Constitution and laws of his country and refused to recognise its democratically elected Government and lawfully constituted courts. He had refused to give evidence on oath before the Detention Commission and before the courts. He should not have any locus standi before a Commission set up by a Convention, which had been ratified by Ireland, and established within the framework of the Council of Europe of which Ireland was a founder Member;

(iii) that the Applicant's affidavit of 10th December 1958, was full of untrue and irrelevant allegations. Its submission to the European Commission after the release of the Applicant showed that the Application was 'merely vexatious and an abuse of the right of recourse.' (1)

./.

(1) Observations of 27th January 1958, paragraphs 23 to 25, particular Observations, paragraph 7(2); Observations of 25th March 1958, paragraph 8(g); Verbatim Record of oral hearings 19th to 20th June 1958 revised, pages 61, 66, 98 .

The Applicant submitted that:

(i) there was no incompatibility between the Convention and his Application which were both aimed at preventing an irregular and improper mode of dealing with unlawful activities;

(ii) the Application was neither abusive, subversive of the Convention nor made for purposes of publicity and propaganda;

(iii) much of the Respondent Government's Observations of 25th March 1958 were 'untrue, tendentious, misleading or exaggerated' and 'were an attempt to influence the European Commission by means of unfounded charges, allegations and innuendoes';

(iv) his case had not been brought for propaganda purposes. It had been argued before the Irish High Court and Supreme Court and accepted as a matter of vital importance. Moreover, the present proceedings before the European Commission were in camera and not available to the public;

(v) as to the question why he had not given evidence before the Detention Commission, he had not done so because he had filed an affidavit for that purpose. (1)

./.

(1) Reply of 21st February 1958, paragraphs 11, 14; Applicant's affidavit of 21st February 1958, paragraph 10; Reply of 12th May 1958, paragraph 1; Verbatim Record of oral hearings, 19th to 20th June 1958.

C

27. As regards the question whether or not the Application was manifestly ill-founded within the meaning of Article 27, paragraph (2) of the Convention

The European Commission, in its Decision of 30th August 1958, decided to join this issue to the merits of the case (see paragraph 30). In this part of the Report, a brief summary only of the respective contentions of the Parties will be given and a full statement of their submissions will be found under Part III, Chapter I.

Summary

The Respondent Government submitted in general that, having regard to the Applicant's history, activities and membership of an I.R.A. group, the Minister of Justice, on 12th July 1957, made an order under Section 4 of the 1940 Act, for his arrest and detention. He was detained in order to restrain him from persisting in a course of conduct which was a violation of his obligations under the Irish Constitution. Such detention was covered by Article 5, paragraph (1)(b), of the Convention, which provided as a lawful exception a detention 'in order to secure the fulfilment of any obligation prescribed by law'. On this basis the Respondent Government requested the European Commission to declare the Application manifestly ill-founded under Article 27, paragraph (2), of the Convention which stated as follows:

> "The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded....."

The Applicant submitted in general that his arrest and detention without charge or trial was a violation of the Convention, in particular, of Articles 5 and 6. The Respondent Government had suggested that his detention was in order to restrain him from violating an obligation imposed upon him by Article 9, Section 2, of the Constitution. However, even if a civil obligation had been so imposed upon him or if a breach of such an obligation amounted to a criminal offence, he would in either case be entitled, under Article 6, paragraph (1), to 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

./.

D

28. As regards the question whether or not, if the special measures of arrest and detention were found to be in conflict with the provisions of the Convention, those measures were justifiable under Article 15 of the Convention

The European Commission, in its Decision of 30th August 1958, decided to join this issue to the merits of the case (see paragraph 30). In this part of the Report a brief summary only of the respective contentions of the Parties will be found and a full statement of their submissions will be found under Part III, Chapter II.

Summary

The Respondent Government invoked:

(a) Article 15 of the Convention, the terms of which are as follows:

" (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

(b) A letter dated 20th July 1957, addressed by the Department of External Affairs in the following terms to the Secretary-General of the Council of Europe:

" I have the honour to inform you that Part II of the Offences against the State (Amendment) Act, 1940, was brought into force on the 8th July 1957, when a Proclamation made by the Government of Ireland on the 5th July 1957, under Section 3 of the Act was published in the Iris Oifigiuil, the official gazette. A copy of the Proclamation, together with a copy of the Act, is attached to this letter.

2. In so far as the bringing into operation of Part II of the Act, which confers special powers of arrest and detention, may involve any derogation from the obligations imposed by the Convention for the Protection of Human Rights and Fundamental Freedoms, I have the honour to request you to be good enough to regard this letter as informing you accordingly, in compliance with Article 15 (3) of the Convention.

3. The detention of persons under the Act is considered necessary to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution.

4. I have the honour also to invite your attention to section 8 of the Act, which provides for the establishment by the Government of Ireland of a Commission to inquire into the grounds of detention of any person who applies to have his detention investigated. The Commission envisaged by the section was established on the 16th July 1957."

The Respondent Government then submitted that:

(i) if it was found that the arrest and detention of the Applicant was in conflict with Articles 5 and 6 of the Convention, the above-mentioned communication of 20th July 1957, constituted a valid notice of derogation for the purposes of Article 15, paragraph (3) of the Convention;

(ii) the measures providing for arrest and detention were essential to deal with a situation which was fraught with danger for the peaceful existence of the Irish State and for her relations with a neighbouring State and, further, were strictly required by the exigencies of the situation within the meaning of Article 15, paragraph (1) of the Convention.

The Applicant submitted that:

(i) the communication of 20th July 1957 did not constitute a valid notice of derogation from the provisions of the Convention and that, in general, no notice of derogation had been given to the Secretary-General of the Council of Europe which would comply with the requirements of Article 15, paragraph (3);

(ii) alternatively, the measures complained of exceeded in extent those strictly required by the exigencies of the situation within the meaning of Article 15, paragraph (1) of the Convention.

E

29. As regards the question whether or not the Applicant was precluded, by reason of Article 17 of the Convention, from invoking the provisions of the Convention

The European Commission, in its Decision of 30th August, 1958, decided to join this issue to the merits of the case (see paragraph 30.) In this part of the Report a brief summary only of the respective Contentions of the Parties will be found, and a full statement of their submissions will be found under Part III, Chapter III.

Summary

The Respondent Government invoked Article 17 of the Convention, the terms of which are as follows:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

The Respondent Government then submitted that:

> the Applicant, at the time of his arrest on 12th July 1957, was engaged in activities and performing acts aimed at the destruction of the rights and freedoms safeguarded by the Convention. He was at the material times a member of the I.R.A., which had been declared an unlawful organisation, and later a member of a splinter group of the I.R.A. which committed a number of armed outrages.

The Applicant submitted that he was not engaged in activities or performing acts aimed at the destruction of the rights or freedoms safeguarded by the Convention. He admitted that he had been a member of I.R.A. from January to June 1956, and, thereafter, a member of a splinter group until some time towards the end of 1956. Since that time the Applicant had not been a member of any unlawful organisation.

30. Decision of the European Commission of 30th August 1958 on the admissibility of the Application

The European Commission, in its session on 30th August 1958, after having deliberated, declared the Application admissible. It informed the Parties that it would communicate the full text of the decision at a later date.

The full text of the decision of the Commission was communicated to the Parties by letter dated 24th October 1958. The text was as follows:

"The European Commission of Human Rights, sitting in private on 30th August, 1958, under the Presidency of Mr. C.H.M. WALDOCK, the following members being present:

MM. C.Th. EUSTATHIADES, Vice-President
P. BERG
P. FABER
F.M. DOMINEDO
A. SUSTERHENN
S. PETREN
Mme. G. JANSSEN-PEVTSCHIN
MM. J. CROSBIE
M. SØRENSEN
F. SKARPHEDINSSON
N. ERIM

M. P. MODINOS, Director of Human Rights, acting as Secretary to the Commission.

HAVING REGARD to the Application lodged on 8th November 1957, by Gerard Richard LAWLESS (Geraoid O'Laigleis) represented by Mr. Patrick C. Moore, Solicitor, against the Republic of Ireland and registered on 12th November, 1957, under file No. 332/57;

HAVING REGARD to the instrument of ratification whereby the Government of Ireland on 18th February 1953 confirmed and ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms;

./.

HAVING REGARD to the declaration made in accordance with Article 26 of the said Convention on 18th February 1953, whereby the Government of Ireland recognised the competence of the European Commission of Human Rights to receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the said Convention;

HAVING REGARD to the Statement of Complaint and Claim submitted by the Applicant on 8th November, 1957;

HAVING REGARD to the report of 16th December, 1957, provided for in Rule 45, paragraph 1, of the Rules of Procedure of the Commission;

HAVING REGARD to the Decision of the Commission of 18th December, 1957, that notice of the said Application be given to the Government of the Republic of Ireland and that the said Government be invited to submit, within a period of six weeks from the date of giving such notice, its observations in writing as to the admissibility of the said Applicant as a whole;

HAVING REGARD to the written Observations submitted by the Government of Ireland on 27th January, 1958:

to the Reply and Affidavits submitted by the Applicant on 21st February, 1958;

to the Observations submitted by the Irish Government on 25th March, 1958;

to the Reply submitted by the Irish Government on 12th May, 1958;

HAVING REGARD to the oral explanations of the parties made before the Commission on 19th and 20th June, 1958, the Applicant being represented by:

Mr. Sean MacBride, S.C.,
Mr. Thomas J. Connolly, S.C., M.A.,
Mr. Seamus Sorahan, Barrister-at-Law,

as Counsel, and

Mr. Ciaran McAnally,

as Acting Solicitor;

the Government of Ireland being represented by:

Mr. Thomas Woods, Permanent Representative of Ireland to the Council of Europe,

as Agent, and

Mr. Andrias O'Caoimh, S.C., Attorney-General,
Mr. Brian Walsh, Senior Counsel,
Mr. Anthony Hederman, Barrister-at-Law,
Mr. Sean Morrissey, Barrister-at-Law, Legal Adviser, Department of External Affairs,

as Counsel, and

Mr. Donough O'Donovan, Chief State Solicitor,
Mr. Thomas J. Coyne, Secretary, Department of Justice,

as Advisers;

HAVING REGARD to the Statement of Claim, filed by the Applicant on 20th June, 1958, pursuant to the Decision of the Commission dated 20th June, 1958;

THE COMMISSION, having deliberated,

The facts of the case

WHEREAS the facts of the case may be summarised as follows:

WHEREAS the Applicant states that he is a builder's labourer, an Irish national and domiciled in Ireland;

On 14th May, 1957, he was arrested and on 16th May, 1957, charged in the Dublin District Court under Sections

./.

12 and 24 of the "Offences Against the State Act, 1939" (hereinafter referred to as "the Act of 1939") with, respectively, "possession of incriminating documents" and "membership of an unlawful organisation by possession of such documents". He was sentenced to one month's imprisonment on the first but acquitted on the second charge;

On 11th July, 1957, the Applicant was again arrested and detained in the Bridewell Police Prison in Dublin under Section 30 of the Act of 1939, as being a suspected member of an illegal organisation;

On 12th July, 1957, the Chief Superintendent of Police, acting under Section 30 of the Act of 1939, made an Order that the Applicant be detained for a further period of 24 hours expiring at 7.45 p.m. on 13th July, 1957;

In the morning of 13th July, 1957, the Applicant was transferred to the Curragh Military Camp, County of Kildare, and was first detained in a Military Detention Prison and later, on 17th July, 1957, in an Internment Camp. On 13th July, 1957, while in the Internment Camp, he was handed a copy of an Order made on 12th July, 1957, by the Minister for Justice pursuant to Section 4 of the "Offences Against the State (Amendment) Act, 1940" (hereinafter referred to as "the Act of 1940") and ordering his arrest and detention;

On 11th July, 1957, the Applicant was informed in writing that he would be released forthwith on giving a written undertaking that he would respect the Constitution and the Laws of Ireland and would not be a member of, or assist, any organisation declared unlawful under the Act of 1939. The Applicant declined for alleged political and religious reasons to give such undertaking;

On 8th September, 1957, the Applicant applied to the Government to have the continuation of his detention considered by a Commission set up under Section 8 of the Act of 1940 (hereinafter referred to as "the Internment Commission");

The Internment Commission held sittings on 17th September and 20th September, 1957, in the presence of the Applicant and his Counsel. At the session of 20th September the hearing was adjourned sine die, pending the outcome of proceedings regarding a Conditional Order of Habeas Corpus ad subjiciendum, which the Applicant had applied for on 18th September, 1957, and subsequently obtained from the High Court. The said Order was directed to the Commandant in charge of the Curragh Internment Camp.

./.

The Motion of the Applicant, dated 30th September, 1957, for an Order to have the Conditional Order made absolute notwithstanding cause shown, was heard on 8th October, 1957, by the High Court which after further hearings on 9th, 10th, 11th and 16th October, 1957, allowed the cause shown and discharged the Order.

On 14th October, 1957, the Applicant appealed from the Order of the High Court to the Supreme Court asking that that Order be reversed, the appeal be allowed and the Conditional Order of Habeas Corpus be made absolute. The hearing of this Appeal began on 21st October and was concluded on 31st October, 1957. On 6th November, 1957, the Supreme Court announced its decision refusing the appeal and affirming the Order of the High Court allowing the cause shown and on 3rd December, 1957, delivered its judgment.

On 6th and 10th December, 1957, the Internment Commission continued its hearings during the course of which the Applicant filed an affidavit denying various allegations which had been submitted in the Police Report as being parts of the grounds for the Applicant's detention. Following the reading of this affidavit, the Attorney-General stated that he would be prepared to recommend the Applicant's release if the latter would give assurance that he would not in the future engage in any illegal activities. The Applicant agreed provided that the Attorney-General would undertake to re-investigate the charges made against the Applicant before the Internment Commission. The Attorney-General indicated that he would take this course. On 11th December, 1957, the Applicant was released from detention.

WHEREAS it is now alleged by the Applicant that his arrest and imprisonment under the Act of 1940 without charge or trial constituted a breach of the Convention and, in particular, of the provisions of Articles 5 and 6 thereof;

WHEREAS in his Statement of Complaint and Claim of 8th November, 1957, the Applicant requested the Commission to take all steps within its competence to secure:

"(a) the immediate release from imprisonment;

(b) the payment of compensation and damages by the Irish Government for his imprisonment from 12th July, 1957, to the date of his release;

(c) the payment by the Irish Government of all the costs and expenses of and incidental to the proceedings instituted by the Applicant to secure his release in the Irish Courts and before the Commission of Human Rights."

WHEREAS the Applicant stated in a letter of 16th December, 1957, to the Secretary-General of the Council of Europe that, notwithstanding his release from internment, he wished to maintain his application before the Commission and that his claim was solely for damages;

WHEREAS the Applicant declared in his Statement of Claim, filed on 20th June, 1958, that he claimed payment of compensation and damages for his imprisonment by the Respondent Government:

"(a) From the 12th day of July, 1957 (the date upon which the Warrant for the imprisonment of the Complainant pursuant to the provisions of the Offences Against the State (Amendment) Act, 1940, was signed by a Minister of the Respondent Government), to the 11th day of December, 1957;

(b) In the alternative, as and from 6 a.m. on the 13th day of July, 1957, (the hour at which the Complainant was removed from the Bridewell Police Prison) to the 11th day of December, 1957;

(c) In the further alternative, as and from 8 a.m. on the said 13th day of July, 1957, (the hour at which the Complainant became a prisoner at the Military Internment Camp) to the 11th day of December, 1957.";

The Applicant further claimed payment by the respondent Government of all the costs and expenses of, and incidental to, the proceedings instituted by him in the Irish Courts and before the Commission;

WHEREAS the respondent Government has requested the Commission to reject the Application and declare it inadmissible, on grounds which may be summarised as follows:

(i) the Applicant did not comply with Article 26 of the Convention, in that he failed to exhaust the domestic remedies which were open to him;

(ii) the Application is an abuse of the right of recourse;

(iii) the Application is inadmissible under the provisions of Article 17 of the Convention;

(iv) the Application does not disclose any violation of the rights set forth in the Convention; ./.

(v) Article 15 of the Convention permits derogation and the Irish Government addressed in this respect a letter to the Secretary-General of the Council of Europe, dated 20th July, 1957;

DECIDES as follows:

1. As regards the exhaustion of domestic remedies

Whereas Article 26 of the Convention provides that "the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken";

Whereas it is not disputed that under the laws in force in the Republic of Ireland a person claiming to be illegally detained has available to him certain remedies before the ordinary courts, and in particular proceedings for habeas corpus and an action for false imprisonment;

Whereas the Applicant sought to obtain his release by proceedings for habeas corpus in the High Court; whereas the responsible officers of the Republic made answer that the Applicant was detained under powers conferred on them by Section 4 of the Act of 1940; whereas the High Court held,

(1) that the Act of 1940 is not open to challenge on constitutional grounds since the Supreme Court has already ruled that its provisions are not in conflict with the Constitution (In re Article 26 of the Constitution and the Offences against the State, Amendment Bill, 1940; 1940 Irish Reports, p. 470);

(2) that the European Convention for the Protection of Human Rights and Fundamental Freedoms does not have the force of law within the Republic of Ireland, so that, even if it were to be assumed that a conflict exists between the provisions of the Act of 1940 authorising detention without trial and the provisions of the Convention concerning liberty and security of the person, that would not affect the right of the Government to invoke and rely upon the provisions of the Act of 1940 in the Courts of the Republic; and

(3) That, in consequence, it was a sufficient answer to the Applicant's proceedings for habeas corpus to show that he was detained by the responsible officers of the Government under powers conferred on them by the Act of 1940;

and whereas the decision of the High Court was upheld by the Supreme Court on substantially the same grounds and no further appeal was open to the Applicant;

Whereas it appears evident that the grounds which led the High Court and the Supreme Court to dismiss the Applicant's claim in the proceedings for habeas corpus would have equal force in proceedings by the Applicant for false imprisonment or in any other proceedings in the ordinary Courts of the Republic brought by the Applicant with respect to his detention under the Act of 1940; whereas, therefore, any such further proceedings open to the Applicant in the ordinary Courts of the Republic with respect to his detention under the Act of 1940 did not offer him a reasonable prospect of success and must be regarded as ineffective remedies, and whereas it follows that under the generally recognised rules of international law it was not necessary for the Applicant to have recourse to such further domestic remedies before submitting his case to the Commission;

Whereas, however, the respondent Government points out that the Applicant's claim is for compensation with respect to his detention from the 12th July, 1957, to the date of his release, that from the 12th July until early on the 13th July he was held in the Bridewell Police Prison under powers contained in the Act of 1939 and that on the 13th July he was removed by police officers from that prison to the Curragh Internment Camp, where he was detained under an order made by the Ministry of Justice pursuant to the Act of 1940; whereas it also points out that in the habeas corpus proceedings before the High Court and Supreme Court the Applicant complained that, when he was removed from the prison to the camp he was not informed of the place where he was being brought nor the grounds on which he was being taken there into custody; whereas it further states that the Supreme Court itself intimated in the habeas corpus proceedings that, if these allegations were well-founded, that part of the Applicant's arrest was illegal; whereas the respondent Government contends that at any rate, in respect of the brief period covering the transfer of the Applicant from the Bridewell Police Prison to the Curragh Internment Camp, the Applicant had available to him an action for false imprisonment which he made no attempt to use; and whereas it further contends that, even if this ground of objection should appear to be somewhat technical, it ought to be given full weight since, in the Government's view, the Applicant's claim is politically inspired and unmeritorious;

Whereas at the oral hearing Counsel for the Applicant conceded that an action for false imprisonment could technically have been maintained with respect to a period of

approximately two hours covering the period of his transfer from the Bridewell Police Prison to the Curragh Internment Camp; whereas, however, he also stated that the Applicant did not consider it to be worth while to pursue that action;

Whereas in paragraph 24 of the Application the Applicant's claim was formulated in general terms as a claim to compensation and damages "for his imprisonment in violation of the Convention from the 12th July, 1957, to the date of his release"; whereas the Order made by the Minister for Justice ordering the Applicant's detention under the Act of 1940 was in fact made on 12th July, 1957, although it was not actually executed until early the following morning; whereas the detention of the Applicant from "the 12th July, 1957, to the date of his release" extended in all over a period of 153 days; whereas, therefore, whatever action for false imprisonment may have been open to the Applicant with respect to the brief period of two hours covering his transfer from the Bridewell Police Prison to the Curragh Internment Camp, or with respect to any other period between 12th July, 1957, and his detention under the Act of 1940 at the Camp at 8 a.m. the following day, relates to an infinitesimal part of the period of detention which is the subject of his claim; and whereas a judgment in the Applicant's favour in any such action for false imprisonment could not in any way have altered his position with respect to the subsequent period of his detention under the Act of 1940; whereas it follows that the Commission must hold any such action for false imprisonment to have been an ineffective remedy with respect to the claim which is the subject of the Application;

Whereas it remains a question whether the Applicant's failure to institute an action for false imprisonment with respect to some brief period before his detention in the Curragh Internment Camp has the consequence that his claim to compensation with respect to that period must be excluded from consideration; whereas, however, the facts relating to this question form an integral link in the facts on which the Applicant's whole claim is based; whereas for this reason the Commission considers it desirable to defer its decision on this question until after the investigation of the facts of the case; and whereas accordingly the Commission reserves its decision on this question until a later stage in the proceedings;

Whereas, in general, with respect to the subject of this Application, the Applicant must be held to have exhausted the domestic remedies available in the ordinary

Courts of the Republic according to the generally recognised rules of international law;

Whereas, however, the generally recognised rules of international law required the Applicant to exhaust not merely the remedies in the ordinary Courts but the whole system of legal remedies available in the Republic;

Whereas the Act of 1940 provided in Section 8 for the establishment of a special Commission, namely the Internment Commission, to which persons detained under the Act might apply to have their cases examined; whereas Section 8 provided that the Commission should consist of three persons, of whom one should be a commissioned officer of the Defence Forces with not less than seven years' service, and the other two should be barristers or solicitors of not less than seven years' standing or should be or have been a judge of the Supreme Court, High Court, Circuit or District Court; and whereas Section 8 further provided that on an application being made to the Government by a detained person to have his case examined:

"(a) the Government shall, with all convenient speed, refer the matter of the continuation of such person's detention to the Commission;

(b) the Commission shall inquire into the grounds of such person's detention and shall, with all convenient speed, report thereon to the Government;

(c) the Minister for Justice shall furnish to the Commission such information and documents (relevant to the subject-matter of such inquiry) in the possession or procurement of the Government or of any Minister of State as shall be called for by the Commission;

(d) if the Commission reports that no reasonable grounds exist for the continued detention of such person, such person shall, with all convenient speed, be released;";

Whereas it clearly appears from paragraph (d) that a report of the Commission recommending the release of a detained person is binding upon the Government and effective to secure his release; whereas, moreover, it is common ground between the Parties that, if the Internment

./.

Commission were to decline to examine a case or to render a report, it would be open to the detained person to apply for a mandatory order from the High Court to compel the Internment Commission to examine the case and to render a report;

Whereas, therefore, the question is raised by Section 8 of the Act of 1940 whether the right which it gives to persons detained under the Act to have recourse to the Internment Commission is to be considered a domestic remedy the exhaustion of which is required by Article 26 of the Convention; whereas, however, it is unnecessary for the present Commission to pronounce upon this question because:

(a) the Applicant is no longer in detention and the Application, although originally framed so as to include a demand for the Applicant's release, is now confined to a demand for compensation and damages;

(b) it clearly appears from Section 8 - and this is not disputed by the respondent Government - that the power of the Internment Commission is confined to a power to recommend the release of the detained person and does not extend to recommending an award of damages or compensation;

(c) the right of recourse to the Internment Commission under Section 8 is not therefore an effective remedy for the purpose of securing the redress which now forms the object of the Application;

Whereas it is true that the Application was filed on 8th November, 1957, at which date the Applicant was still in detention and his case was still under consideration by the Internment Commission; whereas it is also true that at that date the Application, as previously stated, included a demand for the Applicant's release; and whereas, on the hypothesis that the right of recourse to the Internment Commission is a domestic remedy within the meaning of Article 26 of the Convention, the respondent Government contends that the Commission ought not to entertain the Application because the conditions laid down in that Article had not been fulfilled when it was filed;

Whereas, even if it be accepted that the Application was out of order when it was filed on 8th November, 1957, by reason of the Applicant's failure to exhaust the domestic remedies available for obtaining his release, account

has to be taken of the facts that subsequently the Applicant obtained his release from detention and wrote to the Commission amending his claim so as to limit it to compensation and damages; whereas the present Commission, as an international tribunal, is not bound to treat questions of form with the same degree of strictness as might be the case in municipal law (Mavrommatis Palestine Concessions Case, Permanent Court of International Justice, 1924, Series A, No. 2, page 34); whereas the Applicant's letter of 16th December, 1957, stating that, notwithstanding his release, he wished to maintain his Application with respect to the claim for compensation and damages, should properly be regarded as in substance a resubmission of his Application amended so as to exclude the demand for his release and to confine it to a demand for compensation and damages; whereas the Commission has already held that the right of recourse to the Internment Commission is not an effective domestic remedy with respect to the Applicant's demand for compensation and damages; and whereas it follows that, even if the original Application is regarded as having been defective in that it was filed without first exhausting the remedy before the Internment Commission, the Application was not subject to that defect in the form in which it was presented to the Commission in the letter of 16th December, 1957;

Whereas it has also been contended by the respondent Government that the Applicant could have secured his release from detention at any time by giving an undertaking to respect the Constitution and the laws and by agreeing not to be a member of any unlawful organisation; that on 11th July, 1957, while under detention in the Bridewell Police Prison, the Applicant was informed that he could secure his release by this means; and that by not availing himself of this means of obtaining his release, the Applicant failed to exhaust a domestic remedy open to him;

Whereas it suffices to observe that the signing of such an undertaking by a detained person and the release of a detained person upon signing such an undertaking was not a procedure for which provision was made by law; and whereas, in consequence, that procedure cannot be considered to be a domestic remedy within the meaning of the generally recognised rules of international law concerning the exhaustion of domestic remedies and is not a remedy the exhaustion of which is called for under Article 26 of the Convention;

./.

Whereas, finally both the original Application and the letter of 16th December, 1957, amending it, were filed within six months of the date on which the Supreme Court gave its final decision on the Applicant's proceedings for habeas corpus;

The Commission decides that, for the several reasons above stated, the contention that the Application is inadmissible on the ground of an alleged failure to comply with the provisions of Article 26 of the Convention must be rejected.

2. As regards Article 17 of the Convention

Whereas Article 17 of the Convention provides:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention";

Whereas the respondent Government contends that prior to June, 1956, the Applicant was known to be a member of an unlawful organisation, the so-called Irish Republican Army (hereinafter referred to as the I.R.A.); that after a split in that organisation the Applicant was a member of a minority group which committed a number of armed outrages; that on 21st September, 1956, the Applicant was one of four men discovered by the Garda Siochana in a disused shed at Keshcarrigan, County of Leitrim; that these men were in possession of arms and admitted that they were members of the I.R.A. and that one of them was identified as the Applicant; that on 18th October, 1956, the four men were charged in the Dublin District Court under the Fire Arms Act of 1925 and the Criminal Justice Act of 1951; that on 25th October, 1956, at a hearing in the said Court, the Applicant admitted that he was a member of the I.R.A.; that the acquittal of the Applicant by the Dublin Circuit Criminal Court on 23rd November, 1956, did not involve a declaration of innocence, but was decided on the grounds that the technical requirements of proving that the accused did not hold firearms certificates had not been fully complied with; that on 14th May, 1957, the Applicant was arrested on suspicion of engaging in unlawful activities and that, when searched, a sketch map was found of the border village of Pettigo with markings to indicate a British

./.

Customs and Police Barracks and with the words "Infiltrate, Annihilate, Destroy" written on the map; that the Applicant admitted ownership of that map; that on 18th May, 1957, the Applicant was sentenced in the Dublin District Court to one month's imprisonment for possession of incriminating documents; that his acquittal on the same occasion on a charge of membership of an unlawful organisation was no proof of his innocence since, having convicted him on the first count of possessing incriminating documents, the Court simply dismissed the remaining charges without investigating them; that while in prison he consorted with members of the above-mentioned minority group and after his release from prison he resumed his association with the same group; and whereas the Government submits that these several circumstances show that the Applicant was a member of a subversive organisation engaged in activities aimed at undermining the institutions of the Republic established to protect the rights and freedoms guaranteed in the Convention; that the Applicant was himself a person engaged in activity aimed at the destruction of such rights and freedoms, including notably the most fundamental right of all, the right to life; and that, in consequence, he is debarred by Article 17 from himself invoking the protection of the Convention in the present case;

Whereas the Applicant, in his affidavit of 21st February, 1958, stated that he had ceased to be a member of any unlawful organisation at the time of his arrest on 11th July, 1957; that he had in fact withdrawn his support from, and severed all connections with, the I.R.A. and the above-mentioned minority group; whereas the Applicant, inter alia, relied upon his acquittal by the Dublin District Court on 18th May, 1957, of a charge of being a member of an unlawful organisation; and whereas he submitted that in general the allegations of the respondent Government in regard to him were untrue or exaggerated;

Whereas in Application No. 250/57, the German Communist Party Case, the Commission held that members of an organisation, which was found to be engaged in activities aimed at the destruction of the rights and freedoms set forth in the Convention, were debarred by Article 17 from invoking in their own favour the provisions of the Convention concerning freedom of association; whereas the possibility that the principle applied in the German Communist Party Case may be applicable in the present case is not excluded by a prima facie consideration of the statements of the Parties and the evidence so far submitted to the

./.

Commission; whereas, however, in the present case there is a direct conflict of view between the Parties on a crucial point of fact, namely, whether the Applicant had or had not ceased to be a member of an illegal organisation or group engaged in activities of the kind covered by the provisions of Article 17, when he was arrested on 11th July, 1957, and subsequently detained under the Act of 1940; and whereas the Commission is not in possession of sufficient evidence to enable it to pronounce now upon that point of fact; and whereas also that point of fact is closely connected with matters arising upon the merits of the Applicant's claim;

The Commission decides to join to the merits the respondent Government's preliminary objection founded upon Article 17 of the Convention.

3. As regards Article 15 of the Convention

Whereas Article 15 of the Convention provides:

"(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

Whereas the Department of External Affairs of the respondent Government addressed a letter to the Secretary-General of the Council of Europe, dated 20th July, 1957, which read as follows:

"I have the honour to inform you that Part II of the Offences against the State (Amendment) Act, 1940, was brought into force on the 8th July, 1957, when a Proclamation made by the Government of Ireland on the 5th July, 1957, under section 3 of the Act was published in the Irish Oifigiuil, the official gazette. A copy of the Proclamation, together with a copy of the Act, is attached to this letter.

2. In so far as the bringing into operation of Part II of the Act, which confers special powers of arrest and detention, may involve any derogation from the obligations imposed by the Convention for the Protection of Human Rights and Fundamental Freedoms, I have the honour to request you to be good enough to regard this letter as informing you accordingly, in compliance with Article 15 (3) of the Convention.

3. The detention of persons under the Act is considered necessary to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution;

4. I have the honour also to invite your attention to section 8 of the Act, which provides for the establishment by the Government of Ireland of a Commission to inquire into the grounds of detention of any person who applies to have his detention investigated. The Commission envisaged by the section was established on the 16th July, 1957."

Whereas, if the arrest and detention of the Applicant under the Act of 1940 should be considered by the Commission to have been inconsistent with the provisions of Articles 5 and 6 of the Convention, the respondent Government relies on its powers under Article 15, paragraph 1, to take measures derogating from its obligations under the Convention; and whereas it refers to its letter of 20th July, 1957, as a sufficient notification of such measures to the Secretary-General and of the reasons for them;

Whereas the Applicant contests the view of the Government that in July, 1957, there was in the Republic of Ireland "a public emergency threatening the life of the nation" within the meaning of Article 15, paragraph 1, and the view that, if there was such a public emergency, the special powers of arrest and detention exercisable under the Act of

1940 were measures "strictly required by the exigencies of the situation"; and whereas the Applicant further appears to challenge the right of the Government to rely upon its letter of 20th July, 1957, as a notification to the Secretary-General under paragraph 3 of Article 15;

Whereas both the question whether in July, 1957, there was in existence a "public emergency, threatening the life of the nation", and the question whether the special powers of arrest and detention exercisable under the Act of 1940 were measures strictly required by the exigencies of the situation depend on matters of fact which are in dispute between the parties; whereas the Commission is not in possession of sufficient evidence to enable it to form an opinion now upon these matters of fact; and whereas these matters of fact are closely connected with matters arising upon the merits of the Applicant's claim;

The Commission decides to join to the merits the respondent Government's preliminary objection founded upon Article 15 of the Convention.

4. As regards the question whether the Application is inadmissible under Article 27, paragraph 2, of the Convention as being manifestly ill-founded

Whereas Article 27, paragraph 2, of the Convention provides that the Commission shall declare inadmissible any Application filed under Article 25 which it considers to be manifestly ill-founded;

Whereas the respondent Government represents that the Applicant was arrested and detained in July, 1957, in order to restrain him from persisting in a course of conduct violating the obligations of loyalty to the Republic imposed on all citizens by the Constitution and endangering the lives and limbs of others; whereas it contends that such arrest and detention was justifiable because Article 5, paragraph 1 (b) of the Convention expressly envisages that in accordance with a procedure prescribed by law a person may be made the subject of a lawful arrest or detention "in order to secure the fulfilment of any obligation prescribed by law" and because paragraph 3 of that Article, which requires an arrested or detained person to be brought before a judge or other judicial authority within a reasonable time does not apply to cases under paragraph 1 (b); and whereas, alternatively, it contends that the arrest and detention of the Applicant was justifiable because paragraph 1 (c) of Article 5 expressly envisages that, in accordance with a procedure prescribed by

law, a person may be made the subject of a lawful arrest or detention "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence" and because, in its view, paragraph 3 is not applicable to the case of a person arrested when it was reasonably necessary to prevent him from committing an offence in view of the impossibility under Irish law of putting a person on trial merely for intending to commit a crime;

Whereas, however, the Applicant contends that either the obligation imposed upon him by Article 9, Section 2, of the Constitution constitutes a civil obligation within the meaning of Article 6, paragraph 1, of the Convention or alternatively the breach thereof must be a criminal offence; that in either case he was entitled under Article 6 of the Convention to a fair and public hearing within a reasonable time by an independent and impartial judicial tribunal, established by law; that, if the breach of the said Constitutional obligation constitutes an "offence" within the terms of Article 5 (1)c, the Applicant was likewise entitled to a trial within a reasonable time or to release pending trial by virtue of Article 5 (3) of the Convention; that the interpretation which the respondent Government seeks to place on Article 5, paragraph 1 (b), would negative the provisions of Article 5, paragraph 3, and Article 6, paragraph 1, of the Convention and deprive them of all force and effect and cannot therefore be correct; that, if the breach of the constitutional obligation constitutes an "offence", the lawful arrest or detention of a person on reasonable suspicion of having committed such an offence or where it was reasonably considered necessary to prevent his committing such offence, which is authorised by Article 5, paragraph 1 (c), can only be an arrest or detention for the purpose of subsequently bringing him before the competent legal authority for trial and not for the purpose of indefinite detention without trial;

Whereas at this stage of the proceedings the Commission's task, in deciding whether the Application is inadmissible under Article 27, paragraph 2, as manifestly ill-founded, is limited to determining whether a prima facie examination of the facts of the case and the statements of the Parties does or does not disclose any possible ground on which a breach of the Convention could ultimately be found to be established; and whereas it cannot be concluded from a prima facie examination of the facts and

./.

the statements of the Parties in the present case that there is no possible ground on which a breach of the Convention could ultimately be found to be established;

The Commission accordingly rejects the respondent Government's contention that the Application is inadmissible under Article 27, paragraph 2 of the Convention, as being manifestly ill-founded.

5. As regards the question whether the Application is inadmissible under Article 27, paragraph 2, of the Convention as being an abuse of the right of petition

Whereas the respondent Government contends that it was open to the Applicant at any time to secure his own immediate release by signing the above-mentioned undertaking to respect the Constitution and the laws and by agreeing not to be a member of any unlawful organisation; whereas it also contends that, by refusing to do so, the Applicant failed to make use of a means which he had in his own hands to put an end to his detention and by thus failing to mitigate the damage disentitled himself from claiming compensation; whereas it further contends that the Application was inspired by motives of publicity and political propaganda; and whereas it submits that for these various reasons the Application should be held to be vexatious and an abuse of the right of petition within the meaning of Article 27, paragraph 2, of the Convention;

Whereas the Applicant takes the position that the Government by the act of detaining him committed a violation of the Convention; that the signing of an undertaking to obtain release was not a procedure which had any legal basis; and that he himself had certain scruples in regard to the signing of the undertaking;

Whereas the question as to what extent the Applicant could and should have mitigated the damage is a question which relates to the merits and cannot be determined at this stage of the proceedings; and whereas the fact that the Application was inspired by motives of publicity and political propaganda, even if established, would not by itself necessarily have the consequence that the Application was an abuse of the right of petition, and whereas in any event that fact is not one which can be determined until after a full examination of the merits of the case; and whereas in general the question whether the present Application constitutes an abuse of the right of petition depends upon the outcome of the issue whether or not the Applicant has been the victim of a fundamental breach of the Convention, which issue essentially belongs to the merits and cannot be decided at this stage of the proceedings;

The Commission accordingly rejects the respondent Government's contention that the Application is inadmissible under Article 27, paragraph 2, of the Convention, as being an abuse of the right of petition.

Whereas, to sum up,

1. As regards the exhaustion of domestic remedies under Article 26 of the Convention

The Commission rejects the contention of the respondent Government that the Application is inadmissible on the ground of an alleged failure to comply with the provisions of Article 26 of the Convention with regard to the exhaustion of domestic remedies;

2. As regards Article 17 of the Convention

The Commission decides to join to the merits the respondent Government's preliminary objection founded upon Article 17 of the Convention;

3. As regards Article 15 of the Convention

The Commission decides to join to the merits the respondent Government's preliminary objection founded upon Article 15 of the Convention;

4. As regards the question whether the Application is inadmissible under Article 27, paragraph 2, of the Convention as being manifestly ill-founded

The Commission rejects the respondent Government's contention that the Application is manifestly ill-founded;

5. As regards the question whether the Application is inadmissible under Article 27, paragraph 2, of the Convention, as being an abuse of the right of petition

The Commission rejects the respondent Government's contentien that the Application is an abuse of the right of petition.

Now therefore the Commission

DECLARES THIS APPLICATION TO BE ADMISSIBLE"

Chapter III - PROCEEDINGS BEFORE THE SUB-COMMISSION

I. APPOINTMENT OF THE SUB-COMMISSION

31. The Application having been declared admissible by the European Commission on 30th August 1958, the President laid down 22nd September as a time-limit before which the Parties should state whether they wished to avail themselves of the right, as set out in Article 28, paragraph 2, of the Convention, of appointing each a person of their choice as a member of the Sub-Commission.

32. The Respondent Government, in a letter from its Agent of 17th September, appointed Mr. James Crosbie as the member of its choice and the Applicant's solicitor, in a letter of 18th September, appointed the President of the European Commission as the member of his choice and, if the President did not accept, M. Süsterhenn or M. Eustathiades in that order.

33. The President of the European Commission, in accordance with Article 29 of the Convention and Rules 15 and 18 of the Rules of Procedure, carried out on 15th November the drawing by lot of the remaining five members of the Sub-Commission and their three substitutes. The resulting composition of the Sub-Commission, as communicated to the parties on 25th November, was as follows:

Members:

Mr. C.H.M. Waldock - appointed by the Applicant
Mr. J. Crosbie - appointed by the Respondent Government
M. F.M. Dominedo
M. C.Th. Eustathiades
M. P. Faber
M. P. Berg
M. N. Erim

Substitutes:

M. Sørensen
M. Süsterhenn
M. L.J.C. Beaufort

In pursuance of Rule 20, paragraph 1, of the Rules of Procedure M. Eustathiades assumed the duties of President of the Sub-Commission.

II. SESSIONS AND MEETINGS

34. The Sub-Commission held the following sessions and meetings:

(a) 23rd and 24th March 1959
(b) 17th and 20th April 1959
(c) 26th and 27th June 1959
(d) 3rd and 4th July 1959
(e) 3rd and 4th [illegible]ber 1959
(f) 14th November 1959

The oral hearing of the Parties took place during the Session at (b) from 17th to 19th April 1959.

III. EXAMINATION OF THE APPLICATION WITH REPRESENTATIVES OF THE PARTIES BY MEANS OF WRITTEN AND ORAL PLEADINGS

35. The Secretariat, acting on the instructions of the President of the Commission, in a letter to the Applicant's solicitor of 8th September 1958, invited the latter to submit within a period of 6 weeks his arguments and conclusions on the case. In a further letter to the Applicant's solicitor of 10th October 1958, the Secretariat stated that this time-limit had been extended by a further period of 4 weeks to run as from the date of the receipt by the Applicant's solicitor of the full text of the decision of the Commission.

36. On 20th November 1958, the Applicant's Memorial, entitled 'Arguments and Conclusions', was filed with the Secretariat together with 8 schedules.

37. On 25th November 1958, the Secretariat, acting on the instructions of the President of the Sub-Commission, sent the Applicant's 'Arguments and Conclusions' to the Respondent Government and informed it that the President had fixed a time-limit of six weeks, namely until 6th January 1959, for the submission by the Respondent Government of its Counter-Memorial. This time-limit was extended, at the request of the Respondent Government, until 20th January 1959.

38. The Respondent Government's Counter-Memorial dated 12th January 1959, reached the Secretariat on 22nd January. This was sent to the Applicant, who, on the instructions of the President of the Sub-Commission, was asked to submit his Reply within three weeks, namely before 16th February 1959. At the request of the Applicant, this time-limit was extended by an Order of the President to 23rd February 1959.

39. The Applicant's Reply of 19th February 1959, was served on the Agent of the Respondent Government on 21st February 1959, which was asked to submit to the Sub-Commission before 14th March 1959 any Observations which it might desire to make.

40. The Observations of the Respondent Government of 12th March 1959, were communicated to the Applicant for information.

41. The Sub-Commission in its meeting of 23rd to 24th March 1959, after deliberating, took a decision, which was communicated to the Parties on 26th March 1959(1) and in which it invited the representatives of the Parties to appear before it at an oral hearing on 17th to 18th April 1959, to make certain explanations. At the same time it invited the Applicant and Inspector McMahon to appear as witnesses in order to furnish information on certain points. These two witnesses were invited to appear at the expense of the Council of Europe. At the meeting of 23rd to 24th March 1959 M. Süsterhenn acted as substitute for M. Dominedo as M. Sørensen, the first substitute, was unable to attend.

42. On 1st April 1959, the Applicant's solicitors informed the Secretariat that the Applicant had accepted the Sub-Commission's invitation to appear personally at the hearing on 17th and 18th April 1959.

43. On 4th April 1959, the Agent of the Irish Government informed the Secretariat that Inspector McMahon would also be present at the oral hearing.

44. The oral hearing took place on 17th to 19th April 1959.

The Sub-Commission was composed as follows:

M. C. Th. Eustathiades - President
Mr. C.H.M. Waldock - nominated by the Applicant
Mr. J. Crosbie - nominated by the Respondent Government
M. P. Berg
M. P. Faber
M. N. Erim
M. A. Süsterhenn - substitute member replacing M. Dominedo.

---

(1) For text see paragraphs 100 and 127 below.

The Parties were represented as follows:

For the Applicant:

Mr. Sean MacBride	- Senior Counsel
Mr. Thomas J. Conolly	- Senior Counsel
Mr. Seamus Sorahan	- Barrister-at-Law
Mr. Patrick C. Moore	- Instructing Solicitor
Mr. Ciaran McAnally	- Instructing Solicitor

For the Respondent Government:

Mr. Aindrias O Caoimh	- Senior Counsel Attorney-General
Mr. Brian Walsh	- Senior Counsel
Mr. Sean Morrissey	- Barrister-at-Law
Mr. Anthony Hedderman	- Barrister-at-Law
Mr. Donough O'Donovan	- Chief State Solicitor
Mr. Peter Berry	- Secretary, Department of Justice

45. The two witnesses made statements and were questioned by the President, members of the Sub-Commission and representatives of both Parties. The Sub-Commission then delivered a decision on 20th April 1959 in which it referred to the submissions of the Parties and the evidence of the two witnesses at the oral hearing.

46. At the same time, it invited the Parties to state whether they wished to avail themselves of the assistance of the Sub-Commission, in accordance with Article 28 paragraph (b) of the Convention, in order to attempt to reach a friendly settlement. And, if so, to submit their suggestions in regard to such a settlement of the case. (For full details see Part IV of this Report).

47. The Applicant and Respondent Government replied to the Sub-Commission's invitation by letters of 25th May, 22nd June and 9th July 1959, and of 30th May and 23rd June 1959 respectively and the Sub-Commission met on 3rd and 4th July 1959 to deliberate.

./.

The Sub-Commission was on that occasion composed as follows:

M. C. Th. Eustathiades - President
Mr. C.H.M. Waldock - Member mominated by the Applicant
M. Sørensen - Substitute member appointed by the Respondent Government to replace Mr. Crosbie
M. P. Berg
M. P. Faber
M. N. Erim
M. A. Süsterhenn - Substitute member replacing M. Dominedo

48. On 9th July 1959, on the instructions of the Sub-Commission, the Secretariat wrote a further letter to the Parties stating that their above-mentioned replies did not appear to provide a basis for a solution of the case by means of a friendly settlement, but recalling that the Sub-Commission continued to be at the disposal of the Parties for that purpose.

The Applicant's solicitor acknowledged that letter in a further letter of 14th July 1959.

49. The Sub-Commission met again on 3rd and 4th September 1959 to deliberate and to draft its report to the Commission. The following members were present:

M. C. Th. Eustathiades - President
M. C.H.M. Waldock - nominated by the Applicant
Mr. J. Crosbie - nominated by the Respondent Government
M. P. Berg
M. P. Faber
M. F.M. Dominedo
M. A. Süsterhenn - Substitute member replacing M. Erim

50. The Sub-Commission then met in Paris on 14th November 1959 to complete its report to the Commission and it adopted it on the same day.

The Sub-Commission was on that occasion composed as follows:

M. C. Th. Eustathiades - President
Mr. C.H.M. Waldock - nominated by the Applicant
Mr. J. Crosbie - nominated by the Respondent Government
M. P. Berg
M. P. Faber
M. F.M. Dominedo
M. N. Erim

M. A. Süsterhenn was also present, at the request of the Sub-Commission.

PART III

ESTABLISHMENT OF THE FACTS AND OPINIONS OF THE COMMISSION

Points at issue

51. In the light of the European Commission's Decision of 30th August 1958, as mentioned in Part II, paragraph 30, of the Report, the task of the Sub-Commission was to establish the facts in regard to the following points :

1. Whether the measures of detention and arrest taken by the Respondent Government against the Applicant conflicted with the Convention, in particular Articles 5, 6 and 7;

2. If the Applicant's detention is found to be in conflict with Articles 5 and 6, whether it is justifiable by reference to the right of derogation under Article 15 of the Convention;

3. Whether the Applicant was precluded from invoking certain of the rights and freedoms set out in the Convention as a result of the application to him of Article 17;

4. The estimation, if appropriate, of any damages, compensation and costs to be awarded to the Applicant.

These four issues are dealt with in Chapters I to IV below. The relevant opinion of the Commission is set out at the end of each Chapter.

CHAPTER I

The question whether the measures of arrest and detention taken by the Respondent Government against the Applicant were in conflict with the Convention, in particular Articles 5, 6 and 7

A. The question whether there was a violation of Articles 5 and 6 of the Convention

52. A more comprehensive summary of the factual background of the case appears at Part I of the Report and paragraph 54 below simply sets out those facts which relate particularly to the question of the arrest and detention of the Applicant.

53. In order to appreciate the legal aspects of the Applicant's arrest and detention, it is necessary first to set out the relevant provisions of the Irish law:-

"Offences Against the State Act, 1939"(1)
Section 21

"(1) It shall not be lawful for any person to be a member of an unlawful organisation.

(2) Every person who is a member of an unlawful organisation in contravention of this section shall be guilty of an offence under this section and shall -

(a) on summary conviction thereof, be liable to a fine not exceeding fifty pounds or, at the discretion of the court, to imprisonment for a term not exceeding three months or to both such fine and such imprisonment, or

(b) on conviction thereof on indictment, be liable to imprisonment for a term not exceeding two years."

Section 30:

"(1) A member of the Garda Siochana (if he is not in uniform on production of his indentification card if demanded) may without warrant stop, search, interrogate, and arrest any person, or do any one or more of those things in respect of any person, whom he suspects of having committed or being about to commit or being or having been concerned in the commission of an offence under any section or sub-section of this Act or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act or whom he suspects of carrying a document relating to the commission or intended commission of any such offence as aforesaid.

./.

(1) Already referred to as the 1939 Act.

(2) Any member of the Garda Siochana (if he is not in uniform on production of his identification card if demanded) may, for the purpose of the exercise of any of the powers conferred by the next preceding sub-section of this section, stop and search (if necessary by force) any vehicle or any ship, boat, or other vessel which he suspects to contain a person whom he is empowered by the said sub-section to arrest without warrant.

(3) Whenever a person is arrested under this section, he may be removed to and detained in custody in a Garda Siochana station, a prison, or some other convenient place for a period of twenty-four hours from the time of his arrest and may, if an officer of the Garda Siochana not below the rank of Chief Superintendent so directs, be so detained for a further period of twenty-four hours.

(4) A person detained under the next preceding sub-section of this section may, at any time during such detention, be charged before the District Court or a Special Criminal Court with an offence or be released by direction of an officer of the Garda Siochana, and shall, if not so charged or released, be released at the expiration of the detention authorised by the said sub-section.

(5) A member of the Garda Siochana may do all or any of the following things in respect of a person detained under this section, that is to say:-

(a) demand of such person his name and address;

(b) search such person or cause him to be searched;

(c) photograph such person or cause him to be photographed;

(d) take, or cause to be taken, the fingerprints of such person.

(6) Every person who shall obstruct or impede the exercise in respect of him by a member of the Garda Siochana of any of the powers conferred by the next preceding sub-section of this section or shall fail or refuse to give his name and address or shall give, in response to any such demand, a name or an address which is false or misleading shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six months."

"Offences Against the State (Amendment) Act, 1940" (1)

Section 4

" (1) Whenever a Minister of State is of opinion that any particular person is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State, such Minister may by warrant under his hand and sealed with his official seal order the arrest and detention of such person under this section.

(2) Any member of the Gárda Síochána may arrest without warrant any person in respect of whom a warrant has been issued by a Minister of State under the foregoing sub-section of this section.

(3) Every person arrested under the next preceding sub-section of this section shall be detained in a prison or other place prescribed in that behalf by regulations made under this Part of this Act until this Part of this Act ceases to be in force or until he is released under the subsequent provisions of this Part of this Act, whichever first happens.

(4) Whenever a person is detained under this section, there shall be furnished to such person, as soon as may be after he arrives at a prison or other place of detention prescribed in that behalf by regulations made under this Part of this Act, a copy of the warrant issued under this section in relation to such person and of the provisions of Section 3 of this Act.

(5) Every warrant issued by a Minister of State under this section shall be in the form set out in the Schedule to this Act or in a form to the like effect."

In addition, it is relevant to bear in mind the following provision of the Irish Constitution:

Article 9, Section 2

'Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens.' ./.

(1) Already referred to as the 1940 Act.

54. The Applicant was arrested on 11th July 1957 and detained for 24 hours in the Bridewell Police Station in Dublin under Section 30 of the 1939 Act, as being a suspected member of an illegal organisation, namely the I.R.A.

On 12th July 1957, the Chief Superintendent of Police, acting under Section 30 of the 1939 Act, made an order that the Applicant be detained for a further period of 24 hours, expiring at 7.45 p.m. on 13th July 1957.

The Applicant's detention under Section 30 of the 1939 Act ceased, however, at 6 a.m. on 13th July 1957, when he was taken from the Bridewell Police Station and transferred to the Military Prison in the Curragh (the "Glass House"). He arrived there at 8 a.m. on the same day and was detained from that time by virtue of an order made on 12th July 1957 by the Minister for Justice pursuant to Section 4 of the 1940 Act.

From the "Glass House" the Applicant was transferred on 17th July 1957 to the Curragh Internment Camp where he remained until 11th December 1957, the date on which he was eventually released.

At no time during the above period was the Applicant either charged or brought to trial before a court of law.

55. As already mentioned in Part II, paragraph 30, the European Commission, in its Decision of 30th August 1958, found that the Application was not manifestly ill-founded and decided to join to the merits the question of the violation of Articles 5 and 6 of the Convention. It had considered that its task at that stage was simply to determine whether a prima facie examination of the case showed that any ground existed on which it might ultimately be found that a violation of the Convention had occurred. In this respect, it decided that such a prima facie examination of the case did not justify the exclusion of the possibility of a violation.

56. Summary of submissions of the Parties to the European Commission

The following is a summary of the arguments submitted at that stage by the Parties to the European Commission.

The Respondent Government submitted:

(a) that the Applicant had been arrested in July 1957, in order to restrain him from persisting in a course of conduct which violated obligations of loyalty imposed on all citizens by the Constitution;

(b) that such arrest and detention were justified, as Article 5, paragraph 1 (b) of the Convention provided that a person may be lawfully arrested and retained in order to secure the fulfilment of any obligation prescribed by law; moreover, in such cases, Article 5, paragraph (3), which requires that an arrested or detained person be brought before a judge within a reasonable time, does not apply;

(c) that, alternatively, the Applicant's arrest and detention were justifiable because Article 5, paragraph (1)(c) of the Convention provided that a person may be lawfully arrested and detained 'for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence.' Article 5, paragraph (3), was not applicable in the case of a person arrested to prevent his committing an offence as it was impossible under Irish law to put a person on trial simply for a criminal intention.

The Applicant submitted:

(a) that either the obligation imposed upon him by the Constitution was a civil obligation within the meaning of Article 6, paragraph (1) of the Convention or a breach of that obligation must be a criminal offence. In either case he was entitled under Article 6 of the Convention to a fair and public hearing within a reasonable time by an independent and impartial tribunal;

(b) that, if the breach of that obligation was an 'offence' under Article 5 paragraph (1)(c) of the Convention, he would still be entitled to trial within a reasonable time or to release pending trial under Article 5, paragraph (3);

(c) that the interpretation put by the Respondent Government on Article 5, paragraph (1)(b) would nullify the provisions of Article 5, paragraph (3) and Article 6, paragraph (1) of the Convention. If the breach of the above-mentioned obligation was an 'offence', the lawful arrest or detention of a person on reasonable suspicion of having committed such an 'offence' or to prevent his committing it, is authorised under Article 5, paragraph (1)(c), could only be an arrest or detention for the purpose of bringing him to trial and not for an indefinite detention without trial.

57. Summary of submissions of the Parties to the Sub-Commission

During the establishment of the facts by the Sub-Commission, the written submissions of the Parties were contained in an exchange of written pleadings and the oral submissions were made at the hearing before the Sub-Commission on 17th to 19th April 1959. They were as follows:

58. Memorial of the Applicant

The Applicant, in his Memorial, (entitled 'Arguments and Conclusions'), of 20th November 1958, submitted that his imprisonment from 12th July, alternatively from 13th July 1957, until 11th December 1957, without trial, charge or the intervention of the due process of law constituted a violation of the Convention, in particular of Articles 5 and 6(1)

59. Counter-Memorial of Respondent Government.

The Respondent Government, in its Counter-Memorial of 12th January 1959, submitted that there had been no violation of Articles 5 or 6 of the Convention for the following reasons:

(a) The Applicant had been arrested and detained in order to prevent him committing an offence against public order and security. This was allowed for under Article 5, paragraph (1)(c) of the Convention and this provision was not, in the present case, subject to Article 5, paragraph (3). The Applicant had been detained under the 1940 Act for an intention to commit a criminal offence. Such an intention was not itself an offence and the Irish Courts had decided that a person so detained was not detained on a criminal charge. Detention in these circumstances need not be followed by a 'trial' within the meaning of Article 5, paragraph (3); ./.

(1). Paragraph 1 of 'Arguments and Conclusions'

(b) Arrest and detention under the 1940 Act was not arbitrary as a person so detained was entitled to challenge the legality of his arrest and detention in the Irish Courts. The Applicant had done this by means of habeas corpus proceedings;

Further, the warrant of detention was signed by a Minister of State, in this case by the Minister of Justice, and only signed when he considered from police information that the person concerned was engaged in activities prejudicial to the security of the State;

(c) In a dispute between an individual and his government, a presumption existed in favour of the legality of the 'acts of that government' and should be applied by the Commission.(1)

60. Reply of Applicant

The Applicant, in his Reply of 19th February 1959, to the Respondent Government's contentions, submitted as follows:

(a) that all the allegations made against him constituted criminal offences cognizable by the Irish Courts, namely the ordinary Criminal Courts, the Special Criminal Courts or Military Courts. The Applicant had denied these allegations in affidavits and could have been charged with perjury if the facts stated therein were untrue. The Commission should not undertake the trial of offences as this was the function of the domestic courts and the Applicant had not submitted evidence for that purpose;

(b) that the Respondent Government's submissions as to the construction of Articles 5 and 6 of the Convention would render those Articles ineffective. Arbitrary imprisonment without trial was not permitted by the Convention. Apart from the 1940 Act the legal position as to such imprisonment was set out in the High Court judgment in "The State (Burke) v. Lennon and the Attorney-General" (Irish Reports 1940, page 136). Article 6, paragraph (1) of the Convention gave the right to a fair and public hearing to a person in the determination both of his civil rights and obligations and of any criminal charge. The Applicant would, therefore, still be entitled to trial in the Irish Courts even if the Respondent Government's argument that there was no question of a criminal charge was accepted;

./.

(1) Paras. 22 to 24, 31, 47, 49, 56 (a) of Counter Memorial

(c) that the decision of the Supreme Court in the Applicant's case rendered the remedy of habeas corpus illusory. By virtue of that decision, the Irish Courts must refuse release to any Applicant in habeas corpus proceedings where the authority detaining him produced a warrant signed by a Minister of State under Section 4 of the 1940 Act. The Supreme Court had decided that a Minister could exercise the powers under Section 4 provided that he had formed an opinion as described in that Section and that the validity of such an opinion could not be questioned in any court;

(d) that the onus of proof was on the Respondent Government to show that the Applicant's detention under the 1940 Act was in conformity with the Convention. There should not be a presumption, as suggested in paragraph 31 of the Counter-Memorial, in favour of a Government as against an individual. This would imply a limitation of the rights of the individual which was not expressed in the Convention.

If it should be held that there was such a presumption, the Applicant would contend that this presumption would be displaced as soon as a prima facie breach of the Convention was disclosed.

The arbitrary imprisonment of the Applicant was such a prima facie breach of Articles 5 and 6 of the Convention.(1)

61. Rejoinder of Respondent Government

The Respondent Government, in its Observations of 12th March 1959, made no new submissions but repeated generally that detention under the 1940 Act was not in conflict with the Convention and that nothing had been done in relation to the Applicant which violated its provisions.(2)

62. The Sub-Commission made no reference to this issue of violation of Articles 5 and 6 in its Decision of 24th March 1959, in which it invited the Parties and two witnesses (the Applicant and Detective-Inspector McMahon) to appear before it to give certain explanations on other points.

./.

(1) (Paragraphs 5, 6, 18, 19, 21, 22, 31, 33 of the Reply. Schedule No. 4)

(2) (Paragraphs 3 to 5 of the Observations.)

63 Oral hearing

At the oral hearing before the Sub-Commission on 17th to 19th April 1959, the Parties made brief submissions on this question.(1)

The Applicant repeated that Article 5, paragraph (1)(b) of the Convention referred to lawful arrest or detention of a person to secure the fulfilment of 'any obligation prescribed by law' as being an exception to the absolute right of liberty. Requiring a person to sign an undertaking as a condition of liberty was not, however, an obligation prescribed by law.

On behalf of the Applicant, reference was made in this connection to the United States cases of Kent against John Foster Dulles and Briehl against John Foster Dulles in which it was decided that it was not permissible under the rule of law to compel a person to sign an undertaking in order to secure a passport. The Applicant submitted that a fortiori it was not permissible to impose such a requirement as a condition of liberty.

The submission was also repeated on behalf of the Applicant that Article 5, paragraph (3) of the Convention clearly applied to Article 5, paragraph (1)(c).

The Respondent Government's representative stated that he did not intend again to deal with these legal issues.

64. OPINION OF THE COMMISSION

The Commission considers that the arrest and detention of a person upon the order of a Minister of State under Section 4 of the Offences Against the State (Amendment) Act, 1940, is a measure which does not fall within any of the categories of cases listed in Article 5, paragraph 1, of the Convention as cases in which it is permitted to deprive a person of his liberty.

Under paragraph 1 deprivation of liberty is authorised in six separate categories of cases. Four of these categories, namely, subparagraphs (a), (d), (e) and (f), have no possible application to arrest and detention under Section 4 of the 1940 Act. It is therefore only subparagraphs (b) and (c) which come into consideration in the present instance and in the course of the proceedings the Respondent Government has invoked each of these subparagraphs as justifying the introduction of that measure. ./.

(1) Verbatim Record of Oral Hearing pp. 81, 82, 91 to 95, 134, 153, Exhibit F.

Subparagraph (b) authorises: "the lawful arrest or detention of a person for non-compliance with the lawful order of a Court or to secure the fulfilment of any obligation prescribed by law". The contention of the Respondent Government, in effect, is that the arrest and detention, upon the order of a Minister of State, of a person who in his opinion is engaged in activities prejudicial to the preservation of public peace and order or to the security of the State is an example of an arrest or detention "to secure the fulfilment of an obligation prescribed by law". In the view of the Commission, however, the words in subparagraph (b) "in order to secure the fulfilment of any obligation prescribed by law" do not contemplate arrest or detention for the prevention of offences against the public peace and public order or against the security of the State but for securing the execution of specific obligations imposed by law. That this is the intention of subparagraph (b) is clear and for more than one reason. In the first place, it is the natural meaning of the words "in order to secure the fulfilment of any obligation" in the English text and of the words "en vue de garantir l'exécution d'une obligation" in the French text. Secondly, arrest or detention on suspicion of having committed a crime and in order to prevent the commission of an offence is dealt with in the very next subparagraph. Thirdly, the interpretation of subparagraph (b) for which the Respondent Government contends, if it were adopted, would go some way towards undermining the right to liberty and security of the person guaranteed in Article 5 and it is unthinkable that the Signatories of the European Convention on Human Rights intended subparagraph (b) to have such an effect. This consideration has all the greater force when it is remembered that the guarantees of liberty and security of the person in Article 5 are also an essential foundation of the rights guaranteed to persons by Article 6 in regard to the determination of any criminal charge against them.

Subparagraph (c), on which the Respondent Government also relies, authorises: "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent him committing an offence or fleeing after having done so." The difficulty here, from the point of view of the Respondent Government, is that even if it be assumed that arrest and detention under Section 4 of the 1940 Act falls within the terms of subparagraph (c), this subparagraph has to be read in conjunction with paragraph 3 of Article 5. Paragraph 3 states: "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial ....". The 1940 Act, although it provides that a person arrested and detained under Section 4 shall have the right to have the continuation of his detention considered by a commission of inquiry, does not give such person any right to be brought before a judge or other judicial officer or to have his case tried. The Respondent Government has sought to meet this difficulty by contending, in effect, that when a person is arrested and detained in order to prevent him from committing an offence, it is not possible under Irish Law to bring him to trial merely for his criminal intention and that the right to be brought before a judge and to be tried within a reasonable time is not therefore capable of application to the case of arrest and detention for the purpose of preventing the commission of an offence. Thus, according to the Respondent Government, paragraph 3 of Article 5 must be understood as applying only to a person arrested or detained in order to bring him before the competent legal authority on reasonable suspicion of having committed an offence or in order to prevent him from fleeing after having committed an offence.

In the opinion of the Commission, the Respondent Government's contention is in direct conflict with the plain terms of paragraph 3 of Article 5 which states categorically that <u>everyone</u> arrested or detained in accordance with the provisions of paragraph 1 (c) shall be brought promptly before a judicial officer and shall be entitled to trial within a reasonable time.

Whether the criminal law of the Republic of Ireland does or does not make it possible to bring to trial on a criminal charge a person arrested and detained on the grounds that "it is reasonably considered necessary to prevent him committing an offence" is beside the point.

Paragraphs 1 (b) and 1 (c) of Article 5 provide clearly and categorically that under the Convention a State may not arrest and detain a person upon those grounds except upon the conditions that he is brought promptly before a judicial officer and that he has the right to trial within a reasonable time or to release pending trial.

It is also to be observed that the Respondent Government's contention involves a method of interpreting paragraph 1 (c) which does not appear to be justifiable. That contention requires the words "effected for the purpose of bringing him before the competent legal authority" to be read as applying only to the case of a person arrested or detained "on reasonable suspicion of having committed an offence." In the opinion of the Commission, however, both the English and French texts of paragraph 1 (c) make it clear that those words apply equally to the cases of persons arrested or detained "when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so." Furthermore, if reference is made to the French text, the language confirms that the Article is not susceptible of the interpretation contended for by the Respondent Government. Thus, in the opinion of the Commission, it is clear that paragraph 1 (c) only authorises an arrest or detention of a person "effected for the purpose of bringing him before the competent legal authority". Arrest or detention under Section 4 of the 1940 Act is not such a case.

The Commission is, therefore, of the opinion that arrest or detention under Section 4 of the 1940 Act is not a measure which is authorised by Article 5, paragraph 1 of the Convention It follows that the Respondent Government can only justify the measure in question, by showing that, in the particular circumstances of the case, the measure was permissible as a legitimate exercise of the powers conferred by Article 15 upon a State.

B. The question whether there was a violation of Article 7 of the Convention

65. Memorial of the Applicant

The Applicant in his Memorial (entitled 'Arguments and Conclusions') of 20th November 1958, submitted that the 1940 Act was brought into force on 8th July and he had been arrested on 11th July 1957. Even if there had been proof that the Applicant was, before 8th July, a member of an unlawful organisation, Article 7, paragraph (1), of the Convention would preclude the application of a law to an act which, when committed was not an offence involving the extraordinary penalties provided for under that law.(1)

66. Counter Memorial of Respondent Government

The Respondent Government in its Counter-Memorial of 12th January 1959 stated that it did not understand the Applicant's contention in this respect and that there was no question of the Applicant being held guilty of a criminal offence on account of any act which did not constitute an offence at the time when it was committed.(2)

67. Reply of Applicant

The Applicant, in his Reply of 19th February 1959, submitted that, in the proceedings before the Detention Commission in December 1957, all the accusations made against him related to alleged incidents occurring before 8th July 1957. The Minister of State, when signing the warrant of detention, must be of an opinion that the person concurred was at that time engaged in the activities described in Section 4 of the 1940 Act. He could not take into account matters alleged to have occurred before the coming into force of that part of the 1940 Act. It was on these grounds that the Applicant had submitted that there had been a violation of Article 7 of the Convention which provided that a person should not be held guilty of an offence in respect of an act which did not constitute an offence at the time when it was committed.

It was significant that the Respondent Government had in its Counter-Memorial included for the first time an allegation of an overt act occurring after 8th July 1957 and constituting an offence under the 1939 and 1940 Acts, namely the alleged admission by the Applicant to Inspector McMahon on 11th July 1957, that he was a member of an unlawful organisation.

./.

(1) Paragraph 5 (c) of Arguments and Conclusions

(2) Paragraph 48 of Counter-Memorial.

68. Opinion of the Commission

The Commission does not consider that Article 7 of the Convention applies in the present case. The Applicant was not detained as a result of a conviction on a criminal charge, nor was his detention a "heavier penalty" within the meaning of Article 7. Moreover, Section 4, paragraph (1) of the 1940 Act under which the Applicant was detained, provides that the Minister of State must be of the opinion that the person ordered to be detained is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State. It is, therefore, clear that a person is only liable to be detained under Section 4 of the 1940 Act if a Minister of State is of the opinion that the person in question at a date subsequent to the power of detention conferred by Section 4 being brought into force is engaged in activities prejudicial to the preservation of public peace and order or the security of the State. Accordingly, there is no question of Section 4 being retroactive in its operation.

CHAPTER II

Right of derogation under Article 15 of the Convention

A.

Introduction - The texts, the submissions of the Parties and the Commission's Decision of 30th August 1958

69. As the Commission has stated, its opinion that the detention of the Applicant was in conflict with Articles 5 and 6 of the Convention, the question now arises whether that detention is justified by derogation under Article 15.

70. Article 15 of the Convention on Human Rights states as follows:

> "(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
>
> (3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

71. Legislation concerned

The legislation which is the subject of this Application is the "Offences Against the State Act, 1939" and the "Offences Against the State (Amendment) Act, 1940" (already referred to as the "1939 Act" and "1940 Act" respectively). The 1939 Act has been in force since its enactment and the 1940 Act was brought into force by means of a Government Proclamation of 5th July 1957, which was published in the Irish Official Gazette on 8th July 1957.

72. Communication to the Secretary-General of the Council of Europe

On 20th July 1957, the Department of External Affairs of the Respondent Government addressed the following letter to the Secretary-General of the Council of Europe:

"I have the honour to inform you that Part II of the Offences against the State (Amendment) Act 1940, was brought into force on the 8th July 1957, when a Proclamation made by the Government of Ireland on the 5th July 1957, under section 3 of the Act was published in the Iris Oifigiuil, the official gazette. A copy of the Proclamation, together with a copy of the Act, is attached to this letter.

2. In so far as the bringing into operation of Part II of the Act, which confers special powers of arrest and detention, may involve any derogation from the obligations imposed by the Convention for the Protection of Human Rights and Fundamental Freedoms, I have the honour to request you to be good enough to regard this letter as informing you accordingly, in compliance with Article 15 (3) of the Convention.

3. The detention of persons under the Act is considered necessary to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution.

4. I have the honour also to invite your attention to section 8 of the Act, which provides for the establishment by the Government of Ireland of a Commission to inquire into the grounds of detention of any person who applies to have his detention investigated. The Commission envisaged by the section was established on the 16th July 1957."

73. Arrest and detention of the Applicant

A full statement of the circumstances of the Applicant's arrest and detention appears at Part I of this Report.

It is recalled that the Applicant was arrested in Dublin on 11th July 1957, and detained under Section 30 of the 1939 Act. His detention was continued on 13th July under

a detention Order made by the Minister for Justice under Section 4 (4) of the 1940 Act. He was released from the Detention Camp on 11th December 1957, having given an undertaking as to his future conduct during proceedings before a Detention Commission set up under Section 8 of the 1940 Act.

74. Summary of submission of the Parties to the European Commission

The Respondent Government stated that, if the Applicant's arrest and detention under the 1940 Act were held by the European Commission to have been in conflict with Articles 5 and 6 of the Convention, it relied upon its powers to derogate under Article 15, paragraph (1) of the Convention. In this connection, it referred to its letter of 20th July 1957, as being a sufficient notification to the Secretary-General of the Council of Europe of the measures taken and the reasons therefor.

The Applicant submitted:

(a) that there was not in July 1957 in Ireland a 'public emergency threatening the life of the nation' within the meaning of Article 15, paragraph (1);

(b) that, if there was such an emergency, the special powers of arrest and detention under the 1940 Act were not measures 'strictly required by the exigencies of the situation';

(c) that the Respondent Government was not entitled to rely upon its letter of 20th July 1957 as being a notification to the Secretary-General under Article 15, paragraph 3 of the Convention.

75. The European Commission's Decision of 30th August 1958

The Commission decided to join to the merits of the case the Respondent Government's preliminary objection based upon Article 15 of the Convention. It considered that the question of the existence of a public emergency and the question whether the special powers of arrest and detention under the 1940 Act were measures strictly required by the exigencies of the situation depended on matters of fact which were closely tied with the merits of the case and which were in dispute between the Parties. The European Commission did not consider that it had sufficient evidence at that stage to reach a decision on those matters. (See above, paragraph 30).

76. Consideration of the case by the Sub-Commission

The main questions arising out of the Commission's Decision of 30th August 1958 were as follows:

(a) Was the Respondent Government entitled to rely upon its letter of 20th July 1957, to the Secretary-General of the Council of Europe as constituting a notification to the Secretary-General within the meaning of Article 15, paragraph (3) of the Convention?

(b) Was there in Ireland in July 1957, a 'public emergency threatening the life of the nation' within the meaning of Article 15, paragraph (1) of the Convention?

(c) If so, were the special powers of arrest and detention exercisable under the 1940 Act measures which were 'strictly required by the exigencies of the situation' within the meaning of Article 15, paragraph (1), of the Convention?

The submissions of the Parties in regard to each of these questions, as contained in their pleadings and as made orally before the Sub-Commission, are set out in detail below.

./.

A.

The question whether the Respondent Government was entitled to rely upon its letter of 20th July 1957, to the Secretary-General of the Council of Europe as constituting a notification to the Secretary-General within the meaning of Article 15, paragraph (1) of the Convention.

77. Memorial of the Applicant

The Applicant in his Memorial, (entitled 'Arguments and Conclusions' of 20th November 1958.) submitted:

(a) that the Respondent Government had not pleaded derogation in any written memorandum submitted by it, although the Applicant in his Reply of 12th May 1958, at paragraph 6 had specifically asked the Government to state its intention in that respect. In the oral hearing on 19th June 1958, this question was again raised and the Attorney-General replied as follows:

> "As I have said, if this Commission considers that the detention of persons engaged in, or who might otherwise engage in, illegal activities, is a violation of Article 5 of the Convention, then we rely on the fact that it may become necessary to derogate from the terms of the Convention in order to overcome a graver evil. We do rely on that, Sir.".

That statement was not a plea of derogation, but was 'merely an indication that, in the event of an adverse finding by the Commission, the Respondent Government may then plead derogation.'

Derogation under Article 15 had, therefore, not been pleaded and might never be pleaded by the Irish Government. It did not now arise before the Sub-Commission or Commission;

(b) that the Minister for External Affairs, on 23rd October 1957, informed Dail Eireann that he had been advised that the bringing into operation of the powers of arbitrary arrest and imprisonment did not involve a violation of the Convention. It had, moreover, never been pleaded in the Irish Courts that Article 15 of the Convention could be, or had been, invoked in the present situation;

./.

(c) that the letter of the Respondent Government to the Secretary-General of 20th July 1957, was not in valid compliance with Article 15, paragraph (3) because;

(i) it did not give, as a reason for the measures taken, grounds which would permit derogation under Article 15, paragraph (1), namely the existence of a 'time of war or other public emergency threatening the life of the nation'. The grounds given were, on the contrary:

- 'to prevent the commission of offences against public peace and order'; and

- 'to prevent the maintaining of military or armed forces other than those authorised by the Constitution'.

These two reasons in no way showed that the life of the nation was thereby threatened;

(ii) it did not inform the Secretary-General of the measures taken by the Government.

The letter stated, at paragraph 3, that 'the detention of persons is considered necessary to prevent the commission of offences ...', while the 1940 Act only empowers a Minister to imprison 'when he is of opinion that such person is engaged' in certain activities.(1)

78. Counter-Memorial of the Respondent Government

The Respondent Government in its Counter-Memorial of 12th January 1959, submitted that the Applicant's argument that the notice of derogation was invalid was irrelevant.

Article 15 did not provide for the giving of any form of 'notice of derogation', but provided that a Party derogating should keep the Secretary-General informed of the measures taken and the reasons therefor. Derogation was not conditional on giving such information to the Secretary-General

./.

(1) Paragraphs 8 and 9 of Memorial.

although it was clear that the communication to the Secretary-General must be subsequent to the taking of the measures. The purpose of the communication was to keep the other Parties informed of the measures which one Party had deemed it necessary to take.

The Government had at the earliest opportunity informed the Secretary-General in the most comprehensive terms of the measures taken and of the reasons therefor. Copies of all relevant statutes and documents were sent to the Secretary-General with the Government's communication of 20th July 1957 (1).

79. No further submission was made by the Parties in regard to this issue either in their written pleadings or in their oral submissions before the Sub-Commission on 17th to 19th April 1959.

80. OPINION OF THE COMMISSION

Paragraph 3 of Article 15 of the Convention imposes on a High Contracting Party a duty to inform the Secretary-General of the Council of Europe of any exercise by it of the right reserved in that Article to derogate from the provisions of the Convention in time of war or other public emergency threatening the life of the nation. The task of the Commission, with regard to the present Application, is to state its attitude on the question whether the letter addressed on 20th July 1957 by the Irish Department of External Affairs to the Secretary-General of the Council of Europe, concerning the bringing into force of the 1940 Act, was a sufficient compliance with this duty, having regard to the nature and date of the communication and to the information contained in it concerning the measures taken and the reasons therefor.

Although paragraph 3 of Article 15 is drafted in general terms, the Commission considers that certain particulars are required. A High Contracting Party should notify the Secretary-General of the measures in question without any unavoidable delay and must furnish sufficient information concerning them to enable the other High Contracting Parties and the European Commission to appreciate the nature and extent of the derogation from the provisions of the Convention which those measures involve.

(1) (paragraphs 26 to 28 of Counter-Memorial.)

./.

The above-mentioned provision of paragraph 3 is one of primary importance in view of the fact that the jurisdiction of the Commission can be directly affected by any exercise by a High Contracting Party of its right to derogate from its obligations in reliance upon Article 15 of the Convention. For that reason it is always for the Commission to examine the conformity of a notice or derogation with the requirements set out in paragraph 3 of Article 15. In the present case the Government of the Republic of Ireland brought into force on 8th July 1957, Part II of the Offences against the State (Amendment) Act, 1940 (already referred to as the 1940 Act), which conferred special powers of arrest and detention. Notice was given of this measure by a letter addressed on 20th July to the Secretary-General by the Irish Department of External Affairs.

The Applicant has submitted that this letter could not be regarded as constituting any notice of derogation under paragraph 3 of Article 15. Alternatively, he submitted that it was not a proper notice of derogation. The Respondent Government has contested this point of view. The contentions put forward by the Parties have been summarised above.

It seems clear to the Commission that the Respondent Government addressed its letter of 20th July 1957 to the Secretary-General with the purpose of complying with the provisions of paragraph (3) of Article 15. No special form is prescribed for notices of derogation, and the official character and the particular terms of the letter cannot leave any doubt as to the real intentions of the Respondent Government.

The Commission further believes that the Respondent Government has not delayed in bringing the enactment of the special measures to the attention of the Secretary-General.

On the other hand, the Commission feels bound to point out that the letter of 20th July 1957 may be open to criticism in that paragraph 3 of the letter(1) does not indicate with sufficient clearness the reasons which have led the Respondent Government to derogate from its obligations under the Convention. The Commission recognises that paragraph 3 of Article 15 does not afford clear guidance as to the information required in a notification. The Commission also recognises that the terms of the notification of the Respondent Government of 20th July

./.

(1) "3. The detention of persons under the Act is considered necessary to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution."

1957 were sufficient to indicate the nature of the measures taken and it notes that the texts of the 1940 Act and of the Proclamation bringing it into force were attached to the Government's letter. In general, the Commission does not feel that it is called upon to say, that in the present case there was not a sufficient compliance with the provisions of paragraph 3 of Article 15. The Commission contents itself with drawing attention to the need for fuller information concerning the reasons invoked for any derogation notified under paragraph 3 of Article 15.

The Commission is of the opinion that in the circumstances of the present case there is no question of the measure taken by the Respondent Government under paragraph 1 of Article 15, being invalidated merely by reason of the inadequacy of the reasons given in the letter of 20th July 1957 for the bringing into force of the 1940 Act. In stating this opinion, however, the Commission is not to be understood as having expressed the view that in no circumstances whatever may a failure to comply with the provisions of paragraph 3 of Article 15 attract the sanction of nullity of the derogation or some other sanction.

B.

The question whether there was in Ireland in July 1957 a 'public emergency threatening the life of the nation' within the meaning of Article 15, paragraph (1) of the Convention

81. Memorial of the Applicant

The Applicant in his Memorial, (entitled 'Arguments and Conclusions', of 20th November 1958) made the following submissions:

(a) that the onus of establishing that such a situation existed in July 1957 was on the Respondent Government. No proof of this had been tendered. The Parliament and ordinary courts were functioning normally. No resort had been made to various special courts provided for under the Irish Constitution. The Applicant, although the onus of proof was on the Government, produced by way of 'preliminary rebuttal' the Lord Mayor's affidavit of 13th June 1958, which had been tendered at the oral hearing on 19th June 1958. The Lord Mayor, Mr. James Carroll, stated in his affidavit that for many years there had been a complete absence of public disorder and no abnormal increase in crime. The ordinary courts had been functioning normally for the last ten years and he considered that for many years past there had not existed, and did not then exist, a state of war or public emergency that could reasonably be held to threaten the life of the Irish nation;

(b) that the Government had failed to rely on its contention that there existed 'a state of public emergency threatening the life of the nation':

(i) in its letter to the Secretary-General on 20th July 1957,

(ii) in its written and oral pleadings in the courts,

(iii) in Dail Eireann on 23rd October 1957, and

(iv) in its written and oral submissions to the Commission.

and thus indicated that it did not seriously believe, and was not prepared to state, that such emergency existed. (1)

./.

(1) Paragraph 10 and Schedule 1 of Memorial of Applicant

82. Counter-Memorial of the Respondent Government

The Respondent Government in its Counter-Memorial of 12th January 1959, submitted:

(a) that, in 1939, the I.R.A. had declared war on Great Britain and started a bombing campaign there. In September 1939, the Respondent Government had caused about 70 members of the I.R.A. to be detained as being suspected of engaging in unlawful military activities. Strict legal proof was often not practicable because of intimidation practised by such a secret organisation. One detainee successfully appealed against his detention and the remainder were also released;

(b) that, in December 1939, the I.R.A. raided the principal magazine of the Irish Army but, although the stolen ammunition was eventually recovered, a number of police were killed in attempting to combat these activities. The 1939 and 1940 Acts were enacted to deal with the situation in wartime and members of the I.R.A. were detained under the latter Act. The I.R.A. had, on 23rd June 1939, been declared to be an unlawful organisation within the meaning of section 18 of the 1939 Act and this had never been revoked. From 1939 to 1941, some German agents succeeded in reaching Ireland and contacting the I.R.A.;

(c) that, at the present time, the I.R.A. included several wartime members and in September 1958, a document called 'An t-Oglach' containing 'General Army Orders' was issued by the so-called 'Army Council' of the I.R.A. instructing members to avoid 'aggressive action within the 26-County area'. This was only a political expediency as it also forbade members to swear allegiance to, or recognise, the 'Partition Institution of Government of the Six or Twenty-six County States';

(d) that the Sinn Fein organisation, which was the political wing of the I.R.A., also openly denied the legitimacy of the institution of the State, namely Parliament and Government elected under the 1937 Constitution. Four Sinn Fein members of Parliament had refused to take their seats.

(e) that, in the last few years, the I.R.A. had declared war on, and carried out warlike operations against the police forces of the Government of Northern Ireland and the British military forces in Northern Ireland. This was in defiance of the authority of Parliament, the Government and the people of the Irish State and they were thereby attempting to involve the State in a war against the will of the Government;

(f) that the I.R.A., during that period, had attacked military and police barracks in Northern Ireland, had ambushed police patrols and destroyed bridges, customs huts, etc. The Respondent Government's Observations of 25th March 1958 at paragraph 9 (b), which also referred to the Government's Observations of 27th January 1958, stated that there was clear proof of a movement 'calculated to subvert the institution of the Irish State and, by attacks on the Six Counties, to involve the people of Ireland in a civil war and as well to provoke an armed conflict with Great Britain'. A list of incidents occurring in Northern Ireland from 1st December 1956, to 1st February 1958, was attached at Schedule 3 to those Observations. Three particular incidents were referred to involving the seizure and wrecking of a train on 2nd March 1957, by three armed and masked men, the blowing up of a canal lock on 13th May 1957, by three armed men and the closing by the authorities of many frontier roads as a result of the incidents of violence in the frontier area.

These military activities were still continuing but had been considerably decreased since the entry into force of the 1940 Act and the consequent detention of the leaders and more active members of the I.R.A. Ordinary methods of enforcing the law had failed to check these activities. The I.R.A. claimed in its document An t-Oglach to have carried out 'widespread operations' and declared that from 1st September 1958, the 'B-Special Constabulary' in Northern Ireland would be 'legitimate resistance targets';

(g) that it was for a Government, and for that Government alone, to determine when a state of emergency existed and what measures were required by the exigencies of the situation. The Government recognised, however,

that the European Commission had taken the view that it had the competence and the duty of inquiring into a Government's appreciation of the extent of an emergency and of the measures required to meet it. Its submissions were accordingly made on that basis;

(h) that the Convention did not provide any means by which Governments might consult either the European Commission of Human Rights or the European Court of Human Rights in order to obtain the views of these bodies on whether a public emergency existed and on the measures which must be taken to deal with it, nor would it be appropriate that the Convention should have made any such provision. Governments must take such action as to them seemed to be required in the circumstances of an emergency. It was beyond contemplation that a Government acting in good faith should be held to be in breach of its obligations under the Convention unless its appreciation of the situation or of the remedies to be adopted should be manifestly unreasonable;

(i) that a dispute between an individual and a High Contracting Party was materially different from a case when the dispute was between two High Contracting Parties. In the latter case the European Commission might raise any presumption in favour of either party. In the case of a dispute between an individual and his Government it was submitted that a presumption existed in favour of the legality of the acts of the Government and that this presumption should be applied by the European Commission. (1)

83. Reply of the Applicant

The Applicant filed a Reply on 19th February, 1959, in which he submitted:

(a) that the alleged war-time activities of the I.R.A. could not, at a date some 15 years later, provide a valid reason for the suspension of the rule of law or the operation of the Convention;

(b) that Sinn Fein was an open political organisation which had not been declared an illegal organisation. The European Commission could not be asked to hold, therefore, that its activities and policy constituted 'a public emergency threatening the life of the nation';

./.

(1) Paragraphs 8 to 16, 29 to 31; Schedule 1 of the Counter-Memorial of the Respondent Government.

(c) that an accurate summary of the present day situation was contained in the affidavit of the Lord Mayor of Dublin sworn on 13th June 1958, the contents of which had not been controverted by the Respondent Government.

It was admitted that armed activities had occurred in Northern Ireland but these were mainly the work of Residents in that part of Ireland;

(d) that, although the partition of Ireland raised special problems for the Respondent Government, the latter was exaggerating their magnitude and was not justified in abrogating the Convention. Such problems had existed since the partition of Ireland and would exist as long as partition continued;

(e) that as the Applicant's Counsel had observed in the oral hearing on 19th to 20th June 1958, the Irish Courts were now functioning normally and for ten years no shot had been fired within the jurisdiction of the Respondent Government which could have any political significance. The Attorney-General had accepted that statement at the oral hearing;

(f) that the Respondent Government, in its Counter-Memorial (paragraph 18) had alleged for the first time that in July 1957, it had come to the conclusion that there existed a situation 'constituting a public emergency threatening the life of the nation'. If such a conclusion was reached why was the European Commission not previously informed of it? (1)

84. Rejoinder of the Respondent Government

The Respondent Government in its Observations of 12th March 1958, repeated the general submission that, if it should be held that the Applicant's detention without trial was in conflict with the Convention, such detention was carried out pursuant to the proper exercise by the Government of its right of derogation under Article 15. (2)

./.

(1) Paragraphs 12 to 16, 24 of Reply of Applicant.

(2) Paragraph 3(b) of the Rejoinder of the Respondent Government.

85. Oral hearing of 17th to 19th April 1959

The Sub-Commission took a decision on 24th March 1959, (1) in which it invited the representatives of the Parties to appear in order to submit further explanations on certain points in the case affecting the question of derogation. It also invited the Applicant and Inspector McMahon to appear before it in order to furnish certain additional information.

86. At the hearing on 17th to 19th April, the Attorney-General opened the case for the Respondent Government and retraced the history since 1932 of the I.R.A. He alleged that its object had been by active means to end the partition of the country and at times to overthrow the established Government of the Irish Republic. He also described the circumstances in which the 1939 and 1940 Acts had been enacted and how the I.R.A. had again started a campaign of violence by issuing a manifesto in December 1956. The Attorney-General submitted that the strong action taken by the Government, in renewing the operation of the 1940 Act by Proclamation on 8th July 1957, had so improved the situation that it had been found possible to release all persons who had been detained under that Act. The Government had not yet, however, felt justified in revoking the Proclamation, although the powers of detention were no longer in operation.

In particular it was submitted on behalf of the Respondent Government that:

(a) in the first six months of 1957, a total of 103 persons had been sentenced for activities contrary to the 1939 Act,and, while in prison, had in general acted as members of a military force and in every way indicated that they adhered to I.R.A.;

(b) that acts of violence increased in Northern Ireland up to the beginning of July 1957. Details of these acts could be illustrated on maps of the area concerned and their nature by certain photographs. (These maps and photographs were produced as exhibits). A very considerable police force and equipment and occasionally military forces had been deployed to check these activities and had cost upwards of half a million pounds annually;

./.

(1) For full text see paragraphs 100 and 127 below.

(c) that the Government had tried to deal with this matter with the minimum of cost and inconvenience to the public but was determined, as was its duty under international law, to prevent its territory being used for the maintenance of an unlawful army designed to engage in warfare with another nation. In that respect, the situation in Northern Ireland, owing to the mixed Catholic and Protestant population, had always been highly inflammable and had frequently in the past led to bloodshed;

(d) that, in particular, an incident took place on 3rd-4th July 1957, which showed that the activities of I.R.A. and its splinter group were reaching a new peak. A police patrol was ambushed and one constable was killed and one wounded. Gelignite and a detonator were found nearby. The Government had decided that action must be taken to prevent the spread of these unlawful activities which were in practice extremely difficult to control. The members of these illegal organisations were not primarily committing acts of violence against the Irish police or military forces, when evidence would have been more easily available, but were simply using Irish territory as a basis for attacks outside, and positive or concrete evidence of criminal activities within the Government's jurisdiction was extremely hard to obtain. Reference was made to the list of acts of violence as from 1st December 1956 which was contained in Schedule 3 to the Government's Observations of 25th March 1958(1).

87. The Applicant's representatives submitted generally in reply that there was no longer a dangerous situation in Ireland. The Annual Report of the Commissioner for Police for 1957, which he produced as an exhibit, contained at Appendix A.1 the figures of prosecutions for indictable offences and did not show any abnormal circumstances for that year. This situation was confirmed by the Lord Mayor's affidavit of 13th June 1958 which had been produced as Schedule No. 1 to the Applicant's Memorial of 20th November 1958, and by the Respondent Government's admission that no shot of a political nature had been fired in the Irish Republic for 10 years.

./.

---

(1) Verbatim Record of the hearings, pp. 101 to 103, 106 to 113, 116, 117.

In particular it was submitted:

(a) that the photographs produced concerned incidents which occurred in November 1957 when the Applicant was in prison, and were irrelevant;

(b) that it was incorrect that most persons who took part in armed activities in Northern Ireland had crossed the frontier from the South. In 1957, 223 persons were interned in Northern Ireland of whom 220 were local residents. Of 52 persons convicted in 1957 for offences with violence, 42 had addresses in Northern Ireland and the remaining 10 had addresses in the Republic.(1)

88. The Attorney-General made no further submissions on that issue but stated that he was prepared to accept any written statement made by the Government of Northern Ireland giving the statistics referred to.(2)

89. OPINION OF THE COMMISSION

The Commission, after having deliberated, decided by a majority of nine votes(3) against five votes(4) that there was in Ireland in July 1957, a public emergency threatening the life of the nation within the meaning of Article 15, paragraph (1) of the Convention.

The members of the Commission stated their opinions as set out below.

90. OPINION OF MM. WALDOCK, BERG, FABER, CROSBIE and ERIM

Under Article 15, paragraph (1), the power of a High Contracting Party to derogate from its obligations under the Convention arises only "in time of war or other public emergency threatening the life of the nation". Two points require our consideration: (1) the meaning to be given to the words "in time of war or other public emergency threatening the life of the nation" and (2) the question whether in July 1957, when

./.

(1) Verbatim Record of the hearings, pp. 85, 86, 133, 135 to 137.

(2) Verbatim Record of the hearings, p. 157.

(3) MM. Waldock, Berg, Faber, Beaufort, Petren, Sørensen, Crosbie, Skarphedinsson, Erim.

(4) MM. Eustathiades, Dominedo, Süsterhenn, Mme. Janssen-Pevtschin, M. Ermacora.

the power to detain without trial under Section 4 of the 1940 Act was brought into force, there existed a situation in or in regard to the Republic of Ireland which constituted a "public emergency threatening the life of the nation".

We consider that, read in the general context of Article 15 of the Convention, the meaning of the words "in time of war or other public emergency threatening the life of the nation" is sufficiently clear and that there is no occasion, therefore, to have recourse to the preparatory work of the Convention in order to ascertain their meaning. The International Court of Justice and its predecessor, the Permanent Court of International Justice, have repeatedly stated that when the text of a treaty is clear, there is no occasion to have recourse to the preparatory work; see, for example, the Lotus Case (1927, Series A, No. 10, page 16) and the Advisory Opinion on Conditions of Admission to Membership of the United Nations (I.C.J. Reports 1947-8, page 63).

We can find no ground for attributing to the words "in time of war" a special meaning which is neither expressed nor indicated in the text of Article 15 nor anywhere else in the Convention, and do not therefore see any reason for interpreting them as referring only to a war having the character of a total war. To do so, in our view, would be to revise the treaty. It follows that we see no ground for interpreting the words "or other public emergency threatening the life of the nation" any more strictly than is required by the natural and ordinary meaning of those words.

The natural and ordinary meaning of "a public emergency threatening the life of the nation" is, we think, a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the State in question. If contrary to the view which we take, the meaning of Article 15, paragraph 1, is considered to be doubtful and recourse is had to the preparatory work of Article 15 and of the parallel Article in the draft Covenant of Human Rights formulated by the United Nations Commission of Human Rights, we are of the opinion that the preparatory work confirms that those who inserted the words in Article 15, paragraph 1, intended them to bear the meaning which we consider to be their natural and ordinary meaning.

While the concept of a "public emergency threatening the life of the nation" is sufficiently clear, it is by no means an easy task to determine whether the facts and conditions of any particular situation fall within that concept.

This being so, and having regard to the high responsibility which a Government has to its people to protect them against any threat to the life of the nation, it is evident that a certain discretion - a certain margin of appreciation - must be left to the Government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention. In its Report on Application No. 176/56 concerning emergency measures taken by the United Kingdom in the Island of Cyprus, the Commission recognised that some discretion and some margin of appreciation must be allowed to a Government when assessing the legitimacy or otherwise of its recourse to the exceptional right conferred upon it by Article 15 to derogate from the provisions of the Convention. At the same time it emphasised that, when any particular exercise of that right is challenged, the Commission has the competence and the duty under Article 15 to examine and pronounce upon the Government's determination of the existence of a "public emergency threatening the life of the nation" within the meaning of Article 15. We entirely concur in the views expressed by the Commission on this question in the Cyprus Case and we adopt the same standpoint in examining the Government's determination of the existence of a public emergency threatening the life of the nation in the Republic of Ireland in the present case.

In the present case three elements in the situation obtaining in the Republic of Ireland in July 1957 appear to require our particular attention: (1) the existence of illegal organisations dedicated to the use of violence to achieve their objectives; (2) the activities of these organisations within the territory of the Republic and in the territory of the Government of Northern Ireland; and (3) the threat which the existence of these organisations and their activities may have constituted to the life of the Irish Republic on 5th July, 1957, when the Respondent Government brought into force the power to detain persons without trial upon the order of a Minister of State.

The Existence of Illegal Organisations. The information before the Sub-Commission appears to establish that illegal organisations for the achievement of political objectives have existed in Ireland for a long time; that after the 26 Counties of Southern Ireland became independent and the Republic was established the Irish Republican Army continued to operate as an illegal military organisation having as its objective the ending of partition by the employment of violent measures against the Government and forces of Northern Ireland that as the second world war approached the leaders of the I.R.A. started a recruiting campaign and reorganised their

illegal forces with a view to a vigorous renewal of their acts of violence against the Government and forces of Northern Ireland and in opposition to their own Government; that the Offences Against the State Acts 1939 and 1940 were passed by the Parliament of the Republic in order to strengthen the hands of the Government in dealing with the unlawful activities of the I.R.A.; that during the second world war I.R.A. groups carried out acts of violence in Northern Ireland and one or two even in England; that during the same period many members of the I.R.A. were tried for political offences and convicted by special criminal courts staffed by military personnel; that the Government in addition brought into force powers of detention without trial under an Emergency Powers Order and some 1,100 persons were then detained under these powers; that after the second world war there was a general release of all those in detention and by 1948 all those convicted of political offences had also been released; that for some five years the I.R.A. was comparatively quiescent but that in 1954 some of those who had been active members of the I.R.A. during the war period began to recruit new I.R.A. groups from the youth of the Republic; that in due course a new campaign of violence against the Government and forces of Northern Ireland began and in December, 1956, assumed considerable proportions; and that this campaign continued without interruption throughout 1957, and indeed until into 1959.

The information placed before us, including documents emanating from the headquarters of the I.R.A., also shows that the repudiation of the Constitution of the Irish Republic, freely established by the Irish people in 1937, is a fundamental doctrine of the I.R.A. Members of the I.R.A. are explicitly forbidden to recognise the authority of the Parliament, Government and Courts of the Republic. Moreover, in 1938 a group of individuals, styling themselves "the Executive Council of Dail Eireann, Government of the Republic", purported to delegate to the I.R.A. the governmental authority in the Irish State. In the most recent period of activity from 1954 onwards the I.R.A. leaders have recruited, trained and equipped with arms an underground volunteer corps and have issued orders to this volunteer corps for attacks upon targets in Northern Ireland as if from the General Headquarters of a national army. During this period members of the I.R.A. when brought before the courts of the Republic, have consistently refused to recognise their authority and jurisdiction.

On these facts, the general correctness of which is not in dispute, we are bound to conclude that in July 1957, when the power to detain without trial was brought into force by proclamation, there existed in the Republic an illegal underground organisation, which repudiated the authority of the Government elected by the people and which was dedicated to achieving the ending of the partition of Ireland by the use of armed force.

The Activities of the I.R.A. Groups. We need not refer in detail to the earlier history of the activity of the I.R.A. It is sufficient to recall that during the second world war the I.R.A. campaign of violence against the British authorities and forces reached considerable proportions, even extending to England, and that, according to the respondent Government, the I.R.A. leaders established contact with German agents in the Republic. These facts indicate the fanatical nature of the I.R.A. and the lengths to which its leaders are prepared to go regardless of the possible repercussions of their acts on the security and life of the Irish people.

We now turn to the more recent activity of the I.R.A. groups on the basis of which the Government seeks to justify its resort to detention without trial under the 1940 Act. The information supplied to the Sub-Commission appears to establish that splinter groups of the I.R.A. were responsible for scattered incidents prior to 12th December 1956, and that on that date the main body of the I.R.A. started a general campaign of violence against targets in Northern Ireland; that during the night of 11th-12th December a number of serious incidents occurred in Northern Ireland, including the blowing up of two bridges, an army building and a broadcasting station, the setting on fire of a courthouse and a police drill hall; that on the 12th December the I.R.A. issued a general manifesto proclaiming the opening of the campaign; that during the ensuing six months numerous similar incidents occurred and on numerous occasions I.R.A. raiders into Northern Ireland exchanged shots with troops or armed police in that territory; and that during this period very heavy damage was done to property in Northern Ireland while a number of I.R.A. volunteers and of Northern Ireland police were killed or wounded.

./.

The activity mentioned in the preceding paragraph had its effects primarily outside the Republic in the six counties of Northern Ireland. As to I.R.A. activity within the Republic the information placed before the Sub-Commission appears to show that it made comparatively little impact on the daily life of the general public, except perhaps in the areas near the border with Northern Ireland. The chief manifestation of I.R.A. activity within the Republic appears to have been the illegal recruiting, drilling and arming of commando-type volunteers for operations over the border and the planning and launching of these operations from the territory of the Republic. According to the Government, the strength of the active commando-type element in the I.R.A. rose by about 50 per cent during the period from December 1956 to July 1957, despite the frequent arrest and prosecution of members of the I.R.A. groups on such charges as could be formulated against them. We were also informed of two successful armed raids that had been made by the I.R.A. during this period on factory store-houses in the Republic in order to steal explosives for their sabotage operations.

One of the chief effects of I.R.A. activity within the Republic was the need to divert a considerable body of police and security forces to the task of dealing with it. We were not given figures specifically for the period December 1956 to July 1957 but were informed that at the beginning of 1959 the police forces wholly engaged in countering I.R.A. activities in the border area consisted of one Chief Superintendent, one Superintendent, four Inspectors, 51 Sergeants and 496 other ranks, and that some 40 specially equipped motor vehicles and 12 specially constructed radio-stations were employed by this force. In addition the ordinary police forces and the military forces of the Republic were called upon as occasion demanded. We were also informed that the annual cost of dealing with I.R.A. activity was upwards of half a million pounds and that this was a considerable sum for a small and not very rich country.

Counsel for the Applicant, in support of their contention that the situation in the Republic in July 1957, did not constitute a threat to the life of the nation, made a strong point of the fact that the ordinary courts continued without interruption to sit and administer the law as in normal times. The Government did not dispute that this was so for the general run of civil and criminal cases. In cases involving members of the

I.R.A., however, the Government did contend that there were attempts by the I.R.A. to obstruct the administration of criminal justice by the intimidation of judges and of witnesses or potential witnesses. In support of this contention it referred to the intimidation of witnesses in the previous period of I.R.A. activity during the second world war and, in particular, to two cases in 1943 in which a witness who testified against an I.R.A. member on a charge of murder had shortly afterwards been shot. It then stated that in January 1957 a judge of the Dublin District Court, who had tried and sentenced an I.R.A. member, reported to the Minister of Justice that he had received threats from the I.R.A. It further stated that in a criminal case arising out of one of the I.R.A. raids on a factory storehouse witnesses, who had earlier identified the accused persons, did not adhere to those identifications when the trial took place on 2nd July 1957, and that the police had information to the effect that the witnesses had been visited and intimidated by members of the I.R.A. This was the one specific case of intimidation of witnesses in the period December 1956 to July 1957 mentioned by the Government. The Government at the same time conceded that there had been some cases in which civilian witnesses had given evidence for the prosecution at the trial of members of the I.R.A. but insisted that these cases had been few and far between. The specific information concerning I.R.A. threats to judges and witnesses in the period December 1956 to July 1957 does not enable us to draw any decisive conclusions as to the extent of I.R.A. attempts to pervert the administration of criminal justice during that period. In saying this, we do not overlook the fact - which we have already mentioned - that members of the I.R.A., when charged with criminal offences, consistently refused, in compliance with I.R.A. orders, to recognise the jurisdiction of the courts of the Republic. That the I.R.A. in some measure attempted to obstruct the administration of criminal justice in cases concerning its members is clear. The information available to the Sub-Commission does not, however, establish that the application of the criminal law to members of the I.R.A. was rendered wholly impossible by the action of the I.R.A. organisation.

The Question of a Threat to the Life of the Nation. The mere existence within a State of an illegal organisation, which declines to recognise the legal authority of the elected Government and recruits and equips with arms an underground military force, appears to us to represent in some degree a threat to the life of a democratically

./.

organised State. We recognise that different opinions may be held as to whether the mere existence of such an organisation represents a sufficiently imminent threat to the life of the nation for it to constitute by itself "a public emergency threatening the life of the nation". That it constitutes a substantial threat to the principles and institutions of democracy within the State appears to us, however, to be self-evident. When in the present case the I.R.A. made active preparations within the Republic for guerilla attacks on Northern Ireland and committed armed robberies to obtain explosives for their operations and when, on however minor a scale, cases occurred of apparent attempts by the I.R.A. to threaten judges or witnesses, the situation even within the Republic itself contained some of the elements of a public emergency threatening the life of the nation. When, furthermore, the I.R.A. forces, in defiance of the laws of the Republic and of the repeated injunctions of the lawful Government, launched attack after attack on property and life in the neighbouring territory of Northern Ireland with reckless disregard of the grave consequences that might follow from those attacks, the situation, in our opinion, had clearly become one in regard to which the Government of the Republic might make a determination that a public emergency threatening the life of the nation existed, without being held to have gone beyond the proper limits of a Government's appreciation under Article 15, paragraph 1, of the Convention.

We do not overlook the fact that the main impact of I.R.A. violence was felt within Northern Ireland and not within the Republic. We consider that, if of sufficient gravity, acts endangering the external relations of a State may constitute a threat to the life of the nation no less than acts endangering its internal order. In the actual circumstances of the case we do not think that we should be justified in approaching the matter on the basis that the Government of the Republic could safely assume that the I.R.A. attacks would not be productive of serious reactions on the part of the United Kingdom Government and, in particular, of the Government of Northern Ireland. The I.R.A. attacks in the period between December 1956 and July 1957 had resulted in very heavy damage to property, in the death or injury of some policemen and in considerable dislocation of road and rail communications in Northern Ireland. These were matters to which any Government would be bound to react most strongly. The Government of the Republic could only expect to avoid serious repercussions from

./.

the other Governments if it was able to satisfy them that it was using to the full the means at its disposal to suppress and stamp out the guerilla warfare of the I.R.A. in the territory of Northern Ireland. These activities had already led the Government of Northern Ireland to bring into force emergency measures and already on 27th June 1957, the Government of the United Kingdom had notified the Secretary-General of the Council of Europe of the existence of a public emergency threatening the life of the nation in Northern Ireland. If the Government of the Republic, whose subjects were using its territory to launch guerilla warfare against Northern Ireland, did not also treat the grave situation which had arisen as one of public emergency, it might reasonably fear that it would come under the suspicion of being half-hearted in its efforts to control the I.R.A., with most serious results. Having regard to the general background to the situation - the union of Northern Ireland with the Republic being a foremost political objective of the Republic and the past history of the matter - we do not feel able to take the view that these were risks which the Government of the Republic could afford to treat lightly.

We also think that the Respondent Government is justified in its contention that in appreciating the existence of a public emergency threatening the life of the nation in July 1957, it was entitled to give substantial weight to its obligation under international law to prevent its territory from being used as a base for attacks upon a neighbouring territory. It was the clear duty of the Republic under general international law to use the means at its disposal to prevent, and to prevent completely, its territory from being used as a base for armed raids into Northern Ireland. If it failed to discharge this duty, the continuance of the attacks would engage it in international responsibility to the United Kingdom. In our view, this is an element in the situation to which due consideration may be given in appreciating whether or not the Government of the Republic acted within the propor margin of a Government's discretion in determining the existence of a public emergency threatening the life of the nation in July 1957.

The Respondent Government further represented to the Sub-Commission that it was also influenced by the fear that, if the I.R.A. attacks were not promptly stopped, Protestant groups in Northern Ireland might take reprisals against the Catholic element, the element in that territory which is most in sympathy with the idea of union with the Republic. The

./.

Government stated that its fears on this point were based on bitter past experience of such happenings and that the danger of their repetition was believed by it to be very real. It said that, despite the existing political division between the two territories, it felt itself to have a certain responsibility with respect to the peoples of Northern Ireland to prevent them from being exposed to the horrors of civil strife as a result of the activities of the I.R.A. The maintenance of law and order in Northern Ireland is, it is true, the responsibility of the United Kingdom and Northern Ireland Governments. But, in our view, the Government of the Republic was both entitled and bound to have regard to the possible consequences in Northern Ireland of the continuance of I.R.A. attacks launched upon that territory from the territory of the Republic. The Government of the Republic, as we have pointed out, was bound under international law to use the means at its disposal to prevent these attacks and, that being so, it certainly could not dissociate itself altogether from the possible consequences in Northern Ireland of the continuance of the attacks. It would also, we think, be in accord with the spirit of European co-operation, which inspired both the establishment of the Council of Europe and the conclusion of the European Convention of Human Rights, to recognise that Members of the Council of Europe have a special responsibility towards each other in regard to unlawful activities in their territory which threaten the enjoyment of human rights and fundamental freedoms in the territory of another Member. We accordingly conclude that the fact that the peoples of Northern Ireland, like those of the Republic, were within the community of the Council of Europe and under the protection of the European Convention of Human Rights was another cogent reason why the Government of the Republic could not shut its eyes to the risk of the unlawful activities of its subjects causing an outbreak of civil strife in the adjoining territory. In any event, we ourselves cannot overlook the serious possibility that, if the Government's fear of reprisals beginning in Northern Ireland against the Catholic element in the population had been realised, bitter resentment would have been aroused among the people of the Republic with the risk of a general deterioration in the whole dangerous situation.

Finally, we must refer briefly to the particular timing of the Government's proclamation introducing the power of detention without trial under the 1940 Act. The main I.R.A. campaign began, as we have said, in November 1956. It mounted through January and February of 1957 and reached its full force in

./.

March, April and May. During these months the Government brought what charges it could against members of the I.R.A. and by May had over 100 in prison. Almost all of these were held on short sentences and the great majority were due to come out of prison during July. The Government, unable to find fresh grounds for putting them in prison again at once, was afraid that their release from prison would herald a large intensification of the violence. Then, on 4th July a particularly serious incident occurred in Northern Ireland, involving the death of one policeman and the wounding of another; and on the following day the Government issued its proclamation bringing into force the power of detention. Thus, it was only after I.R.A. attacks on Northern Ireland had continued for more than six months and only when the Government had grounds for fearing an intensification of the campaign that it finally decided to have recourse to a measure derogating from its general obligations under the Convention. Accordingly, if in other respects the Government is considered to have acted within the proper limits of its discretion in determining that the I.R.A. activities constituted a public emergency threatening the life of the nation, we are clear that there was nothing premature in the timing of that determination.

Having regard to the view which we take on the various matters which are examined above, we conclude that in making a determination on 5th July 1957 that there existed in the Republic of Ireland a public emergency threatening the life of the nation, the Respondent Government did not go beyond the proper margin of discretion allowed to it under Article 15, paragraph 1. We need only add that the facts and considerations on which we base this conclusion did not materially change in the period from July to December 1957 during which the Applicant was in detention under the 1940 Act.

91. MM. Sørensen and Skarphedinsson were of the same opinion as MM. Waldock, Berg, Faber, Cross-ie and Erim (see paragraph 90 above).

92. OPINION OF M. EUSTATHIADES

The expression "public emergency threatening the life of the nation" appears to me to refer to a situation much more serious than any state of affairs threatening public order or national security as described in certain other articles of the Convention; it implies in fact, an emergency of such magnitude that it affects not one section of the population, but the nation as a whole.

The threat to public order and security from I.R.A. activities can scarcely be described as a threat to the life of the nation within the meaning of Article 15. In this connection the Convention itself draws quite a clear distinction by referring in a series of articles to threats to public order or safety justifying restrictions on certain rights guaranteed by the Convention, as in the second paragraph of Articles 8, 9, 10 and 11 respectively: whereas the kind of situation referred to in Article 15 is one of quite exceptional gravity, justifying not only the imposition of restrictions but even derogation from the terms of certain Articles protecting human rights.

The above interpretation is further borne out by the preliminary work on Article 15, so that the letter of the Convention is amplified by its background.

As decided by the Committee of Ministers when it was set up, the Committee of Legal Experts appointed to draft the Convention was to pay due attention to the progress achieved by the United Nations. The United Nations draft Covenant contained an Article 4 covering the same ground as Article 15 of the European Convention. That Article 4, adopted by the Committee of Experts, read as follows: "In time of war or other public emergency threatening the interests of the people, a State may..... ". The Committee had discussed the "comments of the Government of the United Kingdom received by the Secretary-General (of the U.N.) on 4th January 1950", in which the United Kingdom, while suggesting certain additions to the above-mentioned Article 4, left the wording of the first paragraph as quoted. On 4th February, Sir Oscar Dowson (United Kingdom) submitted to the Committee an amendment to Article 4 of the Assembly's draft which began in the same way: "1. In time of war or other public emergency threatening the interests of the people, a State may ....". It is clear that this United Kingdom amendment, supported by Professor Eustathiades (Greece), was an "almost textual reproduction of Article 4 of the draft Covenant" /Doc. DH (56) 4 of 22nd May 1956:"Preparatory work on Article 15 of the European Convention on Human Rights", p. 5/.

./.

When, at the Committee's second session, the United Kingdom submitted a new amendment, the opening sentence still read: "In time of war or other public emergency threatening the interests of the people .....". It will be recalled that the Committee submitted two variants, the first being founded on the method of precise definition. Article 2 of this text was founded in the main on the British amendment and began as follows: "1. In time of war or other public emergency threatening the life of the nation ....", this latter phrase being substituted for "threatening the interests of the people". These two phrases were likewise interchanged in the United Nations draft Covenant to which I shall return later, since it is most enlightening in this connection.

It should be pointed out, however, that both expressions fit in with the method of "precise definition" (adopted for the Rome Convention), which entailed embodying in the Articles relating to specific rights a reference to the restrictions that might be imposed on them to take account of special situations threatening public order and safety. It follows that the British proposal was retained in the draft text as a provision to meet a situation of a quite exceptional nature far more serious than any threat to public order and safety already covered as a result of the method of "precise definition" being adopted.

The above remarks are founded on the preparatory work, in which, indeed, there is nothing to support any other interpretation, since, in the later stages, Article 15 of the Convention was not discussed at all; it was considered that sufficient light had been thrown upon it by the United Nations, whose draft Covenant had been taken as a model for this clause. The extract from the notes prepared by the United Nations Secretary-General should be recalled at this point. First of all, however, it might be said in connection with the wording of Article 15 that: (1) the use of the word "other" shows that the threat to the existence of the nation must be of as exceptional a nature as war; (2) it is obvious that the expression "the life of the nation" can only apply to a situation at least as serious as any in which "the interests of the people" are threatened. A threat to the former is in fact more grave than a threat to the latter. This emerges equally clearly from a study of the background of Article 4 of the United Nations draft Covenant, which Article "as the preparatory work clearly shows, the wording of Article 15 of the European Convention on Human Rights closely followed (page 10 of the above-mentioned document on the preparatory work on Article 15 prepared by the Secretariat of the Commission).

Article 4 of the United Nations draft Covenant began as follows: "In time of public emergency which threatens the life of the nation ....". The United Nations comment is that "the only kind of emergency envisaged in the Article is a 'public emergency' and, according to paragraph 1, such an emergency can occur only when the 'life of the nation' is threatened ..... The main concern", the commentary continues, "was to provide for a qualification of the kind of public emergency in which a State would be entitled to make derogations from the rights contained in the Covenant which would not be open to abuse. The present wording is based on the view that public emergency should be of such a magnitude as to threaten the life of the nation as a whole .... It was thought that the reference to a public emergency 'which threatened the life of the nation' would avoid any doubt as to whether the intention was to refer to all or some of the people ....." (paras. 38, 39 and 40). The underlining is mine, in the interests of brevity. It remains only to draw the obvious conclusion that the concept of a threat to the life of the nation refers to a public emergency of such magnitude that it threatens the existence of the nation as a whole, that is to say the whole population and not merely a part of it.

Generally speaking, the preparatory work on Article 15 and its background show that the word "nation" is used to make it clear that what is meant is a threat to the existence of the population as a whole from some particularly serious emergency far outweighing any problems of public order and safety that may arise in other circumstances.

It is for each Government to judge, when faced with a situation such as that described in Article 15, whether that situation warrants the exercise of the right conferred by the Convention to derogate from certain of its provisions. In the event of disagreement, however, that is to say in the event of such a case being brought before the European Commission, that body is called upon to express an opinion on the use made of this right by the Contracting Party concerned.

Although there is no need for any rigid ruling as to which of the parties shall be required to prove the existence or non-existence of a situation such as that described in Article 15 of the Convention, it is the duty of the Sub-Commission to establish the facts with the assistance of the parties so that the Commission may decide, in the light of them, whether a derogation under the terms of Article 15 was justified or not in the specific case laid before it. The power thus conferred upon the Commission is such that, once the case has been brought, the Commission may and

./.

must exercise that power by all the means authorised under the Convention and the Rules of Procedure, and in the light of all the known facts. Consequently, the claim by the Applicant in his Memorial that the Irish Government did not invoke the existence of a "public emergency threatening the life of the nation" in their written or oral submissions to the Commission, but only in the Counter-Memorial, seem of little importance, since once the case had been brought, it was for the Commission to determine whether or not the situation in Ireland corresponded to that described in Article 15 of the Convention, that is to say whether or not it was one "threatening the life of the nation".

The facts show, however, that the Irish Government, Parliament and Law Courts are functioning normally; there does not appear to be any abnormal increase in crime, the number of victims of I.R.A. activities is not large and the general picture at the present time (the I.R.A. activities mentioned in the Counter-Memorial of the Irish Government of 12th January 1959 belonged to another period) is one which contains at most a risk of localised disturbances, whereas the problems created by the partition of Ireland have existed ever since that partition came about.

Furthermore, between 1st December 1956 and 1st February 1958 the incidents cited by the Respondent Government in their comments of 27th January and 25th March 1958 and their submissions at the hearing of 17th to 19th April 1959 did not bring about a state of affairs which could be regarded as justifying a derogation from the Convention under the terms of Article 15 (cf. above).

With regard to the possibility of I.R.A. activities spreading in the future, any conclusion drawn from an investigation of the situation in Ireland for the purpose of comparing it with the requirements of Article 15, must be based on existing facts only, and cannot take account of subjective predictions as to future developments or unilateral fears that the situation may degenerate and the threat increase (these fears being, moreover, equated in advance with the exceptional emergency provided for in Article 15 of the Convention), particularly as such fears appear to have little foundation in the present case, since no intensification of I.R.A. activities is apparent.

To sacrifice one of the most fundamental human freedoms to a Government's self-imposed vigilance in the interests of future public order is no duty of the European Commission, which is empowered by the Convention to authorise the abolition of a fundamental human right by derogation, as stated in Article 15,

only in quite exceptional circumstances constituting in addition to a threat to public order and safety, serious danger to the life of the nation as a whole.

93. OPINION OF M. SÜSTERHENN

Article 15 provides for derogation from obligations under the Convention "in time of war or other public emergency threatening the life of the nation". In 1935, Oppenheim-Lauterlacht (Int. Law, p. 172) defined war as an armed contest between States "for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases". The accent is thus placed on the fact that war is a fundamental threat to the very existence of a State. History has indeed, shown that States have on many occasions been destroyed by war. When the authors of the Convention spoke of "time of war", in 1949 and 1950, they had in mind particularly the experiences of the last World War. These showed that war is taking on more and more the character of total war and threatens the life of the nation itself, that is to say, its frontiers and internal order, its economy and culture, as well as the life and liberty of its citizens. This conception of modern war underlies Article 15, as can be seen from the fact that the expression "in time of war" is followed by the words "other" public emergency threatening "the life of the nation".

In positive international law hostilities begin with a declaration of war; but a state of war may also be caused by military operations which have not been preceded by a formal declaration of war. In that case, however, the military operations must be so intensive and extensive as to represent a real threat to the existence of the State. A mere exchange of shots between frontier patrols is not war, even if individuals happen to be killed or wounded. And even when a State makes use of its armed forces or a so-called fifth column to destroy or sabotage installations or communications in the territory of another State one cannot talk of war or a condition tantamount to war so long as the acts of sabotage are committed in a frontier area and do not disturb the general economy of the State concerned.

This doctrine, which is of some importance when we have to decide whether actual warlike operations between States constitute war, must also be applied in considering the supposition that events which are not acts of force between States may nevertheless represent a threat, tantamount to war, to the life of a nation.

There is no question but that life in all sectors - politics, economics, transport, education and press - is going on as usual in the Republic of Ireland. The same is true of the administration of justice. The Irish Government maintains that judicial safeguards are lacking in certain political trials; this is disputed by the Applicant. We shall return to this point in connection with another question. At all events it appears from the accounts given by both parties that, on the whole, there is no interference with public order and security in the Republic of Ireland. Both parties acknowledge, in particular, that for ten years not a single shot has been fired for political reasons in the territory of the Republic of Ireland. Here lies a fundamental difference between the Irish question and, say, the Cyprus case, which was the subject of Application No. 176/56.

It cannot be denied that, for many years, there has existed in Ireland an illegal, paramilitary organisation - the I.R.A. - equipped with arms and ammunition, for the most part stolen. Members of the I.R.A. take an oath and are under severe discipline; in particular, they are bound to strict secrecy and take part in paramilitary manoeuvres in the territory of the Republic of Ireland. The I.R.A.'s objective is to unite the Six Counties of Northern Ireland, now under the Crown of the United Kingdom to the Republic of Ireland. In pursuit of that aim, very many attacks have been made over the years on police barracks and policemen in Northern Ireland, as well as acts of sabotage against installations, railways, etc. On 3rd or 4th July 1957 one Northern Irish policeman was killed and another wounded in one of these raids.

The acts of violence which the I.R.A., from its bases in Southern Ireland, orders to be carried out in Northern Ireland are calculated to embitter the friendly relations between the Republic of Ireland and the United Kingdom. But it cannot be maintained that a real danger of war between the Republic of Ireland and the United Kingdom could arise therefrom. The United Kingdom Government is fully aware that the Government of the Republic of Ireland is doing all it can to suppress the I.R.A. and its activities, although without success up to the present.

Furthermore, the United Kingdom Government is in just as delicate a position as the Irish Government, since some of its own nationals living in Northern Ireland take part in these acts of violence. Thus, in 1957, 220 out of 223 persons interned in Northern Ireland on suspicion of taking part in acts of violence committed by the I.R.A. were local residents.

Out of 52 persons convicted there in 1957 of having committed acts of violence, 42 had addresses in Northern Ireland and 10 in Southern Ireland. Those Northern Irish who take part in these acts of violence are irredentists and, like members of the I.R.A. of Southern Ireland, seek to bring about the annexation of Northern Ireland to Southern Ireland by force. The United Kingdom Government has not yet been able to put a stop to I.R.A. infiltration into its territory or to the commission of acts of violence by the I.R.A., still less to prevent those of its citizens who sympathise with the I.R.A. from taking part in such acts of violence. Considering that both Governments are confronted by the same difficulties, it would be unreasonable to contemplate the possibility of an armed conflict.

Since the Government of Southern Ireland is combatting the I.R.A. and seeking to put a stop to its activities, at the same time abjuring the use of force to bring about the union of Northern Ireland with Southern Ireland, that Government and the political parties it represents are regarded by the I.R.A. as traitors to Irish national unity. That is why the I.R.A. refuses to recognise the Government of Southern Ireland. The practical consequence of this withholding of recognition is that the I.R.A. ignores the laws passed to suppress its campaign, and those of its members who have been convicted of offences against these laws by the Courts of Southern Ireland deny that those Courts have any jurisdiction over them. But no act of violence of any kind has ever been attempted by the I.R.A. against the Government, Army or Police of the Republic of Ireland. General Order No. 8 which was actually transmitted to the Irish Government by the Chief of Staff of the I.R.A., lays down:

"1. Volunteers are strictly forbidden to take any militant action against 26-County forces <u>under any circumstances whatsoever</u>. The importance of this Order in present circumstances especially in the Border areas cannot be over-emphasised.

.....

4. <u>At all times</u> volunteers must make it clear that the policy of the Army is to drive the British forces of occupation out of Ireland."

Although, then, the experience of many years and the orders of the I.R.A. themselves give no ground for diagnosing an <u>immediate</u> danger that the I.R.A. will engage in revolutionary acts against the Irish Government and thereby threaten the

./.

life of the nation, the existence of a secret, illegal, paramilitary organisation, provided with arms and ammunition, does nevertheless constitute a potential threat to the constitutional order of the Republic of Ireland. A paramilitary organisation, well disciplined and immune from State control, owing to its secret character, can at any time be used by its leaders for revolutionary purposes. That possibility is increased, in the case in point, by the fact that the I.R.A.'s objective of uniting Northern Ireland to Southern Ireland is, on the Irish Government's own showing supported by a large majority of the population of Southern Ireland - although they do not countenance the violent methods employed.

The Irish Government adduces yet another threat in that the acts of violence committed by the I.R.A. in Northern Ireland might incite the Protestant majority there to retaliate against the local Catholic minority. Past experience has taught the Irish Government that it is not easy to find a cure for this dangerous situation. It is, however, no function of the Government of Southern Ireland to preserve order between religious groups in Northern Ireland: that is the United Kingdom Government's responsibility. Hence, this argument of the Irish Government has no legal force in connection with Article 15, although it should be accorded moral weight.

In assessing the general situation in the Republic of Ireland, as well as the relations between the Republic and the United Kingdom, we cannot flatly deny the existence of a potential threat which might menace the life of the nation in the future. Since a government is allowed a certain margin of appreciation in judging whether the life of the nation is threatened by an emergency, we may recognise the Irish Government's right to plead its standpoint that such an emergency exists and to consider this emergency as very serious. It must be admitted, however, that the emergency, being only potential, having persisted in virtually unchanged form for years and not having led to any serious disturbance of general public order of external relations, cannot be regarded as of exceptional gravity, but only as a latent emergency of a minor degree.

Such a potential and latent emergency, which although it has been in existence for many years, has not developed into an actual emergency and has not in general interfered with normal life in Ireland, cannot be considered to be a public emergency threatening the life of the nation, analogous to the "case of war" as required by Article 15 of the Convention. This is all the more true if the preparatory work of Article 15 of the Convention is taken as a basis as has been analysed by M. Eustathiades and M. Dominedo in their opinions (paragraphs 92 and 94). It is more of a question of a danger against public order. Even if such danger were serious, the Government of the Republic of Ireland could have fought it with appropriate

./.

means of maintaining public order which are not forbidden by the Convention as detention without trial is.

94. OPINION OF M. DOMINEDO

A. The facts

In order to make an accurate assessment of the facts, it must first be clearly understood that the expression "public emergency threatening the life of the nation" does not mean any unspecified emergency: it means a particular kind of emergency, and an extremely grave one; it must threaten the very life of the nation, i.e. its existence, as is shown beyond any shadow of doubt by the wording of Article 15 of the Convention ("in time of war or other public emergency ....").

Now the facts of the case indicate that it may be possible, as M. Faber has justly observed, to infer the existence of a danger to public order; but it is not possible, if we wish to keep within the bounds of reality, to say that Ireland's very life is at stake. I am referring here to both the State and the Nation of Ireland. It seems that any ordinary man or any person of responsibility, whether Irish or not, who regards the present conditions of life in Ireland objectively is bound to reach this fundamental conclusion.

We cannot really call a situation a public emergency threatening the life of the nation and then describe it as a slight potential threat. Take your choice: either the threat is slight, in which case it does not affect the life of the nation; or it actually does affect the life of the nation, in which case it is not a slight threat. In short you cannot, either in logic or in practice, turn black into white or white into black. In the event, no one can maintain that there is an explosive situation in Ireland; it is sufficient to reflect that, after twenty years' experience, the situation is perfectly calm and offers no ground for expecting any change. I do not therefore feel justified in asserting that the situation in Ireland is strictly on all fours with that envisaged by Article 15, which requires that a threat be immediate, serious and persistent.

Finally, from the standpoint of precedent, a comparison with historical examples of threats to the life of a nation impels me to the same conclusion.

Once we rule out the possibility of establishing the existence of an actual, concrete threat to the life of Ireland, there is no longer any need to enquire whether the emergency measures

go beyond the extent strictly required by the exigencies of the situation. A specific measure providing for detention without trial is an exceedingly grave matter, as has been pointed out in particular by M. Süsterhenn, but it is clear, logically, that no such measure can be warranted if the condition of a genuine threat to the life of the nation is not fulfilled. In the present case, there is only a question of danger to public order.

B. Intent

It is plainly not sufficient however to examine the material facts; they must also be interpreted in the light of their causes, i.e. the political and moral motives underlying them. This second, psychological, enquiry which is also supported in Mr. Waldock's opinion, may be still more important in its legal consequences than the literal, historical interpretation of Article 15 which has been ably put forward by other members of the Commission, e.g. by M. Eustathiades and, with some additional refinements, by M. Süsterhenn.

The acts regarded as threats to the public order of the Irish nation were not after all meant to threaten that nation but rather, ulimately, to unite and hence, strengthen it by the accession of elements alleged to be irredentist. Even without touching on the substance of this delicate matter, therefore, it is quite certain that, in the eyes of the Applicant the acts committed are not against Ireland but for Ireland. This circumstance cannot be ignored, if Article 15 is to be applied correctly.

In other words, the will to achieve the ethnic unity of one's own nation, whatever else it may mean, cannot mean a will to harm that nation's life; any such proposition would be a contradiction in terms.

Nor let it be said that the pursuit of such an aim might bring about a situation conducive to civil war. In that case, there would still be no "latent" emergency, in the sense employed by Mr. Süsterhenn, let alone an immediate, real and persistent threat. Such a possibility must in any event be relegated to the abstract world of hypothesis; apart from anything else, it is fundamentally inconsistent with the aims and actions of the Applicant. Perhaps that explains his refusal to sign undertakings to obey his country's emergency laws.

Furthermore, other members, including M. Süsterhenn, have already pointed out that one cannot talk seriously of a danger of foreign war; that would be a far-fetched supposition, when

everyone knows the true nature of relations between Ireland and the United Kingdom, which have assuredly grown more settled over the years. The United Kingdom Government, moreover, are fully conversant with the steps taken by the Irish Government to put an end to the I.R.A. and its activities.

The significance of the foregoing considerations may lie in the fact that the European Commission of Human Rights by giving a strict interpretation of Article 15 of the Convention intends to emphasise the importance it attaches to the Human Rights which are given the fullest protection in the Convention and cannot therefore be violated by Member States otherwise than in exceptional cases expressly provided for.

By so acting, the Commission complies both with the rules of law and with the European spirit, i.e. with the ideals which a democratic country such as Ireland has maintained throughout its glorious history.

95. OPINION OF MME. JANSSEN-PEVTSCHIN

I would preface my remarks by saying that, as a number of my colleagues have already noticed, when only part of the Commission is working, in the form of a Sub-Commission, there is a certain lack of balance.

However informative the reports submitted to them, those members who only hear the case indirectly have an incomplete picture of it. Hence the opinions they are called upon to give when deliberating in accordance with Rule 65 of the Rules of Procedure before drawing up a report in pursuance of Article 31 of the Convention cannot carry the same weight as those expressed by members of the Sub-Commission at the conclusion of their proceedings.

With this reservation, I may say that I am not entirely convinced by the arguments for the existence of a public emergency threatening the life of the nation (as understood in paragraph 90 of the report), although they have some foundation. They do not, to my mind, prove the real existence of such an emergency or its consequences. The considerations of the majority group centre round the repercussions of the continuance of I.R.A. activities upon the relations of the Respondent State with the United Kingdom. Those considerations are essentially conjectural and hypothetical; they are not backed up by any evidence of protests or intervention from outside.

I hold, therefore, with M. Süsterhenn, that the emergency was not actual but only potential and that consequently Article 15 could not be invoked. In order to preserve the principle that the rights set forth in the Convention are sacrosanct, derogation should be permitted only under the strictest conditions.

96. OPINION OF M. ERMACORA

It is for the Irish Government to answer the question whether there was a public emergency within the meaning of Article 15 of the Convention. But the Commission is competent to judge whether the emergency was so serious as to necessitate taking the measures in question.

I do not think that the emergency was so serious as to require the measures in question, for the following reasons:

(a) The main activities of the I.R.A. were carried out in the territory of Northern Ireland and not in that of the Republic of Ireland; the Republic of Ireland did not sanction those activities.

(b) The activities were not such as to have aggravated the situation in the Republic. It appears rather that the situation was that normal in the circumstances. In other words, the situation was not exceptional.

(c) The I.R.A.'s actions did upset neither ordinary life nor the life of the State. According to the principles of public municipal law, a "Notstand" (state of emergency) exists if constitutional rules can no longer be applied, in other words when the legislature, the judiciary and the administration are no longer functioning. But that was not the case during the period in question.

(d) The merits of the argument that relations between the Republic of Ireland and the United Kingdom had become such as to cause a threat to the life of the Irish nation have not been proved. To my knowledge, no official diplomatic approach was made; nor indeed does the respondent party advance that argument, although it would support its thesis.

C. The question whether the special powers of arrest and detention exercisable under the 1940 Act were measures which were 'strictly required by the exigencies of the situation' within the meaning of Article 15, paragraph (1) of the Convention.

97. Memorial of the Applicant

The Applicant in his Memorial, (entitled 'Arguments and Conclusions', of 20th November, 1958) submitted:

(a) that, even if the Respondent Government were now to submit satisfactory proofs to the Sub-Commission to establish that a situation existed in July 1957, that warranted derogation under Article 15, the Complainant would contend that the bringing into force of Part II of the 1940 Act and the use of the powers contained therein were grossly in excess of any measures strictly required by the exigencies of the situation;

(b) that the ordinary Courts of Justice had been, and still were, functioning normally in every respect and would have been quite capable of dealing with any suspected offender charged before them. In 1957, 122 persons were charged with offences against the 1939 Act and, of these 109 were convicted and 13 acquitted. Most of these were charged before the 1940 Act was brought into force and, since then, such suspected persons were in the main interned and not brought before the courts;

(c) that, in the letter of 20th July 1957, from the Respondent Government to the Secretary-General of the Council of Europe, two reasons were advanced for detention of persons, namely, 'to prevent the commission of offences against public peace and order' and 'to prevent the maintaining of military or armed forces other than those authorised by the Constitution'. Both types of offences would constitute criminal offences cognizable by the ordinary courts.

The commission of offences against public peace and order was a crime cognizable by the Irish courts and in respect of which prosecutions might be brought under numerous statutes and under the Common Law.

The maintaining of armed forces other than those authorised by the Constitution was an offence under Section 6 (1) of the 1939 Act, in respect of which prosecutions could always have been brought at any time by the Government in the ordinary domestic courts or in the Special Criminal Courts provided for in Part V of the 1939 Act.

Furthermore, under the Treason Act, 1939, and under Article 39 of the Constitution, persons engaged in certain activities might be charged with treason, which was defined as "levying war against the state, or assisting any state or person or inciting or conspiring with any person to levy war against the state or attempting by force of arms or other violent means to overthrow the organs of government established by this constitution or taking part or being concerned in or inciting or conspiring with any person to make or to take part or be concerned in any such attempt". No charge of treason had been made against any person;

(d) that no provision was made in the 1940 Act for the intervention of judicial process to test the validity or reasonableness of the opinion of a Minister who signed and issued a Warrant under Section 4 of the 1940 Act; thus a person so imprisoned was afforded no judicial protection against error or prejudice;

(e) that, apart from the ordinary courts, there existed under the Irish Constitution provisions which enabled the above, and all other, offences to be tried by special tribunals with very far-reaching powers:

(i) Military Tribunals might, under Article 38, Section 4, (1), of the Irish Constitution, be established to deal with a "state of war or armed rebellion";

(ii) Military Courts could be set up to try civilians on any charge where Parliament passed an Act pursuant to the provisions of Article 28, Section 3, (3), of the Constitution. Such an Act must be "expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion". An Act in those terms could have

./.

been passed in 1957 or since, and would have had the effect of suspending the operation of all constitutional safeguards concerning the trial of offences. It could also have altered, relaxed or suspended all the laws and rules of evidence and procedure. Military Courts were in fact in operation for a number of years before 1946;

The Respondent Government had not asked Parliament to pass such legislation but was now indirectly asking the European Commission to declare that a situation existed analogous to that contemplated by Article 28 Section 3, (3), of the Constitution;

(iii) Special Criminal Courts might, under the provisions of Article 38, Section 3, (1), of the Constitution and under Part V of the 1939 Act, try criminal offences. These Courts, which consisted of military officers, were duly established and could have been used at any time since 1939 for the trial of persons engaged in the activities described by the Respondent Government. No special legislation would have been required;

(f) that, accordingly, the Respondent Government had more than ample powers at its disposal to bring offenders to trial, for any of the matters of which it complained, before:

(i) the ordinary Courts of Justice;
(ii) the Special Criminal Courts;
(iii) Military Courts, or
(iv) Military Tribunals.(1)

98. Counter-Memorial of the Respondent Government

The Respondent Government submitted its Counter-Memorial on 12th January 1959, in which it made the following submissions:

(a) that it was for a Government, and for that Government alone, to determine not only whether a state of emergency existed but also what measures were required by the exigencies of the situation. It was clear that there might be a choice of measures which could be taken. A Government, however, could not be held to be in breach of the Convention if it took the measure which it considered necessary, even

./.

(1) paragraph II of Memorial.

though some other meaure (also in derogation of the rights guaranteed under the Convention) might have been adopted as an alternative. The Respondent Government had adopted detention as the least oppressive measure which could be taken in the circumstances and which would be effective to protect the community and its liberties;

(b) that one of the factors which the Commission should take into account was the general history of the country concerned. Due to partition, there was in Ireland a peculiar danger of the formation and growth of armed groups arrogating to themselves the right to seek the attainment of political objectives by force in disregard of the policy determined by the elected Parliament and Government with the support of the great majority of the people. From time to time such groups had become so active that firm steps had to be taken to counter them and to preserve the democratic institutions of the State. The 1939 Act and the 1940 Act were part of the permanent legislation of the State and were such by reason of this very situation which had had to be met from time to time. Experience over the years had shown that members of these groups could not be successfully dealt with by trial in the ordinary courts. Evidence sufficient to satisfy a court of law could not easily be obtained. Even when it was obtained, witnesses were afraid to come forward and give evidence, judges and jurors were threatened and on occasions witnesses and, earlier, jurors had been shot because of their part in trials of such persons;

(c) that the decision to bring Part II of the 1940 Act into force was taken immediately after the occurrence of a particularly grave incident, in which a Six-County police patrol was ambushed within a short distance of the border and a policeman was shot dead and another wounded.

In addition a number of police huts in Counties Tyrone and Fermanagh were destroyed by explosives. In that week, too, a number of men, including two men named Chrystie and Gorahty, had been returned for trial on charges of armed robbery from an explosives store in County Laois and were acquitted in the Dublin Circuit Court. Witnesses who had identified them, both to the police and at the preliminary hearing in the District Court, had gone back on their identification when the case came for trial.

From its special knowledge of all the circumstances, including the history and existing plans of the I.R.A., the Government was satisfied that the exigencies of the situation required the bringing into force of the powers of detention - in effect, preventive detention - conferred on them by law and that, in fact, no other measure was available to them to deal rapidly and effectively with the situation;

(d) that the conduct of those engaged in I.R.A. activities in recent years had not departed from pattern. Out of a total of 122 cases of persons charged under the 1939 Act before the courts in the year 1957, the accused in 119 cases declined to recognise the jurisdiction of the Court. Reference was made to 'General Order Number One' contained in the document 'An t-Oglach'. The Courts which the accused refused to recognise were ordinary courts established under the Constitution, whose judges are independent in the exercise of their functions and not subject to removal by the Government. The Applicant himself when charged had refused to recognise the court even as late as May 1957, although he now claimed that he should have been tried by such a court when arrested in July 1957. This refusal to recognise the court must convey to the courts themselves and to those giving evidence that the persons charged regarded themselves as above the courts of law and that those who took part in court proceedings concerning such persons did so at some risk. It had been found that witnesses who had positively identified accused persons withdrew their identification when the case came finally to trial;

(e) it had been argued that Special Criminal Courts could deal with the problem which faced the Government. There was, indeed, provision in the Constitution for the establishment of those courts and such courts had functioned in the past. In those courts the ordinary laws of evidence were adhered to and it could not be suggested that the mere change of venue from the normal domestic courts to Special Criminal Courts would meet cases in which witnesses could not be produced to give evidence;

(f) that, in the system of detention in force in Ireland, the person detained was released if he undertook to respect the Constitution of the State, and not be a member of, or assist, any unlawful organisation. Ireland was a

founder member of the Council of Europe and the democratic nature of the Irish Constitution was not open to question. It should not be said to any Commission set up by the Council of Europe that an Irish citizen was entitled to refuse to respect that Constitution. There could surely be no reasonable objection during a public emergency to requiring a citizen to give an undertaking not to be a member of, or assist, any unlawful organisation.

Apart from the right to secure release by giving an undertaking on the lines indicated, the person detained had by law the right to apply to the Detention Commission to have his case reviewed. Once an application was referred to it, if the Detention Commission reported that no reasonable grounds existed for the continued detention of the applicant, the latter must be released.

Finally, detention without trial under the circumstances outlined, even if it should be held to be in conflict with the provisions of Article 5 of the Convention, was not an unwarranted derogation from the rights guaranteed by the Convention (1).

99. Reply of the Applicant

The Applicant, in his Reply of 19th February 1959, repeated his general submission that the Respondent Government had ample powers within the due process of law to deal with the situation without resorting to arbitrary imprisonment without trial.

In particular, it was submitted that the Respondent Government had implied in its account of the trial of the two men Chrystie and Geraghty, that the witnesses had been intimidated. That was not correct as the reason for acquittal was, as stated in the Press, that the witnesses were not sufficiently positive in their identification of the accused (2).

./.

(1) Paragraphs 17 and 18, 32 to 39, 45 of Counter-Memorial.
(2) Paragraphs 14 and 16 of Reply.

100. Oral hearing of 17th to 19th April 1959

The Sub-Commission took a decision on 24th March 1959, the relevant part of which was as follows:

"The Sub-Commission, ... after having deliberated,

DECIDES, in accordance with Rules 53 and 54 of the Rules of Procedure, to invite the Parties to appear before it at Strasbourg on 17th and 18th April 1959, in order that the Sub-Commission may obtain further information and explanations from them in regard to the case and may hear the statements of the persons named below.

The Sub-Commission desires the Parties at the above-mentioned oral hearing to develop further their respective points of view on the question whether, in connection with the application of Article 15 of the Convention, the detention of persons without trial was or was not a measure which was strictly required by the exigencies of the situation in July 1957. The Respondent Government is asked, in particular, to furnish a full statement of its position on the following points:

(1) What are the precise facts by reference to which the Government justifies its contention that the detention of persons without trial was a measure strictly required by the exigencies of the situation in July 1957?

(2) In regard to the Government's submission that it was impracticable to deal with the situation in July 1957, by means of the normal application of the criminal law in the ordinary Courts against members of an illegal organisation, and more especially owing to the intimidation of witnesses and the difficulty of obtaining evidence, what comment has the Government to make on the Applicant's statement that in the year 1957 there were in fact 122 persons charged with offences under the Offences Against the State Act, 1939, and that of those persons no less than 109 were found guilty and only 13 acquitted? What was the nature of these cases and by what kinds of evidence were the convictions obtained in the cases where the accused was found guilty?

(3) What were the considerations which, in the view of the Government, made it necessary in July 1957 to deal with the situation by having recourse to the measure of detention without trial rather than by setting up the Special Criminal Courts authorised under Article 38, Section (3), Sub-Section (1) of the Irish Constitution and under Part V of the Offences Against the State Act, 1939?"

101. At the oral hearing on 17th to 19th April, the Applicant's representative submitted:

(a) that the words 'strictly required' were a stringent limitation on the exercise of derogation.

The suspension of the right of trial should only be exercised in the gravest emergency and where it was established that the courts could not function. Extracts from the official Reports of the Irish Parliament (which were produced as exhibits) showed, at columns 267 and 268, the number of persons convicted and acquitted in 1957 and 1958. Out of 137 persons charged, 131 had been convicted. In June 1957, 38 persons had been charged and all convicted. It was clear that there was no difficulty in securing convictions at that period;

(b) that, as had already been submitted, the ordinary Criminal Courts were functioning normally. Special Criminal Courts existed and could be put into operation without legislation. Military Courts could be set up under the Constitution. Military Tribunals could also be used in time of war or armed rebellion. None of these had been used and the Respondent Government had utterly failed to show that the ordinary courts could not function normally. (1)

102. The Attorney-General then submitted on behalf of the Respondent Government:

(a) that it was widely considered that detention was less drastic than the establishment of Special Criminal Courts under Part V of the 1939 Act which did not provide adequate safeguards for persons appearing before them. Such courts were for exclusively criminal matters and composed of military personnel and were not well regarded by the population. During the war detention was found essential and had existed simultaneously with Special Criminal Courts;

(b) that in 1957 there were 129 charges out of which 69 were against persons simply for failing to account for their movements during a specified period, as under Section 52 of the 1939 Act. In 38 of these 69 cases the persons concerned were arrested on the same occasion when engaged in military exercises in the mountains near Dublin. No other offence was provable against them and they were released about a month after the Proclamation came into force. The remaining charges in the 129 cases were either for possession of incriminating documents under Section 12 of the 1939 Act or for membership of an illegal organisation under Section 21. There was no evidence in any case other than that of ./.

(1) Verbatim record of the hearing, pages 85 to 87.

members of the police. The Applicant was one of those who went for trial on a charge of possession of firearms without a firearm certificate and was acquitted because of lack of technical proof.

In 1957, there were two armed raids. In the second of these at The Swan, the Applicant's friends, Chrystle and Geraghty, were identified and sent for trial to the Dublin Circuit Criminal Court in July 1957. They were acquitted as the witnesses who had identified them failed to adhere to their evidence. The full particulars of these charges were correctly stated in the Government's Counter-Memorial of 12th January 1959, at paragraph 45. There had been information but no proof that these witnesses had been visited by members of the splinter group.

Intimidation of witnesses had occurred in Ireland in 1943 in a case before the Special Criminal Court in which a witness named Dunn was shot for giving evidence against the principal offender and another witness named Hill was also shot in the leg and lamed for life;

(c) that the members of these illegal organisations were not primarily committing acts of violence against the Irish police or military forces, when evidence would have been more easily available, but were simply using Irish territory as a basis for attacks outside, and positive or concrete evidence of criminal activities within the Government's jurisdiction was extremely hard to obtain. Reference was made to the list of acts of violence as from 1st December 1956, which was contained in Schedule 3 to the Government's observations of 25th March 1958.

It would have been very hard to satisfy an ordinary court or even a Special Criminal Court that, for example, a visit by someone to the border area was unlawful if no overt act of violence had yet been committed;

(d) that the Special Criminal Court sat in private and its members were military personnel who were not subject to intimidation as in the case of judges of ordinary courts. The laws of evidence are the same in Special Criminal Courts as in ordinary courts. As to the

./.

intimidation of judges, a Justice of the District Court in Dublin in January 1957, had convicted members of the I.R.A. and sentenced them to imprisonment. He received a threat from the I.R.A. and reported it to the Minister for Justice. The threat was regarded very seriously and the judge was given police protection. That judge dealt with some further Irish cases but apparently only on one later date. It would be very undesirable to change the laws of evidence in order more easily to obtain conviction;

(e) that all except 6 of the 206 warrants issued under the 1940 Act had, in fact, been signed by the Minister for Justice, as the Respondent Government realised that detention without trial was a grave step and interfered with the normal liberties of Irish citizens. For the same reason, the law provided for Detention Commissions and the Government was obliged to set free any detained person if the Commission decided that there were no reasonable grounds for his continued detention. Although there was no law to that effect, the Government had further declared that detained persons who did not wish to go before the Detention Commission could obtain their release by giving an undertaking 'to uphold the Constitution' and, after 14th July 1957, 'to respect the Constitution'. At the date of the Applicant's detention the formula accepted by the Government was 'to uphold';

(f) that during the period from 8th July 1957, until 11th March 1959, a total of 206 persons had been detained and this had resulted in such an improvement of the situation that the Government believed the I.R.A. menace had been overcome. It should be possible soon to revoke the Proclamation and thereby terminate the operation of the special powers of detention.(1)

103. The Applicant's representative submitted in reply to the Attorney-General:

(a) that the Respondent Government had not contested the Applicant's submission as to Article 15 of the Convention, in particular, as to the meaning of the words "strictly required by the exigencies of the situation" and had therefore presumably accepted the construction made on behalf of the Applicant;

./.

(1) Verbatim record of the hearings, pages 99 to 101, 103 to 106, 109 to 118.

(b) that the alleged intimidation in 1957 of a District Justice was not known to the Applicant or his representatives and was not mentioned in the Report of the Commissioner of Police for 1957. That Report always included such incidents and further it made no mention of any case of intimidation of a political nature. The other events referred to, including the wounding of Dunn and Hill in 1943, had all occurred a considerable time ago. The facts did not support the Government's contention that the ordinary courts could not function as a result of the intimidation of witnesses, judges and juries;

(c) that the "Constitution (Amendment No. 17) Act, 1931" which was the same type of legislation as the 1939 Act, had provided for the establishment of Special Criminal Courts but did not provide for internment without trial. Until March 1957, this legislation had been found adequate to deal with the situation;

The suggestion that trial by Special Criminal Courts was more unpopular than detention without trial was untrue. The former Attorney-General, Professor McGilligan, had stated in the Dail on 9th April 1959, on behalf of the Opposition, that most people were 'revolted' by detention without trial merely on the warrant of a Minister. Reference was made to the Official Report of the Parliament Debates on 9th April 1959, at Column 243.

The Labour Party had tabled a motion in Parliament asking that these internment powers be abolished and the Speaker had decided that this question should not be debated while it was sub judice the Commission of Human Rights. Other leading public bodies had passed similar resolutions;

(d) that, in any event, the question of the popularity of certain courts should not affect the issue which was simply whether the ordinary courts were functioning normally. The Government could by law change the rules of evidence if it found them unsatisfactory. Not one of the judges, ninety per cent of whom had been appointed by the Government, had stated that the Courts could not function normally. The Government's suggestion that sentences imposed by the courts were not adequate simply reflected on the discretion of the judiciary and did

./.

not justify the suspension of the Convention. Sentences up to 10 years were provided for under the 1939 Act and could, if required, be increased by amending legislation. Further, the Emergency Powers Act, which was not in operation but could be re-enacted, provided that, in the case of certain trials, all the rules of evidence should be suspended;

(e) that, as had already been stated, Chrystle had not been acquitted because of any intimidation of the witnesses but because the witnesses, Nash, Brannan and Ling, had failed to identify him on the identification parade. A full report of the proceedings in the District Court was contained in the Irish Times of 29th May 1957, and the case was also mentioned in the Report of the Commissioner of Police for 1957 (at page 11) where no suggestion of intimidation of witnesses had been made;

(f) that it was untrue that civilian witnesses could not be got to give evidence in political cases. The "Kilkenny People" of 1st March 1958, reported a case where civilian witnesses gave evidence against a man who was tried and convicted on a charge of having explosives. This was a man who had refused to recognise the court and had made a political I.R.A. speech;

(g) that, contrary to the Respondent Government's statements that adequate safeguards had been provided, mistakes had occurred in the cases of persons interned. The Court had recently accepted the affidavit of a man called Kelly who in habeas corpus proceedings showed that he had been detained in mistake for his brother.(1)

104. The Attorney-General in his final remarks made certain particular submissions to the effect:

(a) that the case of the intimidation of a District Judge had been mentioned in Schedule 7 to the Respondent Government's pleading of 27th January 1958, which quoted in that respect a speech made by Mr. Traynor, the Minister for Justice, in the Dáil;

(b) that the Constitution Act of 1931 which had set up a 'Constitutional Special Powers Tribunal' was extremely drastic as the Tribunal was empowered to pass the death

(1) Verbatim record of oral hearing, pages 133, 135 to 141, 145 and 146.

sentence if an executive Minister certified that, to the best of his belief, the act concerned was done in order to impede the machinery of Government or administration of justice;

(c) that, contrary to the Applicant's submission, the Executive had, since 1927, powers of internment without trial at its disposal. Those powers remained in force when the 1931 Act was passed and showed that the Irish people regarded such internment as less onerous than trials before military tribunals;

(d) that it was true that in one case during the war period the rules of evidence had been suspended. This was the case of the murder by four accused of a man named Devereux, who was wrongly thought to be an informer against the I.R.A. The witnesses failed to give evidence before the Special Criminal Court and the Government found it necessary to set up a Military Court which could admit written instead of oral evidence for the prosecution. This was a drastic step which was much regretted;

(e) that he was prepared to accept any figures supplied to the Applicant's representative by the Government of Northern Ireland;

(f) that he had not stated that witnesses would not give evidence in cases against members of the I.R.A. Civilian witnesses had given evidence in such cases, for example, in "The Swan" case and in the case against a man called Bolger. He had simply stated that witnesses had not been called or been available in cases under the 1939 and 1940 Acts;

(g) that, as to the trial of Chrystle and Geraghty, an official copy of the depositions had been supplied by the Circuit Court and the previous statements to the police by the witnesses Kelly and Nash were also available. These confirmed the Respondent Government's submission as to the failure of the witnesses to adhere to their evidence of identification;

(h) that, as to the alleged mistaken detention of the man named Kelly, the right man was detained but the warrant was, by mistake, issued in the name of his brother.(1)

./.

(1) Verbatim record of oral hearing, pages 154 to 158.

105. OPINION OF THE COMMISSION

The Commission, after having deliberated, decided by a majority of eight votes(1) against six votes(2) that the measures of arrest and detention taken by the Respondent Government were measures which were strictly required by the exigencies of the situation within the meaning of Article 15, paragraph (1) of the Convention.

The members of the Commission stated their opinions as set out below.

106. OPINION OF MR. WALDOCK

I interpret the task of the Commission in the same way as it was interpreted by the majority of the Commission in Application No. 176/56 relating to the emergency in the Island of Cyprus. The Commission has both the right and the duty to examine whether a measure taken by a Government in reliance on its exceptional power under Article 15 was such a measure as was strictly required by the exigencies of the particular situation. The burden lies upon the State concerned to satisfy the Commission that a measure derogating from the Convention was one strictly required by the exigencies of the emergency at the time when the measure was imposed. On the other hand, the express purpose of Article 15 being to give governments the necessary authority to take special measures to meet a threat to the life of the nation, that Article must be interpreted as leaving to the Government a reasonable discretion in judging the needs of the situation. It is also clear that a Government is in a better position than the Commission to know the relevant facts and to weigh the various considerations to be taken into account in deciding which of the different possible lines of action to adopt to deal with the emergency. Accordingly, the Commission, in examining measures taken by a Government under Article 15, must allow it a certain margin of appreciation.

The public emergency threatening the life of the nation which the Commission has found to have existed in the Republic of Ireland in July 1957, was of a somewhat special kind. It arose out of unlawful activities of the Irish Republican Army, directed not against the Government in the Republic but against

---

(1) MM. Waldock, Berg, Faber, Beaufort, Petren, Sørensen, Crosbie, Skarphedinsson.

(2) MM. Eustathiades, Dominedò, Süsterhenn, Mme. Janssen-Pevtschin, MM. Erim, Ermacora.

the authorities, police and armed forces of a neighbouring territory. These unlawful activities of the I.R.A., although they had some impact within the territory of the Republic in the shape of acts such as unlawful drilling, unlawful seizure or possession of arms, etc., did not manifest themselves there with the same intensity as would have been the case if they had been directed at the overthrow or forcible control of the Government of the Republic itself. While these activities were a source of grave embarrassment and difficulty to the Government and police of the Republic and set up dangerous tensions with the neighbouring territory of the Six Counties, they did not cause any such major upheaval in the internal life of the community or such major dislocation in the working of the normal processes of law and order, as for example occurred during the public emergency in Cyprus. Accordingly, the Commission has a particular need to be satisfied that the normal processes of law and order were not reasonably sufficient to deal with the situation.

Although there may not have been any major dislocation of the normal processes of law and order, the special character of the emergency seems, nevertheless, to have created psychological and political obstacles to their effective use as a means for dealing with the situation. The fact that the I.R.A. groups, while using misguided and illegal methods, were pursuing an aim which is a national aspiration of the people of the Republic, may have made it less easy either to secure a rigorous application of the criminal law to suppress their activities or to introduce new penal laws to deal with them. These psychological factors were not given great prominence in the pleadings of the Parties but there are numerous indications in the evidence submitted to the Commission and in the statements of the Parties that they existed. Indeed, the history of the Applicant himself shows that the ordinary process of the criminal law might be an unreliable instrument for countering the activities of members of the I.R.A. He was twice caught by the police in flagrante delicto, on one occasion in unexplained possession of military weapons and ammunition and on the other in unexplained possession of I.R.A. documents of the most compromising character. Yet on the first occasion he was acquitted and on the second he received a sentence of only one month's imprisonment.

The Applicant nevertheless urged that the I.R.A. activities alleged against him in July 1957 were criminal offences under Irish law and that he could have been dealt with by bringing him to trial on specific charges before the criminal courts and that, consequently, his detention without trial cannot be considered to have been a measure strictly required by the exigencies of the situation. He underlined the fact, which is not disputed by the Government, that the ordinary courts continued to operate during the emergency without any interruption. He further

pointed to the official criminal statistics for the year 1957 as evidence that it was perfectly possible during that year to secure convictions in the ordinary courts against persons charged under the Offences Against the State Act 1939, with I.R.A. activities. Out of 122 persons charged under that Act in 1957, no less than 109 were found guilty and only 13 acquitted. In June, the month immediately preceding the detention of the Applicant, there was a conviction in every single one of the 38 cases brought.

The Government, on the other hand, stated that, owing to the intimidation of witnesses and owing to the reluctance of members of the public to come forward with evidence lest they be afterwards vilified as "informers", it was virtually impossible to secure convictions except in cases where the accused had been caught in flagrante delicto or the police evidence was for other reasons sufficient in itself to prove his guilt. Indeed, the official statistics cited by the Applicant, when looked at more closely, confirmed that it was impossible to obtain evidence from members of the public in cases involving the I.R.A. During 1957 there had been 129 cases under the Offences Against the State Act, 1939, involving 122 persons. In no less than 69 of these cases, the only charge that could be brought against the persons arrested was under Section 52 of the 1939 Act, namely on the ground that, having been arrested on suspicion of having committed one of the offences listed in the Schedule to the Act, they had failed to account for their movements. Moreover, the 38 cases in June 1957, to which the Applicant had drawn particular attention, belonged to this category, all the 38 men having been arrested on the same occasion in the mountains on suspicion of illegal drilling. Persons convicted under this Section of the Act were only liable to brief sentences. As to the remaining 60 cases, every case involved either being found in possession of incriminating documents under Section 12 of the Act or membership of an illegal organisation under Section 21 or some combination of these offences with the offence of failing to account for their movements. In not one of the 129 cases was there any evidence available other than the evidence of police officers.

This analysis of the statistics of cases brought under the 1939 Act seems to me clearly to negative the inferences which the Applicant sought to draw from them, and, if anything, to support the Government's contentions. I do not, however, think that any very precise inference can be drawn from those statistics in regard to the unwillingness of members of the public to testify against the I.R.A. for the reason that in most of the cases, as the Attorney-General stated, the charges were for failing to account for movements, possession of incriminating documents, etc., and in these classes of case independent civilian evidence would scarcely be expected. At the oral hearing, on 19th April 1959, the Attorney-General himself stated that there had been some cases - presumably cases coming under other provisions of the criminal law - in which civilians had given evidence against members of the I.R.A., though he added that these cases were few and far between and that often civilians do not "stand up to their evidence" at the trial.

The Government also referred to the trial of two friends of the Applicant, Geraghty and Chrystle, which arose out of an armed raid on a store of explosives at the Swan. It stated that at the preliminary investigation two witnesses identified the men as having been amongst those engaged in the raid but that later at the trial they withdrew their evidence of identification. The information available to the Government was that the witnesses had in the meanwhile been visited by members of an I.R.A. group and were seen in conversation with the accused men or their friends immediately after the case. The Applicant did not altogether accept the Government's version of what had occurred in that case. It is unnecessary, however, to try to reach a conclusion on the point. Even if the Government's version be assumed to be correct, this example of possible or probable intimidation of witnesses, and the one other example mentioned by the Minister of Justice in a speech on 6th November 1957, would scarcely suffice by themselves to establish that it was not feasible to deal with I.R.A. activities through the ordinary application of the criminal law. I do not overlook the incident in January 1957, in which a Justice who had sentenced I.R.A. men to imprisonment is said afterwards to have received a threatening letter. The most, however, that can be extracted from the specific evidence in regard to intimidation is that there were some grounds for fearing possible attempts by the I.R.A. to obstruct the course of justice by the use of intimidation.

I do not therefore find that the Commission is confronted with clear proof of the inadequacy of the ordinary processes of law and order to meet the needs of the emergency. Nevertheless, I have formed the view that, because of the risk of I.R.A. attempts to obstruct the course of justice and because of the psychological factors mentioned above, there were elements in the situation upon the basis of which the Government might properly arrive at an appreciation that the application of the criminal law through the ordinary courts was not an adequate instrument for dealing with the particular threat to the life of the nation which I.R.A. activities constituted at that date.

The question still remains whether the only effective alternative was detention without trial. The Applicant contended that, if the criminal law could not function effectively against the I.R.A. through the ordinary courts it was open to the Government under Irish law to use other special types of courts for that purpose. He argued that the Government should have attempted to deal with the I.R.A. by using the Special Criminal Courts authorised under the Offences Against the State Act 1939, or the Military Courts authorised by the Constitution or the Military Tribunals authorised by the Constitution in time of "war or other rebellion", rather than have recourse to detention without any trial at all. The Government, on the other hand, maintained that a large part of the public in Ireland would regard detention without trial, if subject to the safeguards provided in the 1940 Act, as a "less onerous method of dealing with the activities of illegal organisations than by having resort to courts other than the ordinary courts to which citizens are normally brought". To bring a special class of criminal case into a court composed of military personnel would be regarded by the public of Ireland as a "very serious step indeed".

I am strongly of the opinion that the trial of criminal cases by special Military Courts or Tribunals sitting in secret and applying different rules of evidence from those applied in the ordinary criminal courts is not a procedure which is demonstrably to be preferred to the procedure of detention without trial subject to safeguards. Not only is the trial and conviction of persons by secret military tribunals a procedure which is itself open to serious objection under the Convention on grounds of principle, but it is also a procedure that in numerous cases may result in the conviction of persons on charges of the utmost gravity entailing the most serious consequences. If, therefore, the only choice before the Government of the Republic had been

the procedure of trial by secret military tribunals or the procedure of detention without trial subject to safeguards, I should myself unhesitatingly find that, in adopting the latter, it had not gone beyond the legitimate margin of a government's power of appreciation under Article 15 of the Convention.

In considering the third alternative, namely, trial by Special Criminal Courts, it is necessary to pay close attention to the contents of the two Irish enactments, the Offences Against the State Act 1939, and the Offences Against the State (Amendment) Act 1940. These Acts represent the special legislative provision made in advance by the Irish Parliament to arm the Government with sufficient powers to deal with emergencies like that which existed in July 1957, and of which Ireland in her history had too often had experience.

Part II of the 1939 Act defines as specific offences against the State such matters as usurpation of the functions of government, obstruction of government, interference with military or other employees of the State, printing, publishing and circulating incriminating, treasonable or seditious documents, possession of such documents, unauthorised military exercises, administering unlawful oaths, etc. Part III provides for a power to declare unlawful any organisation which engages in, promotes etc., the commission of treason or of any activity of a treasonable nature, which advocates the alteration of the Constitution by force, raises or maintains etc. a military or armed force without constitutional authority, which engages in, promotes etc. the commission of any criminal offence or the obstruction of the administration of justice etc. and also provides for the suppression of such unlawful organisations and for the punishment of those concerned in them. It further provides that possession of an incriminating document is prima facie proof of membership of an unlawful organisation. Part IV deals with miscellaneous matters such as the prohibition of certain kinds of public meetings, search warrants in relation to offences under the Act, arrest and detention of suspects, etc. The specific offences created by Parts II-IV of the Act are not, of course, the only offences with which persons engaged in I.R.A. activities may be charged. In addition, their activities may expose them to charges under the law of treason and under the general criminal law.

It is Part V of the 1939 Act which empowers the Government to set up Special Criminal Courts. Section 35 of the Act provides that "if and whenever and so often as the Government is satisfied that the ordinary courts are inadequate to secure the

effective administration of justice and the preservation of public peace and order", it is empowered to bring into force by proclamation the Special Criminal Courts machinery contained in Part V. On issuing such a proclamation, the Government may schedule any particular classes or any particular kinds of offences as scheduled offences to which the Special Criminal Courts machinery is to apply. At the same time it may establish one or more Special Criminal Courts, each of which is to consist of not less than three judges. The judges are to be appointed, and also to be removable at will, by the Government, but they must possess the qualifications either of a judge of the High Court or Circuit Court or of a justice of the District Court or of a barrister of not less than seven years' standing, or an officer of the Defence Forces not below the rank of Commandant. Every Special Criminal Court is to have power, in its absolute discretion, to appoint the times and places of its sittings and to control its own procedure in all respects. In regulating its procedure it has power to provide for the bringing of persons before it for trial, the admission or exclusion of the public to or from its sittings, the enforcement of the attendance of witnesses, and the production of documents. Again, a Special Criminal Court is given the power "in lieu of or in addition to making any other order in respect of a person, to require such person to enter into a recognisance before such Special Criminal Court or before a justice of the District Court, in such amount and with or without sureties as such Special Criminal Court shall direct, to keep the peace and be of good behaviour for such period as that Court shall specify". It would, therefore, seem possible for a Special Criminal Court, on the conviction of any person for any offence, including such offences as "failing to account for their movements", to employ the preventive measure of requiring the persons concerned to enter into bonds to be of good behaviour. Other provisions of Part V give the Attorney-General wide powers to direct the removal of cases from the ordinary courts to a Special Criminal Court and to do so even in the case of a non-scheduled offence on certifying that in the particular case the ordinary courts are in his opinion inadequate to secure the effective administration of justice and the preservation of public peace and order. They empower him to select the particular Special Criminal Court to which the case shall be sent. It is also of interest, having regard to the general practice of the I.R.A., to refuse to recognise the authority of the Courts, that another provision of Part V specifically lays down that any such refusal shall be a contempt of court and punishable accordingly.

The objections of principle which attach to the use of Military Courts and Tribunals do not, in my opinion, apply equally to the Special Criminal Courts. Under Part V of the

Act it would be open to the Government to appoint to these Courts experienced judges and lawyers of unimpeachable reputation as a guarantee of the judicial character of the tribunals. In addition, two other provisions of Part V go a long way to meet some of the more serious objections felt to the use of special courts for criminal cases. The first is that the rules of evidence applicable to the trial of a person on indictment in the Irish Contral Criminal Court are to be applicable to every trial by the Special Criminal Courts and that, subject to the provisions of the Act, the practice and procedure in that Court are, so far as practicable, to be applied in the Special Criminal Courts. The second provision - and it is a very important one - is that a person convicted by a Special Criminal Court may appeal to the ordinary Court of Criminal Appeal either by leave of the Special Criminal Court or, if that is refused, by leave of the Court of Criminal Appeal itself.

The Government understandably observed that the very fact that the Special Criminal Courts have to apply the ordinary rules of evidence means that the same factors - the intimidation of witnesses and the reluctance of civil witnesses to be abused as "informers" - which it considers to render the ordinary courts ineffective to deal with I.R.A. activities might also operate in the Special Criminal Courts. While I appreciate the force of this observation, the Government's evidence, as I have explained earlier, has not fully convinced me as to the weight to be given to these factors. Granted that in none of the 129 cases brought in 1957 under the Offences Against the State Act 1939, was civilian evidence available, the fact, however, remains that in no less than 109 cases convictions were secured in the ordinary courts on one charge or another under the Act. It seems reasonable to suppose that Special Criminal Courts, established in pursuance of a Government proclamation calling attention to the gravity of the situation, would have taken a somewhat more stringent view of the application of the criminal law to I.R.A. activities, making full use of the legitimate presumptions and obvious inferences to be drawn from such incriminating facts as unauthorised possession of military weapons and explosives, possession of I.R.A. documents, wilful refusal of suspected persons to give any account of themselves, refusal to recognise the authority of the Court, etc., and dealing with convicted persons with a somewhat greater firmness. It would also seem possible for the Government to have strengthened the criminal law against the I.R.A. by some minor amendments of or additions to the Offences Against the State Acts.

To my mind, therefore, it is not established that Special Criminal Courts set up under Part V of the 1939 Act could not have been effective instruments for dealing with persons suspected of I.R.A. activities. This conclusion, however, only means that the possibility of the Special Criminal Courts machinery having proved an effective means of dealing with I.R.A. activities in 1957 cannot, on the evidence, be altogether excluded by the Commission.

I now turn to the means actually adopted by the Government - detention without trial under the Offences Against the State (Amendment) Act 1950. A power to detain without trial was originally included in the 1939 Act as Part VI but in a form which was held by the Supreme Court to be unconstitutional. Part VI was re-enacted in the 1940 Act in an amended form which was held by the Supreme Court to be in conformity with the Constitution. The power to detain without trial, therefore, forms one of the two special pieces of machinery expressly provided by the Irish Parliament for dealing with activities like those of the I.R.A. The terms in which Parliament gave this power to the Government are very wide: "If and whenever and so often as the Government makes and publishes a proclamation declaring that the powers conferred by this Part of this Act are necessary to secure the preservation of public peace and order and that it is expedient that this Part of this Act shall come into force immediately, this Part of this Act shall come into force forthwith". On the other hand, as a check upon the Government, the Act provided that the proclamation could at any time be annulled by simple resolution of the lower House of the Irish Parliament. In the present instance a proclamation introducing the power to detain without trial was made on 5th July 1957, and to all appearances was acquiesced in by the Irish Parliament.

Section 4 of the 1940 Act reads as follows: "Whenever a Minister of State is of opinion that any particular person is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State, such Minister may by Warrant under his hand and sealed with his official seal order the arrest and detention of such person under this section". Other provisions empower a Minister of State to prescribe the place, and regulate the conditions, of the detention. It is well established in Irish, as it is in English law, that language of the kind used in Section 4 is effective to exclude the Minister's power of detention from control by the ordinary courts. The courts, as the Irish Supreme Court expressly held on Mr. Lawless's habeas corpus application in the present case, are powerless to inquire into the grounds upon which the Minister has formed his "opinion" that a person "is engaged in activities prejudicial to the preservation of public peace etc." Nor does the person detained have any right even to be informed as to what are the grounds for the Minister's opinion. Taken by itself, therefore, Section 4 clearly amounts to a suppression of the guarantees of liberty and security of the person established in the Convention.

The Act, however, seeks to provide a safeguard against abuses or mistakes in the shape of a Detention Commission. This Commission has to consist of three persons, one of whom must be an Officer in the Defence Forces and the other two barristers or solicitors of not less than seven years' standing or judges or ex-judges of one of the ordinary courts. The three members of the Commission, who are appointed and removable by the Government, are to be remunerated in such manner as the Minister of Finance determines. In the present instance the Government in fact appointed to the Commission two judges and an Officer of the Defence Forces who had legal qualifications. Every person detained under the Act is given the right to have the continuation of his detention considered by the Detention Commission and, on such an application being made, the Government is required with all convenient speed to refer the matter to the Commission. The Act then places a duty upon the Commission to inquire into the grounds of the detention and to report thereon with all convenient speed to the Government. At the same time it places a duty upon the Minister of Justice to furnish to the Commission all such relevant information and documents in the possession or procurement of the Government as may be called for by the Commission. The Act leaves it to the Commission to settle its own procedure and the Supreme Court has ruled in the present case that, as the Commission is not a court but an administrative inquiry, it is not bound to disclose to the applicant the information and the documents furnished by the Government. The Commission itself in the present case doubted whether it had the power to administer an oath. On the other hand, it allowed Mr. Lawless to tender evidence and his Counsel to cross-examine a police witness. Finally, the Act expressly provides that, if the Commission reports that no reasonable grounds exist for the continued detention of the applicant, the Government must release him.

The Detention Commission, although it is not a court, is not altogether outside the control of the law. It was common ground between the Parties that, if the Commission refused or neglected to carry out its functions under the Act, it could be made to do so by applying to the High Court for an order of mandamus; and that, if it attempted to travel outside its statutory powers, it could be prevented from doing so by applying for an order of prohibition. Nor would it seem to be lawfully possible for a man to be detained after the Commission had reported that no reasonable grounds existed for continuing to

detain him. In all the circumstances it seems proper to conclude that the right to apply to the Commission does provide anyone, who has not given the authorities substantial cause to suspect him of engaging in I.R.A. activities, a reasonable possibility of a remedy and affords some safeguard against error or abuse. It does not necessarily follow that the Government was justified in introducing detention without trial in the circumstances obtaining in Ireland in July 1957. But it is certainly a point to be taken into account that under the 1940 Act the power to detain without trial was accompanied by a substantial safeguard against errors or abuses. Furthermore, the 1940 Act required the Government at least every six months to supply to each of the two Houses of Parliament detailed returns of the person detained under the Act, including particulars of those still detained, those reported on by the Commission, those whose detention the Commission considered to be no longer justified, those released in consequence of the Commission's report and those released by the Government without any report from the Commission. In other words, both Houses of Parliament were to be put in a position by the Government to enable them to keep a watchful eye on the Government's use of the power to detain without trial under the Act.

In the present instance the Government itself provided another extra-legal safeguard which very materially mitigated the application of detention orders to persons detained under the proclamation of 5th July 1957. Immediately after the issue of that proclamation the Prime Minister made a public announcement to the effect that the Government would release anyone detained under the 1940 Act, who gave an undertaking to respect the Constitution and the law and not to engage in illegal activities. It is true that this announcement had no legal basis and that in law it gave no legal right to persons detained under the Act entitling them to release upon giving the requisite undertaking. Nevertheless, in a parliamentary democracy like the Republic of Ireland a government statement of this kind constitutes a definite political commitment to release persons willing to give the undertaking. The serious character of the Government's commitment is borne out by the evidence before the Commission that immediately after their arrest persons detained under the 1940 Act were informed that they could obtain their release by giving the undertaking. The Applicant himself was so informed on the same day as his arrest. Some detained persons, including the Applicant, professed to find the form of the required undertaking objectionable because for reasons of their own they were unwilling to undertake to "uphold" or "respect" the Constitution of the Republic. The Government, however, did not maintain a stiff attitude on the question of the form of undertaking but offered a

./.

new form which merely involved an undertaking to observe the law and to refrain from engaging in activities contrary to the Offences Against the State Act. The willingness of the Government to compromise on the form of the undertaking, without troubling whether the objections of the detained persons were reasonable or unreasonable, only serves to confirm the seriousness with which it regarded its commitment not to detain persons who gave an undertaking as to their future conduct. Certainly, the scruples professed by the Applicant in regard to the form of undertaking cannot be regarded as diminishing in any material degree the reality of the offer made by the Government to allow detained persons to go free on giving an undertaking as to their future conduct.

General Conclusion

The right to liberty and security of the person guaranteed in Article 5 is a fundamental right and, without it, many of the other rights and freedoms can either not be enjoyed at all or only in very restricted measure. For that reason Articles 5 and 6 contain elaborate provisions setting out the cases in which and the conditions under which a Government may lawfully deprive a person of his liberty and giving to every person arrested and detained on suspicion of having committed an offence certain minimum rights. Broadly, these rights are: to be informed promptly of the reasons for his arrest and of any charge against him, to be brought promptly before a judge and to be tried within a reasonable time or released pending trial, to be presumed innocent until proved guilty and a number of other rights designed to secure him a fair trial. The procedure of detention without charge and trial under the 1940 Act denies to the person detained all these essential rights and all these essential guarantees against arbitrary or unjustified deprivation of liberty. In principle, therefore, detention under the 1940 Act constitutes a very serious departure from the provisions of the Convention.

On the other hand, paragraph 2 of Article 15 of the Convention, which lists a number of rights and freedoms from which it is forbidden to derogate even in time of public emergency, does not include in that list the rights and guarantees contained in Articles 5 and 6. The acts of violence which cause a public emergency menace the personal security of other members of the community and Article 15, paragraph 2, has deliberately authorised the suspension of the rights and guarantees contained in Articles 5 and 6 during an emergency,

should this measure be necessary to meet the threat to the life of the nation. In so doing, those who framed the Convention had in mind that the Constitutions of many member countries of the Council of Europe permit the temporary suspension even of these fundamental rights and guarantees in time of grave public emergency.

Accordingly, while any suspension of the rights and freedoms in Articles 5 and 6 must always be regarded with a very jealous eye, the Commission has equally to bear in mind that the Convention expressly contemplates that such an extreme measure may be appropriate and necessary to deal with a public emergency.

Earlier in this opinion I have indicated my doubts as to whether I.R.A. activities could not have been dealt with by a somewhat more vigorous application of the criminal law. These doubts relate especially to the seven or eight months preceding July 1957, when the pressure at which the criminal law was applied to members of the I.R.A. does not seem to have corresponded with the increasing intensity of their activities and the growing threat to the life of the nation. It does not seem to me, however, that in applying Article 15, paragraph 2, of the Convention the failure of a State to use to the full other possible means of dealing with a worsening situation at an earlier stage should be decisive in appreciating whether the employment of a particular measure was justifiable when introduced at a later stage to deal with a situation which has become a "public emergency threatening the life of the nation". In whatever way a threat to the life of the nation may have developed, the Government is under a duty to its people to deal with it. In my opinion, therefore, while the Commission must certainly examine the Government's previous handling of the I.R.A. activity, it must primarily have regard to the exigencies of the situation and the problems facing the Government in selecting the measures to deal with it in July 1957 and in the months which followed.

The Government's appreciation of the situation in July, 1957, as explained by the Attorney-General at the oral hearing on 18th April, was as follows. I.R.A. groups had started a campaign of violence in the neighbouring territory of the Six Counties on 12th December, 1956, involving serious loss of life and destruction of property. At the same time the I.R.A. intensified their efforts to recruit new active personnel

prepared to undertake commando-type operations in the Six Counties. Indeed despite the fact that members of the I.R.A. were being charged before the ordinary courts with some frequency on such charges as could be brought and numbers of them had been given prison sentences, the I.R.A. had succeeded in increasing the strength of their active personnel by about thirty per cent. Furthermore those who had been imprisoned - amounting to some 103 - had behaved in prison as if they were members of a military force and had given every indication of resuming their activities after their release. By 2nd July 1957, forty-one of these men had already been released and all, except two, of the remainder were due for release during July. Meanwhile a large police force with special equipment was being maintained at considerable expense along the border between the Republic and the Six Counties, assistance also being given on occasions by the Republic's armed forces. The border, however, is about 270 miles in length and is crossed by about 150 roads of one kind or another and the difficulties of preventing I.R.A. raids by control measures were almost insurmountable. If the acts of violence against persons and property in the Six Counties were continued and intensified, the Government was apprehensive of two grave consequences. First, very serious tension might develop between the Republic and the United Kingdom; secondly, the I.R.A. activities might lead to acts of retaliation by the Protestant majority in the Six Counties against the Catholic minority who tend to sympathise with the idea of union with the Republic. Moreover, it so happened that for historical reasons the period around the 12th July was a period when violent clashes between the two elements were particularly to be feared.

It was in the light of that appreciation of the general situation and of the occurrence on the night of 3rd-4th July of a serious incident in the Six Counties territory, in which one policeman had been killed and another wounded by I.R.A. commandos, that the Government invoked its powers of detention without trial under the 1940 Act and took immediate steps to put the active elements of the I.R.A. under restraint.

Clearly, the measure required by the exigencies of the situation, as these appeared to the Government, was one which would operate swiftly to minimise the risk of further I.R.A. acts of violence in the Six Counties territory. Detention of suspects by executive order of a Minister of State under the 1940 Act obviously met this requirement.

./.

The question is, could the same be said of arrest and prosecution before the Special Criminal Courts? It is possible, as I have previously indicated, that this procedure might have been effective to counter I.R.A. activities, given sufficient time for it to operate. In my opinion, however, in July 1957, the Government could reasonably entertain doubts whether the Special Criminal Courts would be effective to counter I.R.A. activities in time to prevent its fears in regard to the threat to the life of the nation from being realised. The very fact that many of the active members of the I.R.A. had recently been brought before the Court and been sentenced made it less easy to put them out of harm's way in July by judicial action. For they could not be charged again with criminal offences on the same facts and persons who had just spent some weeks or months in prison could scarcely be charged with "failing to account for their movements". Another consideration which was urged by the Attorney-General seems to me to have a good deal of weight. I.R.A. activity within the Republic, apart from occasional thefts of arms and explosives, was confined to conspiracies, preparations and plans, so that it was not easy to bring the judicial machinery to bear upon the I.R.A. commandos until after they had been detected in some overt act. The record of I.R.A. incidents in the Six Counties also shows that the I.R.A. commandos found little difficulty in reaching their targets despite the heavy concentration of police and security forces on both sides of the border.

Accordingly, it seems to me that there were elements in the situation in July 1957 which might reasonably lead the Government to think that the situation called for the immediate detention of I.R.A. suspects.

Prima facie, however, there was a certain contradiction between having recourse to detention without trial as a measure necessary for checking the violent acts of I.R.A. desperadoes, who did not recognise the Government's authority, and at the same time offering to set those same men at liberty instantaneously on the faith merely of a written - or even verbal - undertaking to the Government as to their future conduct. If the Government considered that action of that kind would suffice to deal with the emergency, it may reasonably be asked whether those men could not equally.

have been dealt with by being brought before a judge and given the alternative of either entering into a bond to be of good behaviour or remaining in detention by order of the Court - a procedure more consistent with the Convention. Under Article 15 the Government must show that detention without trial was a measure "strictly required by the exigencies of the situation", not merely that politically it was the most convenient method of dealing with the situation.

As I have said earlier, the information before the Commission indicates that there were special psychological factors complicating the problem of dealing with I.R.A. activities. These psychological factors have their roots in a long history of activities in Ireland against the British Government and the I.R.A. groups to-day represent themselves as continuing these activities in a different context. At any rate, the ultimate objective of the I.R.A. being a national aspiration of the people of the Republic, the full use of the resources of criminal law against the I.R.A. might have produced unhelpful reactions from some sections of the community. In a situation like that in the Republic in 1957 a Government has to bear in mind the risk of making martyrs of the wrong-doers. Furthermore, the elements of the people from whom the I.R.A. drew its members appear to have had a particularly fanatical and uncomprising mentality unlikely to be affected - except adversely - by prison sentences. The operation of these psychological factors is, I think, seen in the reactions of the majority of the members of the I.R.A. to the Government's offer to release them on giving an undertaking as to their future conduct. A good many objected to being asked to "uphold" or "respect" the Irish Constitution and, even when the formula was altered to "respect the law and refrain from activities contrary to the Offences Against the State Act" the great majority preferred to stay in detention rather than give the undertaking. The obstinate refusal of the detainees to accept the Government's offer of freedom on condition of giving an undertaking, for the breach of which there was no sanction other than a new detention order, and the fact that only a small proportion of those who gave undertakings afterwards broke them, suggest that the Government's understanding of the psychological factors may have been correct.

The present case is not one where anyone could say that the Government had recourse to detention without trial in order to dispose of political opponents. On the contrary, it had recourse to this measure against persons whose general objectives, thought not their methods, were the same as those of the Government itself. It aimed the measure against them only because their activities threatened to embroil the nation with another friendly country and to cause strife and loss of life and property in a neighbouring territory. Its purposes

were to save its own people and the neighbouring territory from the threatened dangers and also to discharge its obligation under international law not to allow its territory to be used as a base for acts of violence against another territory. The power of detention to which the Government had recourse was one which Parliament in former days had expressly provided for use in an emergency resulting from activities such as those of the I.R.A. As a check upon the power of detention, the law gave to each detained person an immediate right of appeal to a legally qualified administrative body empowered to examine into the grounds for his detention and to call upon the Government to release him. As a further check, the Government was bound under that law to inform Parliament fully every six months as to its actual exercise of its exceptional powers. Moreover, so little did the Government desire to keep anyone in detention without trial that it promised to release at once every person detained under the 1940 Act, without any exception whatever, who gave an undertaking as to his future conduct. The good faith of the Government in regard to the exercise of its power to detain without trial is not, therefore, open to question.

I recognise to the full the importance of the high principle that no man shall be deprived of his liberty except after due process of law. The arrest and detention of a man without due process of law touches not merely his security of person but his dignity and standing as a member of the community. When, however, a public emergency actually exists and threatens the life of the nation, the danger to the community as a whole alters the perspective and it becomes a question of getting into their right proportions the evil of interference with the security and dignity of the individual and the threat to the people as a whole. In the present case, there was on one side I.R.A. activity causing serious damage to life, limb and property in a neighbouring friendly territory and endangering the future peace and security of the Republic and on the other there was a method of interfering with the liberty of the individual under which no suspected person need stay under arrest for one moment longer than he himself chose. It is true that a suspected person did not have the right to try and establish his innocence before a Court and that is a right which is precious in a democratic society. But, when I consider the nature and extent of the dangers to the community involved in the continuance of the I.R.A. campaign of violence, it does not seem to me that detention without trial, in the particular form which it took in the present case, was a measure altogether out of proportion to the threat to the life of the nation.

Accordingly, although I have had greater hesitation about some aspects of the case, I now find myself in general agreement with the opinion of the majority of the Commission. Having regard to the particular circumstances of the emergency in July, 1957, to the particular form in which the Government introduced and applied the measure of detention without trial and also to the Government's evident good faith in the matter, I do not consider that it went beyond its legitimate margin of appreciation under Article 15 when it adopted that measure to deal with the dangerous activities of the I.R.A.

./.

107. OPINION OF Mr. SØRENSEN

One of the most difficult and delicate tasks of the Commission is to evaluate the facts of the case with a view to concluding whether or not the measures taken by the government of Ireland remain within the limits of what is "strictly required by the exigencies of the situation" under the terms of Art.15.

After the interpretation given to that provision by the Commission in the case 176/56 it is beyond doubt that the Sub-Commission, and subsequently the Commission, are entitled under the Convention to evaluate the facts in the light of that criterion, without being bound to accept the evaluation made by the government concerned. On the other hand, it has always been accepted by the Commission, that the government in question will generally be in the best position to decide what measures are necessary to cope with an emergency situation, and that a margin of appreciation must therefore be left to the government. The task of the Sub-Commission, and the Commission, is to answer the question, whether or not this margin of appreciation has been exceeded.

Account must be taken not only of the measures as they appear from the relevant legal texts, but also of the manner in which these measures have been applied in practice. In appreciating the measures taken by the government regard must also be had to the character of any alternative measure available to the government.

The detention of persons in other circumstances than those envisaged by Art. 5, paragraph 1, is a very severe measure and should be strictly scrutinised by the Commission. The mere fact that a person is considered to be dangerous to the public order and safety cannot justify a restriction of his personal liberty if he cannot be convicted of contravening the laws of the country. On the other hand, it is a matter of course that if a person after proper judicial proceedings has been convicted of an offence against the laws of the country, he must suffer such penalties as the law provides. The difficulty arises in circumstances where the normal functioning of the courts is rendered impossible and the maintenance of public order and safety would therefore be endangered, if other measures could not be resorted to.

./.

The Irish Government contends that in cases such as the one in which Lawless has been involved the normal functioning of the courts of justice has been rendered impossible. Instances of the killing of a witness and the intimidation of a judge have been invoked, and another incident to which reference has been made, pointed to the possibility of two witnesses having been intimidated. Although these instances are not very numerous, and not all of them of recent date, account should also be taken of the general climate in which judicial proceedings in such cases are likely to take place. It seems to be a fact that the I.R.A. and persons associated with it and with related organisations, enjoy a certain latent or manifest sympathy in wide sections of the Irish population. The authorities whose task it is to put an end to illegal activities by these organisations and persons are in a particularly difficult position because the general public is reluctant to give information to the police about such activities. It is a general experience in most countries that whenever the population refuses to collaborate with the police in the struggle against crime, the task of the police is rendered extremely difficult, with the result that sufficient evidence for the conviction of law-breakers cannot be procured. In this connection, it is significant to observe that in the few cases where persons have been convicted of offences related to I.R.A. activities, the conviction has been assured only on basis of testimony given by the police.

In assessing the facts as they appear to me I conclude that the Irish Government has remained within its margin of appreciation in finding that the operation of normal judicial proceedings has been rendered ineffective in cases like that of Lawless.

The question then arises whether the Irish Government could resort to alternative measures which, on the one hand, would be effective and, on the other hand, would be less objectionable than the detention of persons without trial.

One measure which might be considered would be the setting up of Special Criminal Courts under Part V of the Offences against the State Act, 1939. As to this possibility, it must be kept in mind that under section 39, paragraph 4 of that Act, such courts shall be bound by the same rules of evidence as the Central Criminal Court. They could therefore hardly be considered to be an adequate alternative, since they would not overcome the difficulty of assuring the conviction of persons who might reasonably be believed to have engaged in illegal activities, but against whom sufficient evidence could not be procured. On the other hand, it must

be borne in mind that such Special Criminal Courts, even if adequate, would not be an entirely unobjectionable alternative. It follows from section 39, paragraph 2, that each member of a Special Criminal Court shall be appointed, and be removable at will, by the Government. Consequently, members of such a Court would not enjoy the usual judicial independence, and the trial before such a Court could not be considered as offering the usual guarantees against a miscarriage of justice.

An efficient alternative would, undoubtedly, be the setting up of Military Tribunals to try such cases, since these Tribunals would not be bound by the ordinary rules of evidence. This measure, however, would be particularly objectionable. A trial which does not include the usual safeguards against the conviction of innocent persons, and which may result in the most severe punishment, including death penalty, may endanger the most elementary and precious human right; the right to life, and should not be accepted as a permissible measure under Art. 15 as long as any less oppressive measure is available. The detention of persons without trial, even if amounting to the temporary suppression of personal liberty, has not the same severe and irrevocable character as a conviction by a Military Tribunal. In my opinion, the Irish Government has rightly refrained from resorting to the establishment of Military Tribunals.

In assessing the detention without trial under Part VI of the Offences against the State Act, 1939, account should be taken of the procedures instituted by that Part of the Act, and also of the administrative practice in matters of internment under this Act.

The Detention Commission set up under section 59, as amended by the Act of 1940, is not a court of justice and does not enjoy the usual judicial independence. Its composition is such, however, that two of its three members have legal training and judicial experience. Its findings in favour of the detained are binding upon the Government, section 8, paragraph 3 (d) of the 1940 Act, providing that if no reasonable grounds exist for the continued detention of such a person, he shall, with all convenient speed, be released. Although far short of a judicial remedy, recourse to the Commission must therefore be considered as a certain safeguard against abuse of the powers conferred upon the Government by the Act.

./.

Furthermore, it is important to note the practice of releasing a detained person upon giving an undertaking to respect the Constitution and the law, and not to engage in unlawful activities. Immediately after the special powers of detention were brought into operation in 1957, the Prime Minister announced that this practice would be adopted. Lawless was informed, immediately after his arrest, that he would be released upon giving such an undertaking about his future conduct, and his refusal to sign the wording first submitted to him explains the fact that he was retained in custody. His subsequent release was ordered after he had given a verbal undertaking of a somewhat modified wording. The detention of persons, as practised by the Irish Government under the Offences Against the State Act has therefore very little resemblance with those oppressive violations of personal liberty, which are known elsewhere.

Taking account of these various factors, I reach the conclusion that the Irish Government has not gone beyond its margin of appreciation under Art. 15 in adopting the measure of detention without trial under the special circumstances obtaining in Ireland.

108. OPINION OF MM. BERG, PETREN, CROSBIE and SKARPHEDINSSON

MM. Berg, Petren, Crosbie and Skarphedinsson were of the same opinion as Mr. Sørensen (see paragraph 107 above).

109. OPINION OF M. FABER

I support Mr. Sørensen's opinion, but I should like to place more emphasis on one point which seems to me all-important, namely the manner in which detention without trial was in fact applied.

In this connection it must first of all be pointed out that the existence of a public emergency threatening the life of the nation automatically gives the State the right of derogation for which Article 15 provides; it thus follows that once the Commission, in the present case, has found that such an emergency existed, it should recognise that the Respondent State has the right to waive Articles 5 and 6 of the Convention.

There has been much insistence on the fundamental nature of the rights protected by these Articles. Be that as it may, Articles 5 and 6 are not among those which, under Article 15 paragraph 2, may not be waived. They are, indeed, among the first to be affected in a country where the life of the nation is threatened. Since the Irish Government had the right to derogate from Articles 5 and 6, the question whether it exceeded the "extent strictly required by the exigencies of the situation" means only how far it in fact exercised its right to

derogate from Articles 5 and 6. The problem is therefore one of degree, unlike such questions as determining the existence of an emergency, which are qualitative problems.

This being so, attention should be drawn to the extreme moderation employed by the Irish Government in the present instance.

Firstly, detention without trial was not arbitrarily ordered by the competent Minister, but in the light of very grave suspicions arising from the police investigation.

Furthermore, the prisoner enjoys the right of appeal against an administrative decision by a police court to a Commission composed to two magistrates and an army officer who has had a legal training. Recourse to that Commission is not, therefore, so very "far short of a judicial remedy" as Mr. Sørenson seems to believe.

In addition, the practice of detention was subject to control by the Irish Parliament.

Lastly, the Government went so far as to accept a mere declaration of loyalty by the detainee upon which he was immediately released.

It is clear that the Government accused of violating the Convention has waived Articles 5 and 6 of the Convention with such moderation and guarantees that we are a long way from detention without trial (Schutzhaft), practised under dictatorships. Briefly, we are faced with a partial derogation from guarantees provided for under the Convention to protect the freedom of the individual, a derogation which is further mitigated by effective supplementary guarantees.

Moreover, the defendant Government was confronted in July 1958 with so grave a situation that, in order to discharge its responsibility, especially in regard to the United Kingdom, it considered it necessary to resort to a measure appropriate to the seriousness of the situation. That measure having, consequently, to be both effective and speedy, the Government decided that, in the circumstances, immediate detention without trial met the case and that both the Special Criminal Courts and Military Tribunals were inadequate, for reasons given by that Government.

Consequently, in the case in point, the Commission could not reproach the Republic of Ireland, alone responsible for averting the emergency and alone in a position to judge all the aspects of the situation, for having committed the exceedingly grave act of violating the fundamental rights of individual freedom. There was no manifest abuse, culpable negligence or irresponsibility on its part; on the contrary, it availed itself of the right provided under Article 15 with a moderation worthy of the democratic State it is.

110. OPINION OF M. EUSTATHIADES

The detention of persons without trial, in defiance of Articles 5 and 6 of the Convention, is an extremely serious measure since it infringes that personal freedom on which the exercise of a number of other rights and freedoms depends. Any deviation authorised by the Convention must conform to one of the derogatory clauses therein, and very detailed provisions are laid down in this regard. Any such clause, since it gravely impairs one of the most fundamental human rights, must be strictly interpreted. Incidentally, the wording of Article 15 gives added force to this argument, since it states that during a "public emergency threatening the life of the nation", any measures in derogation shall be taken only to the extent strictly required by the exigencies of the situation at the time.

It must, in the nature of things, be left to the Contracting State concerned to appreciate the strictly exceptional character of measures derogating from its obligations under the Convention. But this cannot mean that its own view of the matter shall prevail over that of the Commission; the latter is entitled to draw its own conclusion by comparing the actual situation with the express stipulation of Article 15 as to the "extent strictly required" - in itself a patent limitation of the right to derogate. To contend the opposite, i.e. that the Government is in a better position to appreciate the circumstances calling for such a measure, would be tantamount to making a dead letter of the explicit limitation in Article 15 ("extent strictly required").

Whilst the Government, then, naturally has power of appreciation at the time when a particular measure is taken, its assessment is liable to be challenged by the Commission if an appeal is lodged. Otherwise, the Commission's power, as conferred by the Convention would be stultified. Hence any measures taken pursuant to Article 15 cannot be held a priori to be either regular or irregular, since it is for the Commission to consider whether they conform with the Convention. The Commission's investigation of the present case must be meticulous, for detention without charge and without trial under the "Offences against the State (Amendment) Act 1940" is one of the most serious violations of the Convention, which undertakes to guarantee the individual against arbitrary governmental interference with his personal liberty, his rights, including those of being informed promptly of the nature and cause of any accusation against him, of being presumed innocent, of being immediately brought before a judicial body and of being tried within a reasonable time or released pending trial.

It follows that examination by the Commission of the reasons adduced by the State to justify derogation from the Convention through application of Article 15 must take into account on the one hand the fundamental importance of the rights guaranteed by Articles 5 and 6 and, on the other, the wholely exceptional character of the conditions which the Convention requires shall exist before there can be any suspension of one of these fundamental rights.

In the light of these factors I have no difficulty in agreeing with the preliminary remarks made by Mr. Waldock in his opinion, which is contrary to mine, although I cannot accept his conclusion, subtle as it is. In the first place I agree with him, for example, when he says (page 124 of the Sub-Commission's Report) that the activities of the I.R.A. "did not cause any major upheaval in the internal life of the community or major dislocation in the working of the normal processes of law and order", and I also agree that the submission of Counsel for the Applicant, to the effect that the ordinary courts continued to operate without any interruption (page 125) has not been disputed by the Government. Thirdly, with regard to the difficulty of obtaining civilian evidence against members of the I.R.A., I agree with Mr. Waldock, who does not think (page 126) that the statistics put forward by the defendant Government lead to any precise inference in regard to the unwillingness of members of the public to testify against the I.R.A.

I also share his view (page 126) concerning the case of Geraghty and Chrystle, since that "example of possible or probable intimidation of witnesses and the one other example mentioned by the Minister of Justice in a speech on 6th November 1957, would scarcely suffice to establish that it was not feasible to deal with I.R.A. activities through the ordinary application of the criminal law."

Neither do I hesitate to agree with his conclusion as to this point, when he says "I do not find that the Commission is confronted in the present case with clear proof of the inadequacy of the ordinary processes of law and order to meet the needs of the emergency". I could also subscribe to his consequent deduction that there were elements in the situation in July 1957, upon the basis of which the Government might properly arrive at an appreciation that the application of the criminal law through the ordinary courts was not an adequate instrument for dealing with the particular threat which the I.R.A. activities constituted at that date. And assuming that there was a need to resort to methods other than the application of the criminal law through the ordinary courts, I agree with Mr.

Waldock, again that the trial of criminal cases by military courts is not a suitable method (see page 128). As for the special courts contemplated in the Offences Against the State Act 1939, I consider that that machinery might have been promptly and firmly applied as could have been done without difficulty, even, if necessary, by making some minor amendments to the law, as mentioned in Mr. Waldock's opinion (pp.130-131). That, too would have allowed of an effective repression of the I.R.A. activities without recourse to imprisonment without trial.

But I do not feel able to support a view which is based essentially on certain psychological and political aspects of the present case, in the attempt to deny that the machinery of the special criminal courts was unsuitable and did not meet the requirements of the situation. I take the view that that very machinery, for which the Irish law makes explicit provision, justifies the conclusion that imprisonment without trial was a measure that went far beyond the "extent strictly required by the exigencies of the situation," and was therefore incompatible with the terms of Article 15 of the Convention.

I thus come to the same conclusion as Mr.Süsterhenn,while supporting most of his arguments. But, taking my stand chiefly on the system of the special criminal courts, I feel impelled to put forward the following observations:

If the defendant Government thought that certain actions should be removed from the jurisdiction of the ordinary Courts, it could so remove them by applying existing legislation, the "Offences against the State Act,1939", whose aim is precisely to empower the Government to "make provision in relation to actions or conduct calculated to undermine public order and the authority of the State", and for that purpose to confer upon it, over and above the power to regulate and control the formation of associations and declare some of them illegal (1939 Act,Part III, Articles 18 to 25), the right to establish one or more Special Criminal Courts (Article 38) and to determine their constitution, competence and procedure (Part V, Articles 35 to 53).

There is no need for any abstract pronouncement that the operation of such Special Courts is or is not in accordance with the Convention, since we are here dealing with a case where ex hypothesi a derogation from the Convention is to be examined for conformity with the proviso of "the extent strictly required", pursuant to Article 15. And from this angle it remains true, I think, that the institution of Special Criminal Courts, which is a lesser restriction on freedom than detention without trial, is in any event better adjusted to the factual situation facing the Government. The judges in such Courts, although appointed and

capable of dismissal by the Government, should (1) be not less than three in number (Article 41, para. 2), (2) be judges of the Irish High Court or Circuit Court, or Justices of the District Courts, or barristers or solicitors of not less than 7 years standing, or officers of the Defence Forces not below the rank of commandant (Article 39, para. 3). In addition, although each Special Court is entitled to have control over its own procedure, it may decide to exclude the public from its sittings (Article 41, para. 1) and is empowered to administer oaths to witnesses (Article 43). It may also direct a guilty party to enter into a recognisance to "keep the peace and be of good behaviour" and may admit him to bail. Other forms of procedure are also open to the Special Criminal Courts, so that the system provides the desired flexibility and is adaptable to practical requirements. In the opposite direction, indeed, its adaptability goes so far as to include the important indication given in Article 41, para. 4, which reads:

> "Subject to the provisions of this Act, the practice and procedure applicable to the trial of a person on indictment in the Central Criminal Court shall so far as practicable, apply to the trial of a person by a Special Criminal Court, and the rules of evidence applicable upon such trial in the Central Criminal Court shall apply to every trial by a Special Criminal Court."

A whole range of possibilities is thus open to the Government and to the Special Courts; albeit they may not go as far as to detain a person without trial. From the standpoint of the judicial protection of human freedom, which is a cornerstone of the Convention (Articles 5 and 6), we should mention in addition to the aforementioned Article 41 of the 1939 Act, Article 44, under which a person convicted by a Special Criminal Court may, either by authorisation of that Court, or in case of refusal, by authorisation of the Court of Criminal Appeal (the ordinary Court), appeal to the latter from such conviction. Furthermore, leaving the procedural field to enter that of actions which may render the offender liable to the special provisions constituted by the 1939 Act, we observe that every conceivable activity which might be engaged in by any person seeking to further the aims of the I.R.A. is provided for and declared illegal by the clauses of Parts II, III and IV of the Act. Last but not least, it is envisaged that the Act shall be brought into force by a Government proclamation in precisely those cases where "the Government is satisfied that the ordinary Courts are inadequate to secure the effective administration of Justice" (Article 35, para. 2; the same expression occurs in Article 36, para. 1; cf. the converse in Article 35, para. 4, stating that the 1939 Act shall cease to be in force: "if at any time while this Part of this Act is in force the Government is satisfied that the ordinary Courts are adequate to secure the effective administration of justice ...").

There is yet more: the Attorney-General is empowered to refer cases tried by an ordinary Court to a Special Court of his choice, even for offences not mentioned in the Proclamation (non-Scheduled offences), such power being limited only by the condition that the Attorney-General shall certify in writing that in a particular case the ordinary Courts are "inadequate to secure the effective administration of justice and the preservation of public peace and order" (Article 46 et seq.).

There is thus no need for me to labour the point. The Irish legislator has himself expressly provided for cases where the ordinary Courts are, for one reason or another, considered ineffectual; he has done so by enabling the Government to set up Special Courts whose greater efficiency and flexibility (see above) make it unnecessary for the Government to impose detention without trial, under the terms of the 1940 Act amending the Act of 1939 during a period of world war.

I therefore believe it to be unnecessary to express any abstract opinion, i.e. independently of Article 15, on the conformity or otherwise of the Special Courts with the Convention. All that the Commission needs to decide in the present case is whether detention without trial, as a derogation from the Convention, is or is not more closely in line than the Special Courts with the specific fundamental condition of the "extent strictly required by the exigencies of the situation" provided for in Article 15. In our view the Irish Act of 1939 effectively meets the situation invoked by the Government in the present case and thus proves convincingly that detention without trial is not "strictly required by the exigencies of the situation".

The defendant Government's objection to this, in my opinion, well-founded conclusion, is that the fact represented by the intimidation of witnesses, whether direct or indirect, from fear of being regarded as informers, would not be dispelled before Special Criminal Courts applying the ordinary rules of evidence; moreover, such Courts would be undesirable for psychological reasons, since in the face of I.R.A. activities directed at the fulfilment of a national aspiration, they would encounter opposition from a section of the public and would result in penalties which, far from having a salutory effect on the I.R.A. fanatics, would make martyrs of the culprits.

Such objections are hardly decisive. The first will not stand up to examination in the sense invoked by the Government, namely that as a result of the intimidation of witness, or judges, it was not easy to secure convictions. In 1957, however out of 129 cases brought before the Courts under the 1939

Act, there were convictions in 109. And even if the objection were sound, it would be invalidated by the fact that several clauses in Part V of the 1939 Act on the composition and procedure of the Special Courts (see above) would make it possible to eliminate the intimidation factor, if any, and in the last resort they could have been amended in the direction of still more simplified procedure or a strengthening of the laws aimed at repressing I.R.A activities.

In the case of Chrystle and Geraghty, invoked by the Irish Government for the critical period of Mr. Lawless's internment to support the "intimidation of witness" argument, the evidence supplied does not conclusively show that this affair can be legitimately cited in corroboration. Indeed, even if it could, the example would not suffice to show that the ordinary processes of criminal law were incapable of repressing I.R.A. activities.

Secondly, the alleged psychological and political factors leading the Government to choose detention without trial rather than the institution of Special Courts under the 1939 Act cannot, in my view, whatever the importance of those factors in the sphere of governmental tactics, detract from the fundamental character of the right not to be deprived of one's freedom without trial. So important is this right that the danger must be serious indeed before there can be any suspension of it under the Convention, i.e. without exceeding the "extent strictly required by the exigencies of the situation" (Article 15). The Government would be free to choose between setting up Special Courts and ordering detention without trial if the European Convention did not exist and did not oblige it to respect Articles 5 and 6, and, in the event of any derogation, to abide by the condition of "the extent strictly required".

It should be noted that the detainee has no right to inquire into the grounds on which the Minister "is of opinion" (Offences against the State (Amendment) Act, 1940, Article 4) that he has been "engaged in activities which are prejudicial to the preservation of public peace and order or to the security of the State". Moreover, no appeal can lie against a Ministerial order for arrest and detention under the 1940 Act, since the ordinary Courts have no power to investigate the said grounds, and the "Commission for inquiring into detentions" set up for this purpose under Article 8 of the 1940 Act is not a Court. Despite the desire to avoid any abuse of the prisoner's right to appeal to the Commission, and the Government's obligation to release him if the Commission finds no reasonable grounds for his detention, this administrative body offers the prisoner no judicial guarantees, since he has no right to be informed of the documentary and other evidence submitted by the Government

to the commission. The latter's composition and its freedom to determine its own procedure are far from providing an effective guarantee, as the prisoner will not cease to be detained without trial unless the commission finds (in the nature of things an unlikely contingency) that there are no reasonable grounds "for detention"/1940 Act, Article 8, (3) (d) / - the underlining is ours - which is by no means synonymous with reasonable grounds for conviction.

Consequently, the system of detention without trial as established by the 1940 Act does not seem to us, in view of its rigorous character, to be in line with the "extent strictly required" by the exigencies of the situation in Ireland in 1957.

We would point out that the Government's decision of 5th July 1957 to bring into force a system of detention without trial under the 1940 Act was prompted by the incident which occurred during the night of 3rd/4th July, in which a police officer was killed and another wounded. That, however, is not a situation within the meaning of the Convention, since prior to that night the position does not appear to have been alarming - on 2nd July, 41 of the 103 detainees had been set free and the release of all but 2 of the others was planned for the same month. The situation subsequently became appreciably calmer, although the power to detain without trial remained in force. The "situation" surrounding the critical period in the present case seems to have been a permanent state of limited gravity, which had become chronic without any serious likelihood that it would develop into a disturbance of the public peace. In any case it showed no signs of becoming so serious as to justify detention without trial which according to the Government's explanation, was an administrative measure of a preventive character, whereas deprivation of liberty without trial is a drastic action going far beyond the "extent strictly required" by the situation.

The defendant Government mentions the difficulty of promptly repressing I.R.A. activities because they were directed neither against the Government nor against objectives on Irish territory - and this is a pointer of the absence of any emergency threatening the life of the nation /cf. our opinion on this question in paragraph 92 above / - but consisted of conspiracies hatched on that territory, the preparation of plans, etc. thus making it impossible for judicial proceedings to be instituted. True, this is a peculiar feature, but it could have been met by preventive measures other than detention without trial, for example by increasing the minimum penalties for such offences as the possession of arms, explosives, documents,

etc., by greater stringency in the sifting of evidence, and above all by the institution of the Special Criminal Courts provided for in the Offences against the State Act, 1939.

I therefore conclude that, even if it is agreed that the ordinary Courts were not effectual enough to meet the 1957 situation, the establishment of Special Courts pursuant to Part V of the Offences against the State Act 1939, would have enabled the Government to prosecute militant members of the I.R.A. and, in the words of the Act itself, to provide for their punishment. "The preservation of public peace and order" could thus have been assured by an "effective administration of justice" both at the time of the Proclamation of 5th July 1957 and during the following period when the situation noticeably improved.

In expressing my opinion, I am not forgetting the good faith of the Irish Government, particularly as regards its desire to maintain good relations with Great Britain. That, however, is an aspect which is linked with political difficulties: it can have no decisive influence on the legal aspect, namely the concordance required by the Convention between the seriousness of the emergency threatening the life of the Irish nation and the stringency of the measures taken. What is here at issue is the interpretation of the conditions laid down in the Convention to justify any derogation from the fundamental right to personal freedom.

The good intentions of the defendant Government which in the context of public and political order within the country, allegedly reflect its bona fides, can hardly be regarded as fulfilling the criterion of the "extent strictly required" as laid down in Article 15, for the notion of bona fides, or conversely, of guilt, has no bearing on the present case once we admit the hypothesis that the latter involves an emergency within the meaning of Article 15, since that Article deals only with the principle of proportion. In assessing the proportion between the measures adopted and the extent of the emergency in a given instance, we not only have to take into account the general principle, as has been pointed out by several members; we must also bear in mind the very explicit instructions conveyed by Article 15, where the Convention clearly confines the measures to be adopted to "the extent strictly required," thus making a specific and precise application of the principle of proportion.

It is to this strict proportion between the measures taken by a Government in a specific case and the extent of the emergency constituted by a specific situation that Article 15 of our

Convention essentially relates, and that proportion must be objectively determined when supervision is exercised by the bodies established by the Convention for that purpose.

111. OPINION OF M. SUSTERHENN

The Irish Government, by a Proclamation of 5th July 1957, published in the Irish Official Gazette on 8th July 1957, brought into force the Offences against the State Act of 1939 and the Amendment Act of 1940, thereby introducing detention without trial. The Commission has already found that detention without trial is, in principle, at variance with Articles 5 and 6 of the Convention. Derogation from Articles 5 or 6 is permissible only in time of emergency threatening the life of the nation, and the derogatory measures must not go beyond the extent strictly required by the exigencies of the situation.

If, contrary to my opinion expressed in paragraph 93 above, it is admitted that there existed a public emergency threatening the life of the nation, the appreciation of the necessity of the measures taken to meet the danger depends essentially on the seriousness of the threat. Very drastic measures are necessary and expedient when the threat is very grave, but not when it is less so. The severity of the counter-measures must be proportionate to the gravity of the threat.

Even if it is accepted that there was an existence of a public emergency threatening the life of the nation, it is only in this case, an emergency of no particular gravity, which does not in general affect normal life in Ireland.

In assessing the necessity of the derogatory measures, the gravity of the threat is not the sole criterion; account must also be taken of the importance of the rights and freedoms, guaranteed under the Convention, which might be prejudiced by the derogation.

The rights enshrined in the Convention are safeguarded in varying degree so far as the possibility of State interference with them is concerned. Three categories may be distinguished. The first category comprises the most rigorously guaranteed rights, such as the right to life (Art. 2), the prohibition of torture or inhuman or degrading treatment (Art. 3), the prohibition of slavery or servitude (Art. 4, para. 1), and the principle of "nulla poena sine lege" (Art. 7). In accordance with Article 15, para. 2, no High Contracting Party may derogate from any of its obligations under the foregoing Articles even "in time of war or other public emergency threatening the life of the nation". These rights are thus immune from any State intervention.

Rights belonging to the second category, as for instance the right to respect for private and family life, the home and correspondence (Art. 8), the right to freedom of religion (Art. 9), the right to freedom of assembly and association (Art. 11), are covered by less rigid guarantees against State interference. The second paragraphs of these Articles contain a general clause authorising the State to pass legislation restricting the exercise of such rights in specific circumstances, even if the conditions laid down in Article 15, para. 1 (war or other public emergency threatening the life of the nation) do not exist, and without the requirement that derogation shall be notified to the Secretary-General of the Council of Europe in conformity with Article 15, para. 3.

Finally, the Convention contains a third category of rights which, unlike those in the first category, are not absolutely immune from State interference but whose suspension is not simply made the subject of a general clause leaving it to the discretion of the national legislator, as is the case with the second category under the second paragraphs of Articles 8, 9, 10 and 11. In the third category, derogation is possible only in the special conditions laid down in Article 15, para. 1, that is to say in the event of war or other public emergency threatening the life of the nation, and even then only to the extent strictly required by the exigencies of the situation, and with due observance of the notification rule in Article 15, para. 3. These rights, then, are not wholely inviolable; they include those covered by Article 4, para. 2 and Articles 5, 6, 12, 13 and 14.

Articles 5 and 6 of the Convention are of special importance because the guarantees they contain are more solid. Article 5 guarantees the right to liberty and security of the person - the most fundamental of all the fundamental rights, apart from life itself; and it authorises State interference with such liberty and security only by virtue of a judicial decision. Any person deprived of his liberty can set in motion procedure whereby a court takes an urgent decision on the legality of his detention and, if it is shown to be unlawful, orders his release (Art. 5, para. 4).

Article 5, alongside the elementary right to liberty and security, thus enshrines the principle of "Habeas Corpus". This principle is part of the common heritage of political ideals and traditions, of respect for freedom and the rule of law, mentioned in the fifth paragraph of the Preamble to the Convention. In this sense the legal principle of Habeas Corpus is a specific expression of the spirit underlying the entire Convention.

Article 6 is also part of the common heritage, expressing as it does the principle of the "rule of law" to which the Preamble refers. Not content with guaranteeing everyone a fair trial, it goes on to state that everyone shall be considered innocent until proved guilty according to law (Art. 6, para. 2). It is thus not only in the best traditions of European positive law, but also expresses an ethical principle of natural law.

The two fundamental precepts in Articles 5 and 6, "no deprivation of liberty without a Court decision" and "presumption of innocence until guilt is legally proved", are the essence of law among European peoples, and indeed among all peoples of the free world. Where these two basic principles are no longer observed, not only is the formal process of law suspended but there is also a material violation of Human Rights and Fundamental Freedoms, since failing these protective prescripts, the application of substantive law is no longer guaranteed. It may even be said without exaggeration that by suspending the provisions of Articles 5 and 6 the first step is taken from a State governed by free and democratic law towards a totalitarian State. That, at least, is the effect of the method used, even though in the particular instance there is doubtless no such intention. When it is remembered that in a large part of Europe human rights are systematically suppressed by totalitarianism, free Europe must avoid creating any impression that on her side too totalitarian methods are practised. This obligation is imposed on the European Commission of Human Rights less for appearances' sake than because of the sacred nature of the values it is entrusted with upholding. At all events the Commission has already, in this case, underlined the special significance and legal importance of Articles 5 and 6 compared with the other articles of the Convention, pointing out that Article 17, which in certain circumstances places considerable limitations on the rights guaranteed in the Convention, cannot apply to the right set forth in Articles 5 and 6. Let us suppose that one of the Contracting Parties interferes with the rights protected by Articles 5 and 6, which belong to those categories accorded the strongest guarantees, and which by the solemn declaration in the Preamble concerning the rule of law are considered almost as pillars of the Convention. If the total or partial suppression of these rights is notified, it is the duty of the Commission, as the guardian appointed under Article 19 to watch over the maintenance of the rights and freedoms guaranteed by the Convention, to determine by stringent enquiry, whether the derogation is necessary in principle and is within the scope of measures to "safeguard the life of the nation". Article 15, indeed, lays down the general principle that the derogation measures may be taken only to the extent strictly required by the exigencies of the situation. If, however, the issue is one

of suspending such elementary legal principles as those of "no deprivation of liberty without judicial decision" and "presumption of innocence until guilt is legally proved", any High Contracting Party wishing to exercise the right of derogation laid down in Article 15 must be absolutely convinced, and must show proof, beyond all possibility of doubt, that the derogation measures are in fact indispensable to avert the "emergency threatening the life of the nation". Such proof, the onus of which was on the Irish Government, has not, in my opinion, been shown.

The Irish Government seeks to justify the introduction of detention without trial, first, by the alleged inadequacy of the ordinary criminal courts in proceedings against persons suspected of belonging to the I.R.A. and participating in acts of violence. This alleged inadequacy of the Irish criminal courts takes the form, according to the Government, of acquittals even after guilt has been proved or of the imposition of light sentences only. The reason for this failure on the part of the judges is said to be that the I.R.A. exorte a certain pressure on them and that they are consequently afraid to give judgment according to the law, as they are bound by their office to do. The second explanation offered by the Government for this alleged inadequacy of the Irish criminal courts is that the civilian prosecution witnesses are in general intimidated by the I.R.A. and are afraid to tell the truth. Hence evidence of the guilt of the accused could in most cases be provided only by members of the police.

As evidence of the inadequacy of the criminal courts, the Government adduces two cases, both relating to the Applicant. In September 1956, he was found in a deserted house together with three other men in possession of a quantity of firearms, including a Thompson sub-machine gun and ammunition. Although he was unable to produce any licence of authority to carry firearms and although he admitted to being then a member of the I.R.A., an unlawful organisation, he was acquitted by a Dublin Court on a charge of unlawful possession of the firearms and

./.

ammunition, because the prosecution had failed to produce evidence to prove the negative that no firearms licence had been issued to him by any one of the numerous authorities empowered to do so in the Republic.

Later, in May 1957, the Applicant was found to be in possession of incriminating plans for the perpetration of acts of violence; some were found in his pockets and the rest in his lodgings. Although he offered no explanations as to how he came to be in possession of these incriminating documents, he was sentenced to only one month's imprisonment.

If, in the first case, the Applicant ought, under Irish law and in accordance with Irish rules of evidence, to have been convicted and sentenced by the Court, then this would be a clear example of culpable failure on the part of the Court. If the judge had knowingly transgressed in this way, the Government should have taken disciplinary action and proceeded against him for denial of justice. The Government, by taking such action against a judge neglectful of his duties, would undoubtedly have discouraged any further attempts of the kind. But the Government took no action against the judge in question.

In the second case, the Government submits that the sentence passed on the Applicant was too mild. Obviously it could not proceed against the judge who had pronounced sentence. A judge, by virtue of his independence, has absolute discretion within the range of penalties prescribed by law. If, however, as the Government maintains - though without adducing any supporting evidence - sentences in political cases are consistently too light, it could at any time have amended the relevant law by increasing the minimum penalty; but this the Government has not done.

To show that judges were subjected to intimidation by the I.R.A., the Government has adduced only one example - where a judge received a threatening letter after having sentenced an I.R.A. member. There is nothing remarkable about a judge's receiving a threatening letter on a single occasion. In any event, one cannot infer from this one case that judges in general, as a result of intimidation, are afraid to perform their judicial duties.

To show that witnesses called in proceedings against persons suspected of belonging to the I.R.A. or of having taken part in political violence are subjected to intimidation, the Government offers in evidence a few cases which occurred in 1939 or even earlier. These old cases certainly cannot be used as

evidence for the purpose of appreciating a situation that arose in 1957. The only recent case mentioned by the Government is the trial of Chrystle and Geraghty; both of these defendants were acquitted in the Dublin Circuit Criminal Court in June 1957, because witnesses who had previously identified them went back on their evidence in Court. The Government holds that those witnesses had been intimidated by members of the I.R.A. but offers no convincing evidence in support of that assertion. The Applicant submits that the witnesses, when confronted with the accused, stated that they could not identify the culprits with certainty.

The Government's general argument that, as a rule, no civilians, but only members of the police, are available as witnesses against I.R.A. members calls for the following comments: a secret organisation, by its very character, carries on its activities in remote areas, for example in the mountains, and takes precautions to minimise the risk of attracting the notice of outsiders. That is why civilian witnesses capable of testifying to the I.R.A.'s unlawful activities are scarce or non-existent. One cannot, therefore, conclude that, because the witnesses for the prosecution are usually members of the police, civilian witnesses are invariably intimidated by the I.R.A. On the other hand, it is perfectly reasonable to expect the police to be the most likely source of witnesses for the prosecution, since it is precisely their job to keep an eye on the activities of unlawful organisations.

The Applicant disputes the Irish Government's allegation that the courts are inadequate in political cases. To show that the criminal courts are functioning normally, he opposes certain official statistics to the few isolated and mostly unproved examples quoted by the Government. Those statistics show that 122 persons were charged under the Offences against the State Act in 1957; 109 were found guilty and only 13 acquitted. In June 1957 alone, 38 persons were charged under the Act and all convicted.

In the light of these statistics, therefore, the ordinary courts cannot be described as inadequate in proceedings for political offences. The Government seeks to diminish the probative value of the statistics by pointing out that in 69 of the cases the only charge against the persons arrested was one under Section 52 of the 1939 Act, namely of failing to account for their movements during a specified period. In the 38 cases in June 1957, the persons convicted had been caught by the police in flagrante delicto, engaging in military exercises in the mountains near Dublin. There was no evidence in any of these cases other than that of members of the police. On this

last argument, I have already pointed out that secret, illegal organisations do not publicise their activities widely and that ordinary citizens are not in a position to know of those activities. The Government's other argument, that 69 of the accused were convicted only of failure to account for their movements, has no probative value. At most, it would show that the courts had no proof of other offences. Nor has the Government, in the proceedings before the Commission, proved that the 69 persons convicted of failure to account for their movements were actually I.R.A. members and criminals.

The conclusion is thus inescapable that the Government has brought forward no proof that the ordinary courts invariably or very frequently function unsatisfactorily in political cases. Granted that, in specific cases, the Government is justified in its criticism of acquittals or unduly mild sentences, it nevertheless did not take the necessary steps at the time to improve the administration of justice either by proceeding against judges for dereliction of duty or by increasing the minimum penalties prescribed by law.

Even if we granted the truth of the assertion that the ordinary courts do not function properly in political cases, that would not warrant withdrawing political cases from the sphere of the criminal law and substituting the executive measures of detention without trial.

If it transpired that the judges in the ordinary courts failed, universally or in very many cases, to perform their duty, whether through fear or even, perhaps, owing to secret sympathy towards the I.R.A., the Government - besides being able, as I have said, to take disciplinary or criminal proceedings against judges neglectful of their duty - could have set up Special Criminal Courts as authorised under Part V of the 1939 Act. Section 35 of the Act provides that the Government may, by proclamation, set up Special Courts "if and whenever and so often as the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order". Here, then, Irish law shows the Government a way of overcoming the difficulties caused by the alleged inadequacy of the ordinary courts. The law enables the Government to appoint to these Special Courts judges whom it regards as politically reliable and who will ensure that the Offences against the State Acts are effectively and rigorously applied. The Government may remove these judges at will. The Act empowers Special Courts, in their absolute discretion, to appoint the times and places of their sittings and to control their own procedure. They have power to admit or exclude the public. These and

other facilities provided by law would go far to prevent, or at least reduce the risk of, intimidation of judges, jurors or witnesses.

Special Courts are also given the jurisdiction, "in lieu of or in addition to making any other order in respect of a person, to require such person to enter into a recognisance before such Special Criminal Court or before a justice of the District Court, in such amount and with or without sureties as such Special Criminal Court shall direct, to keep the peace and be of good behaviour for such period as that Court shall specify". This Special Court procedure of requiring recognisances is somewhat similar to that introduced by the Irish Government - surely without any basis in law - by which a suspect detained without trial may be released if he expressly undertakes to respect the law and constitution in the future. The provision in the rules of Special Criminal Courts that performance of the undertaking may be secured by sureties gives added effectiveness.

If, therefore, the ordinary courts were really inadequate - which, as I have pointed out, has not been shown by the Irish Government - it would have been possible for the Government, by setting up Special Courts, to make more effective provision for the prosecution of political offences and, hence, for the safety of the State.

Though the establishment of Special Criminal Courts would not have constituted a violation of Article 5 or Article 6 of the Convention, it cannot be denied that judicial independence and procedure would not be safeguarded to the same extent in Special Criminal Courts as in the ordinary courts. It could even be argued that Special Criminal Courts, in view of the removability of the judges, were not independent and impartial tribunals within the meaning of Article 6 (1). Similarly, it might be urged that proceedings in camera before the Special Criminal Courts would violate the same Article of the Convention. In spite of these shortcomings, however, judicial proceedings, even where they only reduced judicial safeguards, are more consistent with the spirit of Articles 5 and 6 of the Convention than executive detention without trial. Even if a government deems it necessary to derogate from the provisions of the Convention, it is under an obligation to choose derogations which violate the letter and spirit of the Convention as little as possible. In my opinion, however, the establishment of Special Criminal Courts would not constitute a violation of the Convention, since a person convicted by a Special Criminal

Court may appeal to an ordinary Court of Criminal Appeal; thus, whatever happens, the accused can avail himself before the Court of Appeal of all the judicial safeguards set forth in Articles 5 and 6 of the Convention.

We may therefore ask why the Government did not set up Special Criminal Courts, since, where the ordinary courts are inadequate, such a measure is specifically authorised under Irish law and is compatible with the Convention. The Government defends its preference for detention without trial on the ground that the establishment of Special Criminal Courts would have met with psychological obstacles in the Irish population. In line with the Anglo-Saxon legal tradition, Irish public opinion is fundamentally opposed to any modification of the judicial machinery, in the belief that the courts as now constituted provide the best safeguards for personal liberty. On the other hand, Irish public opinion is not unduly disturbed by detention without trial, at least in the form practised, and does not regard it as an infringement of the principle of personal liberty. The Government's view may be shared by a large part of the Irish population; but it must be stated that objectively, it is an incorrect view. There is no doubt that the traditional safeguards of Anglo-Saxon justice do provide a real protection for personal liberty. A weakening of these safeguards as a result of the introduction of Special Criminal Courts would, however, be a lesser evil than drastic executive measures which infringe personal liberty without any judicial control, as does detention without trial. The Government could very well have enlightened the public on this point in order to remove the psychological obstacles which it feared. It might, in particular, have drawn the attention of public opinion to the obligations in international law it had assumed under the Convention. Furthermore it may be asked whether the Government has not exaggerated the psychological obstacles to the establishment of Special Criminal Courts. Provision was made for Special Criminal Courts in an Act passed by a majority in both Houses of the Irish Parliament. It is difficult to allow that a majority would have been found for this measure in both Houses of Parliament if, as maintains the Government, the population were really fundamentally opposed to Special Criminal Courts. Lastly, as the Applicant points out, serious criticism has been directed against the practice of detention without trial in the Irish Parliament, in the Press and by various associations. Even if the establishment of Special Criminal Courts was bound to meet with psychological obstacles in the Irish population, that would not entitle the Government to derogate from such fundamental provisions of the Convention as those in Articles 5 and 6.

The Government submits, moreover, that it is free to choose among the different measures which could be adopted to meet an emergency and that it must be allowed a certain latitude in appreciating the measures available to it. This assertion is in itself incontestable. It is, in principle, for the Government alone to decide how it shall deal with an emergency and what measures it must apply in a particular case. But this holds good only for measures compatible with the Convention. The Government's freedom of choice and margin of appreciation are limited by the obligations of international law which the Irish Government accepted in ratifying the Convention.

The Government cannot justify its choice of preventive detention on the ground of its good faith. The good faith of all Contracting Parties must be taken for granted from the mere fact that they have ratified the Convention. In any event, good faith is not decisive in public or international law, as it is in civil and criminal law. In public and international law, the violation of a right is determined on objective grounds. It is not essential to prove bad faith. Such proof would merely render an objective violation more flagrant.

The Irish Government cannot justify the introduction of detention without trial by arguing that the situation in Ireland was particularly grave at the beginning of July 1957 and that, precisely at that time, no other effective measures were available to guard against an immediate threat. It is true that, on the night of 3rd/4th July 1957, an armed raid was made on the South Armagh police station in which one policeman was killed and another wounded. The same night, according to a statement by the Irish Government, a number of police barracks in Northern Ireland were blown up. These events must not be minimised in any way. But a study of the list of incidents occurring from December 1956 to March 1958 (see Secretariat Memorandum of 8.4.59) reveals that the situation in July 1957 differed in no way from that obtaining during the previous six months. Despite the introduction of detention without trial, the situation remained unchanged right through to February 1958. The destruction of barracks and other installations, as well as attacks on police officers, went on continually throughout the whole period. Although these assaults on the police did not, in most cases, cause deaths or other casualties, this was purely fortuitous. But the murder of one policeman and the wounding of another on the night of 3rd/4th July 1957 do not constitute a unique event. As early as 18th December 1956, a constable was wounded in an attack on a police patrol. On 31st December 1956, a

constable was killed. On 7th March 1957, a constable was wounded. On 22nd April 1957, another constable was wounded. On 19th August 1957, a police sergeant was killed and two constables and a soldier were wounded. On 4th September 1957, and again on 11th October 1957, a policeman was wounded. On 3rd March 1958, two constables were wounded.

Even if the Government, when issuing the Proclamation of 5th July 1957, believed there was an exceptionally grave threat which could be effectively met only by detention without trial, it would in any case have been under an obligation later to rescind the Proclamation, since according to its own statements, the situation in Ireland calmed down again. Yet the Proclamation is still in force now; in other words, a law incompatible with the Convention is still in existence.

My standpoint may be summarised as follows:

1. whereas detention without trial is, in principle, at variance with Articles 5 and 6 of the Convention, and whereas derogation from those Articles may be made only if there is a threat to the life of the nation, and then only to the extent strictly required by the exigencies of the situation,

2. whereas the present emergency in the Republic of Ireland may not be regarded as a threat to the life of the nation, but only as a threat for public order,

3. whereas, even assuming that a public emergency threatening the life of the nation existed, this emergency is not of special gravity and the stringency of the security measures should be commensurate with the seriousness of the threat,

4. whereas derogation from Articles 5 and 6 of the Convention, which refer to important and fundamental rights and freedoms, may be made only in cases of dire necessity, and then only when the Government has clearly shown that it has no other measures available to guard against the threat,

5. whereas, in view of the special importance of Articles 5 and 6, the proofs offered by the Government should be scrutinised most strictly.

6. whereas the Government justifies the introduction of detention without trial primarily by the inadequacy of the ordinary criminal courts in political cases, but has not shown proof that the ordinary criminal courts are invariably or even frequently inadequate,

7. whereas the Government has not attempted to secure observance of the law by taking disciplinary or criminal

proceedings against judges for unlawful acquittal in specific cases,

8. whereas the Government, when it considered sentences to be generally too mild, did not avail itself of its legal power to increase the minimum penalties,

9. whereas the Government has not shown proof that judges are generally subjected to intimidation by the I.R.A. or that civilian witnesses refuse, generally through fear of the I.R.A., to testify or to tell the truth,

10. whereas the Government has never availed itself of its power to set up Special Courts, although the Irish Act of 1939 had authorised this measure in cases where, as submitted by the Government, the ordinary criminal courts were no longer adequate,

11. whereas the establishment of Special Criminal Courts in accordance with the above-mentioned Act is not incompatible with the Convention,

12. whereas its attention to psychological obstacles in the population, which is founded on an incorrect view, does not dispense the Government from respecting its obligations under the Convention,

13. whereas in public law and international law the decisive consideration is not good faith but objective violation of a right,

14. whereas at the time of the Proclamation of 5th July 1957 the situation was not so serious that it could not have been remedied except by detention without trial, and whereas the threat remained the same throughout the period from December 1956 to March 1958,

15. whereas the Government has not yet withdrawn the Proclamation of 5th July 1957, but continues to maintain the law relating to detention without trial in force contrary to the Convention, although the situation according to its own statements, has become much quieter since,

I find that enforcement of the law relating to detention without trial, both in its general application and in the particular case of the Applicant, is not strictly required by the exigencies of the situation within the meaning of Article 15 and hence constitutes a violation of Articles 5 and 6 of the Convention.

112. OPINION OF M. DOMINEDO

M. Dominedo, being of the opinion that there does not exist in the Republic of Ireland a public emergency threatening the life of the nation within the meaning of Article 15 of the Convention (see paragraph 94 above), a fortiori considers that the question whether the measures adopted by the Respondent Government with regard to the Applicant were strictly required by the exigencies of the situation need not be examined. Having regard to the decision of the Commission that a public emergency threatening the life of the nation existed, M. Dominedo adopts on the question of "strict measures" the same standpoint as that already expressed by MM. Süsterhenn and Eustathiades (see paragraphs 110 and 111 above).

113. OPINION OF MME JANSSEN-PEVTSCHIN

Mme Janssen-Pevtschin was of the same opinion as M. Süsterhenn (see paragraph 111 above).

114. OPINION OF M. ERIM

I would refer to my opinion (see paragraph 90 above) concerning the existence in Ireland of a public emergency threatening the life of the nation.

As I said there, the Respondent Government should be allowed a certain discretion in appreciating the character of the emergency. It is nevertheless essential to go on to consider more closely whether the measures taken by the Respondent Government come within the "extent strictly required" and whether they conflict with other obligations in international law.

In general, derogation from Articles 5 and 6 of the Convention is only permissible in the last resort, after having tried less drastic measures. In the case in point, the public emergency occasioned in Ireland by the activity of the I.R.A. does not appear to be such as would entitle the Government to suspend one of the most fundamental of the rights protected by the Convention, namely the right of any person held in custody to be brought before a magistrate within a reasonable time. In the circumstances surrounding the present case, the Irish Government's waiving of the safeguards afforded by Articles 5 and 6 of the Convention is strictly speaking a violation of those Articles and is unjustified.

I am nevertheless inclined to recognise the Irish Government's good faith. The Commission must of course attach special weight to their good faith, although this does not alter the fact that the Convention has, strictly speaking, been violated.

I may add that the situation in Ireland, owing to the existence and activity of the I.R.A., is indeed abnormal. But the parties, at the oral hearings, have put forward diametrically opposed arguments regarding the normal operation of the ordinary courts. Some of the documentary evidence shows that the ordinary courts were able to carry out their functions normally without any appreciable hindrance. I am not forgetting, indeed, that the Irish Government drew the Sub-Commission's attention to the difficulties encountered during the trials, especially in the matter of hearing witnesses. But that should not have prevented the Irish Government from bringing every person arrested before a judge, instead of simply providing for an enquiry by an administrative commission. The procedure to be applied by the judge could have been simplified. Some members of the Commission have held that the operation of the Detention Commission in Ireland was preferable to a summary procedure. For my part, rather than a decision taken by an administrative body, I should prefer the guarantee of a judge, even if some procedural safeguards had to be laid aside.

Moreover, persons arrested and detained under the 1940 Act were not detained merely for a few days: they were detained for months. In that time the Irish Government could perfectly well have brought them before a judge instead of before the administrative commission.

I am fully prepared to examine the question of the Irish Government's responsibility very carefully, taking their good faith into account; but I cannot say as much for their having gone beyond the "strict extent required" in acting contrary to the provisions of Articles 5 and 6 of the Convention.

115. OPINION OF M. ERMACORA

I am of the same opinion as M. Eustathiades. I would also add that:

1. In my view, a derogation from fundamental rights should be authorised only where absolutely essential: when there is no other way of safeguarding the life of the nation. In the light of the filed reports, I do not think that the situation was such as to necessitate a derogation from human rights.

2. The Government has not endeavoured to find other, less drastic, means of dealing with the situation.

3. The 1940 Act was primarily intended to safeguard the neutrality of the Republic of Ireland during the war, in accordance with the Hague Convention of 18th October 1907. Measures which may be validly resorted to in time of war should not be taken when the situation bears no similarity to a state of war.

4. The only argument that might justify the measures taken by Ireland would be reference to the "good faith" of the Government. "Good faith" is undoubtedly a fundamental principle of public international law but should not be invoked to justify governmental acts as drastic as those under review, otherwise it would become synonymous with the discretionary powers of the State.

CHAPTER III

Application of Article 17 of the Convention

Introduction

116. Article 17 of the Convention states as follows:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

117. On 23rd June 1939 the I.R.A. was declared an 'unlawful organisation' within the meaning of Section 18 of the 1939 Act. That order is still in force.

For the submissions of the Parties as to the history and activities of the I.R.A., see Chapter II (paras. 81 to 88, 97 to 104) of this Part of the Report.

118. The Applicant admitted that he became a member of the I.R.A. in January 1956, and that he ceased to be a member of the I.R.A. in June 1956 (1). The question whether he ceased to be a member in December 1956, or was still a member of an unlawful group on 11th July 1957, is in dispute between the Parties (2).

119. As already described in Part I of this Report, the Applicant was arrested in Dublin on 14th May 1957 and charged with possession of incriminating documents contrary to Section 12 of the 1939 Act and with membership of an unlawful organisation, namely the I.R.A., contrary to Section 21 of the 1939 Act.

On 16th May 1957, he was convicted and sentenced by the Dublin District Court to one month's imprisonment on the first charge and acquitted on the second charge. The reasons for his acquittal are in dispute between the Parties (3).

The Applicant was again arrested on 11th July 1957, and detained under Section 3 of the 1939 Act for 24 hours, later extended to 48 hours, as being a suspected member of an unlawful organisation, namely the I.R.A.

./.

(1) See paragraph 128 below.
(2) See paragraphs 128, 131, 133-135 below.
(3) See paragraphs 128, 129, 135 below.

On 13th July 1957, his detention was continued under a Detention Order made by the Minister for Justice under Section 4 of the 1940 Act. The Minister stated in this Order that he was of the opinion that the Applicant was engaged in activities which were prejudicial to the security of the State. The Applicant was eventually released on 11th December 1957, on giving an undertaking not to 'engage in any illegal activities' under the 1939 and 1940 Acts.

120. Summary of submissions of the Parties to the European Commission

The Respondent Government submitted:

(a) that the Applicant was, on his own admission, until June 1956, a member of the I.R.A. and thereafter a member of a splinter group which committed a number of armed outrages. On 21st September 1956, the Applicant was one of four men found in possession of arms in a disused shed at Keshcarrigan and that these men admitted being members of the I.R.A. All four men were charged in the Dublin District Court under the Firearms Act of 1925 and the Criminal Justice Act of 1951;

(b) that the Applicant at a hearing on 25th October 1956, before the Dublin Court admitted that he was a member of the I.R.A. His subsequent acquittal by the Dublin Circuit Criminal Court on 23rd November 1956 on a charge of membership of an unlawful organisation, did not involve a declaration of innocence but was decided on the ground that the technical proof that the accused did not hold firearms certificates was lacking;

(c) that on 14th May 1957, the Applicant was arrested on suspicion of engaging in unlawful activities and that a sketch map was found on him showing the border village of Pettigo, marking the location of a British Customs and Police Barracks and bearing the words "Infiltrate, Annihilate, Destroy". The Applicant admitted ownership of that map;

(d) that the Applicant on 18th May 1957 was sentenced in the Dublin District Court to one month's imprisonment for possession of incriminating documents. His acquittal on a charge of membership of an unlawful organisation was no proof of his innocence since the Court, having convicted him on the first charge, simply dismissed the remaining charges without investigation;

(e) that, while in prison, the Applicant consorted with members of the above minority group and, after his release, resumed association with that group;

(f) that the above-mentioned circumstances show that the Applicant was a member of a subversive organisation engaged in activities aimed at undermining the institutions of the

Republic established to protect the rights and freedoms guaranteed in the Convention. Further, the Applicant was himself engaged in activities aimed at the destruction of such rights and freedoms including the most fundamental right of all, the right to life.

The Applicant was in consequence debarred by Article 17 from himself invoking the protection of the Convention.

The Applicant submitted in his affidavit of 21st February 1958, that he had ceased to be a member of any unlawful organisation at the time of his arrest on 11th July 1957 and had severed all connections with the I.R.A. and the above-mentioned minority group.

He relied, inter alia, upon his acquittal by the Dublin District Court on 18th May 1957, on a charge of membership of an unlawful organisation.

In general, the Applicant submitted that the allegations made against him by the Respondent Government were untrue or exaggerated.

121. The European Commission's Decision of 30th August 1958

The Commission decided to join this issue to the merits of the case. It referred to its decision in the German Communist Party Case (Application No. 250/57) in which it held that the members of an organisation, which were found to be engaged in activities aimed at the destruction of the rights and freedoms contained in the Convention, were excluded, by the operation of Article 17, from invoking the provisions of the Convention.

The Commission found that a prima facie examination of the submissions and evidence in the present case did not exclude the possibility of the same principle being applied. It considered that, in this connection, there was a vital question of fact which was in direct dispute between the Parties, namely, the question whether the Applicant was still a member of an unlawful organisation or group engaged in activities of a kind covered by Article 17 when he was arrested on 11th July 1957, and subsequently detained; it further considered that it did not have at that stage sufficient evidence on that question which was one closely connected with matters arising out of the merits of the claim (see paragraph 30 above).

122 Consideration of the case by the Sub-Commission

The main questions arising out of the Commission's decision of 30th August 1958, were as follows:

(a) was the Applicant, at the time of his arrest on 11th July 1957, and subsequent detention, a member or not of an unlawful organisation or group;

or, was the Applicant himself engaged in activities aimed at the destruction of any of the rights or freedoms set forth in the Convention?

(b) Does the operation of Article 17 preclude an Applicant from invoking the provisions of Articles 5 and 6 of the Convention?

As far as concerns the activities of the unlawful organisation or group concerned, the submissions of the Parties in regard to the activities of the I.R.A. and its minority group have been set out in Part III, Chapter II, of this Report which dealt with the questions arising under Article 15 of the Convention as to the existence of a public emergency and the justification by the exigencies of the situation of the special provisions of arrest and detention under the 1940 Act.

With regard to the first question, under sub-paragraph (a) as to whether the Applicant was or was not, on 11th July 1957, a member of an unlawful organisation and as to the nature of his activities, the submissions of the Parties, as contained in their pleadings and as made orally before the Sub-Commission, are set out below under a single heading. The submissions of the Parties on the question under sub-paragraph (b) are set out under a separate heading (1).

A.

Was the Applicant at the time of his arrest on 11th July 1957, and subsequent detention, a member of an unlawful organisation or group, or was the Applicant himself engaged in activities aimed at the destruction of the rights or freedoms set forth in the Convention?

./.

(1) See paragraph 139 and following of this Report.

123 Memorial of the Applicant.

The Applicant in his Memorial (entitled 'Arguments and Conclusions') of 20th November 1958, submitted:

(a) that the Respondent Government had produced no proof that the Applicant was a member of an illegal organisation and this had, in fact, been denied on oath by the Applicant;

(b) that the only evidence before the Commission was his acquittal in May 1957, of a charge of such membership. The Applicant relied upon Article 6, paragraph (2) of the Convention which provided that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." The onus was, therefore, on the Respondent Government to prove his membership of an unlawful organisation and, if their allegations were sustainable, the Applicant should have been put on trial in the Irish Courts in accordance with the due process of law. (1)

124. Counter-Memorial of the Respondent Government.

The Respondent Government, in its Counter-Memorial of 12th January 1959, submitted:

(a) that the Applicant had, as late as May 1957, refused to recognise the established courts and had by his actions shown generally that he aimed at the destruction of the rights which the Commission had been set up to protect. He had not ceased subversive activities and was seeking to use the Convention to facilitate their continuance. This was shown by extracts from intercepted letters between other persons. The I.R.A. was clearly the kind of body contemplated by Article 17 and persons who pursued the same unlawful activities were also debarred from invoking the Convention;

(b) that the Applicant in May 1957, in Mountjoy Prison had been transferred, at his own request, to a separate section where Geraghty and Chrystle, leader of the I.R.A. minority group, were awaiting trial on charges of membership of an unlawful organisation and, later, on charges of armed robbery of explosives. They were acquitted on the charge of armed robbery but Geraghty was convicted and sentenced to three months' imprisonment on a charge of unlawful possession of firearms and Chrystle was sentenced to two months' imprisonment to run concurrently, on charges of membership of an unlawful organisation and unlawful possession of firearms;

./.

(1) Paragraph 5 (c) (d) of Memorial.

(c) that the Applicant's assertion that he was not at the time of his arrest a member of an unlawful organisation was untrue. The police received information on the day of his arrest, 11th July 1957, from a source which for security reasons could not be disclosed, that the Applicant was still an active member of the Chrystle splinter group and intended to go to England to avoid detention. He was, in fact, arrested as he was embarking on the boat. During the subsequent interview by the police, he refused to dissociate himself from that group. (1)

125. Reply of the Applicant.

The Applicant, in his Reply of 19th February 1959, submitted:

(a) that at least five unproven allegations had been made against him by the Respondent Government but had not been made the subject matter of judicial determination by the domestic courts although they constituted criminal offences. These allegations were as follows:

(i) He had taken part in an armed robbery of explosives on 12th January 1957;

(ii) He had taken part in an armed robbery of explosives on the 6th May 1957;

(iii) He had falsely alleged in the Dublin District Court on 16th May 1957 that he had been assaulted and ill-treated by the police;

(iv) The allegations made on oath by the Applicant in his affidavit of 10th December 1957 (concerning his medical treatment in Jervis Street Hospital, his injuries and illtreatment) were "a complete fabrication";

(v) He was at the time of his arrest and imprisonment in July 1957, a member of some unlawful organisation and that his denials on oath in his affidavits of this allegation were untrue.

The Applicant had denied these allegations by affidavit and could, therefore, have been charged with perjury if his statements were untrue. Moreover, it would be an abuse of the Convention if the Commission was invited to undertake the trial of offences which had not been charged or tried by the domestic courts;

./.

(1) Paras. 34, 43, 45, 46. Schedule No. 2 of Counter-Memorial.

(b) that it was untrue that the Applicant during an interview with Inspector McMahon after his arrest on 11th July 1957, admitted his membership of an unlawful organisation and refused to dissociate himself from it.

The Applicant repeatedly denied to Inspector McMahon that he was at that time in any unlawful organisation or group. It was significant that this vital allegation had now been made for the first time by the Respondent Government and had never been mentioned in the proceedings before the Detention Commission, the Irish Courts or the European Commission.

Inspector McMahon had sworn an affidavit on 24th September 1957, (1) dealing with the Applicant's arrest but had made no mention of this alleged admission. If this allegation were true, the Applicant could have been charged with that offence before the Irish Courts and the evidence of Inspector McMahon and any other police officers present would have sufficed to obtain a conviction.

During the interview concerned, the Applicant had been invited to become a paid police agent, as had already been stated in his previous pleadings;

(c) that, as far as his alleged association in Mountjoy Prison was concerned, he had no recollection of asking to be placed in any section of the prison. The Applicant was, in fact, ostracised by the I.R.A. prisoners as he was not a member of the I.R.A.;

(d) that the Respondent Government's suggestion was 'bordering on the fantastic' that the Applicant's attempt to use the European Commission to facilitate his subversive activities was proved by alleged extracts from certain correspondence. Such letters were between persons totally unknown to the Applicant and were inadmissible and irrelevant;

(e) that, as to the Respondent Government's statement that the police received confidential information concerning the Applicant's membership from a source which for security reasons 'cannot be disclosed', such information, if indeed it was received, was untrue. The Applicant had had no association with the I.R.A. since 1956 nor was he engaging in any unlawful activities at the time of his arrest and imprisonment or at any relevant date. He was never a member of the Sinn Fein. Finally, the Applicant had not refused to recognise the Court when on trial in May 1957;

./.

(1) Schedule No. 1 to Statement of Complaint and Claim of 8th November 1957.

(f) that two questions arose:

(i) a question of construction and law as to whether Article 17 could have any application to Articles 3, 4, 5 and 6 of the Convention;

(ii) if so, a question of evidence as to whether the Applicant was on 11th July 1957, engaged in the activities defined by Article 17;

and that the onus of proof in both was on the Respondent Government. (1)

126- Rejoinder of the Respondent Government.

The Respondent Government, in its Observations of 12th March 1959, repeated its general submission that Article 17 debarred the Applicant from relying upon any provisions of the Convention.

127 Oral hearing of 17th to 19th April 1959

The Sub-Commission took a decision on 24th March 1959,(2) the relevant part of which was as follows:

"....Having regard to the fact that the Applicant's claim in the present case is for an award of damages by way of substantial compensation for the alleged breach of the Convention, the Sub-Commission is called upon to establish all the facts relevant for the determination of the question of compensation, should the occasion for such a determination arise. In this connection the Sub-Commission desires to obtain further information from the Parties on the points:

(4) whether or not the Applicant in July 1957, had in fact ceased to be a member of an illegal organisation and ceased all activities in support of such organisation; and

./.

---

(1) Paras 5 to 10, 13, 14, (f), 23 and 31 (d) of Reply.

(2) For first part of this Decision see paragraph 100 above.

(5) whether or not the Applicant acted unreasonably in refusing on 11th July 1957 to sign an undertaking to respect the Constitution and laws of the Republic of Ireland and in continuing, until 11th December 1957 to refuse to sign any undertaking with regard to observance of the law.

The Sub-Commission, furthermore, notifies the Parties that it desires, in particular:

(a) on the fourth point, to put questions to the Applicant and to Detective-Inspector P. McMahon and to hear their statements;

(b) on its fifth point, to put questions to the Applicant and to hear his explanations;

and that, in accordance with Rule 54, paragraphs 2 and 3 of the Rules of Procedure, the reasonable expenses of the Applicant and Detective-Inspector McMahon in connection with their appearance as witnesses before the Sub-Commission will be reimbursed to them.

The Sub-Commission accordingly invites the Parties at the oral hearings on 17th and 18th April to submit any further observations which they may wish to make on the two points mentioned in the preceding paragraph and further invites:

(A) the Applicant to present himself before the Sub-Commission on 17th April for the purposes set out in (a) and (b) of the preceding paragraph, and

(B) the Government to arrange for Detective-Inspector McMahon to present himself before the Sub-Commission on 17th April for the purpose set out in (a) of the preceding paragraph.

The Sub-Commission also invites the Parties to clarify or amplify any other points in the case which they may deem necessary, always bearing in mind, however, the considerable amount of information and argument which has already been submitted to the Commission and Sub-Commission in the previous written and oral pleadings.

Finally, the Sub-Commission wishes to point out that, in accordance with Article 33 of the Convention and Rule 26 of the Rules of Procedure, hearings of the Commission and the Sub-Commissions and all other proceedings in the case are secret. Failure to observe the secrecy of the proceedings may compromise the satisfactory working of the Commission and Sub-Commission."

128. Both witnesses appeared at the oral hearing and the Applicant first made a statement and answered questions put to him by the President and members of the Sub-Commission to the effect:

(a) that he was not a member of any illegal organisation in 1957. He had ceased to be a member of I.R.A. and of the minority group in December 1956, and he had demonstrated this simply by dissociating himself from the organisation and its activities. His membership of I.R.A. had been for idealistic and patriotic reasons but he had ceased to be a member as he decided that it was not getting sufficient support from the Irish people in order to achieve its aim and also that the ending of partition was first and foremost a job for the Government. He had joined I.R.A. about the beginning of January 1956, but did not take an oath or join for a specific period. He had taken a simple pledge to obey orders after a short course in a recruit class;

(b) that he had been arrested on 14th May 1957, at the corner of Ballybough Road in Dublin by Detective-Sergeant O'Connor. He had then said that he 'was not in anything now' by which he meant that he was not a member of any illegal organisation.

He was subsequently charged with membership of an illegal organisation and acquitted but was convicted and sentenced to one month's imprisonment on a charge of being in possession of incriminating documents. He agreed that, in respect of his conviction, he then had a legal remedy by appeal to the Higher Court. The document found in his pocket at the time of his arrest was a document which he was trying to dispose of when, twenty minutes previously he had seen Irish police cars in front of his house. He had kept this document since 1956 in a suitcase and it related to a projected operation about that date. He had not been questioned about that particular document at the subsequent hearing in court;

(c) that, in 1957, he was prepared to give the undertaking which in fact he gave later to the Attorney-General. He did not have a real opportunity to do so until the proceedings before the Detention Commission;

(d) that, when he was arrested, he was embarking for England to get employment. He had not written to any firms but had got addresses of Catholic hostels where he could stay (1).

(1) Verbatim record of oral hearing, pages 3, 6, 7, 10 to 14.

129. The Applicant then gave the following replies to questions put to him by the Attorney-General:

(a) that he first objected to the Irish Constitution on religious grounds in the spring of 1954. This was the result of lectures by Professor Father Fahey which criticised Article 44 of the Constitution. When he took the oath of loyalty as a soldier of the Reserve of Men, he was not aware of any inconsistency. He was 17 years old and did not know that internment without trial existed;

(b) that he had broken away from the main body of I.R.A. in June 1956, but did not wish to give any information about the period of his membership;

(c) that he admitted that he had taken part in September 1956 in an armed raid within the Government's jurisdiction when guns were stolen, but that only three guns were fit for military service, namely an Enfield rifle, Thompson sub-machine gun and .45 revolver. He had been subsequently acquitted by the Central Criminal Court on a charge in this connection;

(d) that his exact words to the Dublin District Court in May 1957 were "whether the judge, the Senior Justice, realised or not that the Special Branch were using the process of the Court to protect the last remains of the British Empire in my country";

(e) that, when charged with possession of incriminating documents, he had not offered the explanation that he was about to thrown one document away as he was clearly guilty of possession, having had the document since 1956;

(f) that between his release and 11th July 1957, he did not avoid the police but was living at home. He had wholely abstained, since his release, from all activities in support of illegal organisations or those engaged in illegal activities. Admittedly, he had been a frequent visitor at 39 Mary Street, Dublin, which was the office of an organisation for the relief of political prisoners in any part of Ireland. He had been active in organising such relief.

He was not a member of Fianna Eireann in February 1958. On 22nd June 1958, he had taken part in a commemoration ceremony at Bodenstown which he thought was organised by Fianna Eireann which was a Boy Scout organisation but he had not marched in military formation with Sean Geraghty.

./.

He had heard of Saor Uladh, which the Attorney-General alleged was a militant organisation, but did not know if a man called Kelly was the leader. The Courts had decided that it was a legal organisation and he did not know if it had met at 39 Mary Street;

(g) that Sean Doyle was a friend of his and was awaiting trial on a charge of intimidating witnesses. The Applicant admitted that on one occasion he had attended court during proceedings concerning that charge as Doyle was a friend of his. He had read in the newspapers that the charge against Doyle was connected with another case regarding the use of firearms;

(h) that on 17th March 1958, (St. Patrick's Day) neither he nor his friends had attempted to interfere with a parade in O'Connell Street, Dublin;

(i) that, in regard to the Court proceedings in May 1957, he had not refused to recognise the Court but had himself taken part in the proceedings and cross-examined the State witnesses;

(j) that Liam Walsh, Sean Geraghty and Joseph Chrystle were also put on remand the same day but were not in the dock with him. As far as he knew, they were at the same time sent for trial to the Dublin Circuit Court on the charge of armed robbery of explosives at the Swan.

In Mountjoy Prison he shared a cell with Sean Geraghty and Liam Walsh at the orders of the Prison staff and not of his own choice. He had not refused to be put in 'A' or 'B' wings but had in fact been put in 'C' wing which was the remand wing, while 'D' wing was apparently for convicted members of I.R.A. Chrystle was in the same wing in an adjoining cell. He associated with those three men and with certain others who could talk about current topics. He objected to stating whether any of the three men were members of the minority splinter group. Doyle was not a member of any illegal organisation.

He did not know who took part in the armed raid on the premises of Messrs. Fleming at The Swan at Athy;

(k) that, on the night of his arrest, Inspector McMahon asked if he was prepared to give information as to the location of arms and ammunition. The Applicant had said that he had no such information and resented being considered as a possible informer. He was also asked to give information about I.R.A. and was offered money and work in Ireland or in England if he did so. He did not reply to Inspector McMahon that he would like to think this over during the night.

He had not been asked to dissociate himself from the splinter group. He repeated to Inspector McMahon that he was not a member of any illegal organisation. Superintendent Gill, Detective McArdle and another detective officer were present.

In the course of the Applicant's deposition, the Attorney-General declared that there could be no question of criminal proceedings against the applicant in respect of any statements made by him before the Sub-Commission (1).

130. The Applicant finally answered questions put to him by his own representatives to the following effect:

(a) that he swore an affidavit on 10th September 1958, and three others on 18th September 1957, 8th November 1957 and 16th June 1958. The statements in these affidavits were correct and that of 10th September 1958, and one other affidavit concerned his interview with Inspector McMahon;

(b) that on 10th December 1957, he gave an undertaking before the Detention Commission as follows: "I hereby undertake that I shall not take part in any activities that are illegal under the Offences against the State Act". He had not been asked before that date to give an undertaking in that form, either verbally or in writing. He had been asked on 16th August 1957, to sign an undertaking as follows:

> "I (giving the name) undertake to respect the Constitution of Ireland and the Laws and I declare that I will not be a member of or assist any organisation that is an unlawful organisation under The Offences Against the State Act 1939."

The Applicant had objected to the word 'respect' which he considered to mean 'love, honour and obey'; ./.

(1) Verbatim record of oral hearing, pages 15 to 36.

(c) that the organisation at 39 Mary Street was the Political Prisoners' Dependents' Organisation which, before Christmas 1958, had obtained a licence from the Irish Courts to run a charity lottery. Fianna Eireann was not an illegal organisation but purely a Boy Scout organisation. The Bodenstown celebrations concerned Wolfe Tone who was commemorated by the State Army and several political parties;

(d) that, on 11th July 1957, when he was arrested, he was going to England to seek employment. He had obtained a list of Catholic hostels in the same month;

(e) that, after his release from the Internment Camp, he was unemployed for two months and then obtained employment on 17th February 1958, at Jordans Bakery in Dublin. He worked there until 2nd August 1958, and was put on short-time employment. He then went to England and was employed in the Central London Bakeries, Mackenzie Road, London. He stayed there about a month and then returned to Dublin where he got his job back at Jordans Bakery where he was still employed at £10.10.0 per week. His father was dead and he gave his mother about £5 per week;

(f) he handed in a copy of a periodical called 'FIAT' which was the journal of a Catholic organisation called 'Maria Duce' and which set out the objections of Catholic social policy to Article 44 of the Constitution(1)

131. Detective-Inspector McMahon then gave evidence on oath and replied to questions put by the President and members of the Sub-Commission to the following effect:

(a) that he had received confidential information in May 1957, that the Applicant had been one of a number of members of the splinter group who had taken part in armed raids at Moorestown on 12th January 1957, and at The Swan on 6th May 1957.

On 14th May, the Applicant was accordingly arrested with nine other suspected members. He was then in company with two members of the splinter group and was found in possession of an incriminating document. Two of the suspected men, one of whom was Geraghty, were identified in an identification parade at the Bridewell.

./.

(1) Verbatim record of oral hearing, pages 37 to 44.

He had arrested the Applicant as a result of confidential information concerning his connection with the raids on the two magazines and not because he was suspected of carrying incriminating documents. He did not know of the Applicant's explanation as to the document.

The Applicant, when consequently charged in the District Court, stated that he refused to recognise the authority of the Court. He alleged that he had been ill-treated and, when sentenced, stated "The Court is here to safeguard the remnants of the British Empire". He had been fingerprinted in the Bridewell against his will but was not ill-treated;

(b) that the Applicant, when serving his sentence of one month's imprisonment in Mountjoy Prison, chose to share a cell with Geraghty and Walsh. He was released on 15th June and confidential information showed that he continued his close association with the activities of the splinter group;

(c) that he arrested the Applicant on 11th July 1957, as a result of information that he was going to England to escape arrest. He took the Applicant to the Bridewell and at 9.20 p.m., with Inspector McArdle, interviewed the Applicant in his cell. He asked the Applicant if he was willing to hand over the arms in his possession which belonged to the splinter group and to dissociate himself from the I.R.A. and illegal organisations. He also asked the Applicant if he would sign a form of undertaking, but he did not produce a written form.

As far as he remembered, he had asked the Applicant to sign an undertaking to "uphold" (not to "respect") the Constitution. The Applicant had refused and he had then asked him to give a verbal undertaking. Such undertaking was sometimes accepted by the authorities. The Applicant had again refused.

He next asked the Applicant if he was willing to give information concerning the splinter group in return for money. The Applicant seemed interested and the conversation was amicable although he, the Applicant, told him that he was going to be shot. He had not taken the Applicant's threat seriously. The Applicant said that he would consider overnight his offer of money. On 12th July, the Applicant told Inspector McArdle that he would have nothing to do with that offer.

He had not specifically asked the Applicant if he was a member of an illegal organisation as the whole discussion was on the basis that he was a member;

(d) that in Mountjoy Prison the Applicant could have elected to go to the official I.R.A. section or to the criminal section, where he would have got a remission of sentence, but he preferred to stay with his own group. This right of election was perfectly normal but would not appear in the prison records;

(e) that the Applicant, after the 1940 Act came into force on 8th July, was attempting on 11th July to run away as was known through confidential information. (1)

132 Detective-Inspector McMahon then made the following replies to questions put by the Applicant's representatives and also by the President and members of the Sub-Commission:

(a) that it was the first time that he had been accused of ill-treating a prisoner and he had made a report;

(b) that he could give no particular reasons for not mentioning in his affidavit that he believed the Applicant on 11th July 1957, to be a member of an illegal organisation. An admission to that effect by the Applicant would, of course, have been the best evidence of this but there would not have been any likelihood of such an admission being made. His interview with the Applicant was on the basis of his membership of an illegal organisation and it would have been ridiculous to have asked him if he was a member. The Applicant at no time said otherwise.

He did not take very seriously the Applicant's threat that he, the witness, would be shot. He had made a report on about 25th September of the interview with the Applicant which he produced. He had not mentioned in the report either the Applicant's threat or his admission, direct or implied, that he was a member of an illegal organisation. His report had been made in September because it followed the Applicant's first affidavit;

(c) that the Applicant had not been arrested only on his advice as the authorities had other sources of information;

./.

(1) Verbatim record of oral hearing, pages 45 to 51.

(d) that the Applicant had the right to, and did in fact, elect in Mountjoy Prison to share a cell with Geraghty and Walsh. In the last two years much latitude had been given to political prisoners in that respect. He, Inspector McMahon, was not a member of the prison staff but had got his information from Mr. O'Donoghue, the Deputy Governor. (1)

133. Detective-Inspector McMahon then made the following replies to questions put by the Attorney-General and also by the President and members of the Sub-Commission:

(a) that the information of the police was that the Applicant, following his release by the Court, had continued his activities with the splinter group which had been fused with another subversive organisation called Fianna Uladh. His constant associates were Geraghty, who had been found in possession of a quantity of explosives and sub-machine guns, and Doyle who had been newly arrested. They had sometimes met at 39 Mary Street where genuine meetings of the 'Prisoners' Dependents' Fund' were also held. The police had taken no action in regard to the activities at 39 Mary Street.

The information as to the Applicant's complicity in the two armed raids came from a reliable source and that stolen ammunition was found in the house of one of the people similarly indicated. The police had occasionally put a watch on the Applicant but he had taken care to conceal his activities;

(b) that the Applicant at the age of 16 had joined Fianna Eireann. In 1955 he joined I.R.A. and was again organising the splinter group of Fianna Eireann which was not recognised by the official Fianna Eireann, being a boys' organisation. The Applicant visited the Dublin mountains where senior boys of Fianna Eireann were allegedly taking part in military exercises. There had been disputes between the two sectors of Fianna Eireann and the Applicant had asked at the headquarters of the official body that their 'boys' should be kept away from his 'boys'. (2)

134. The Representative of the Applicant, Mr. MacBride, then submitted as follows:

(a) that all Inspector McMahon's evidence was 'hearsay' or 'hearsay upon hearsay' except as regards the interview on 11th July 1957, and the events in the Bridewell Prison in May 1957.

(1) Verbatim record of oral hearing, pages 52, 56 to 61.

(2) Verbatim record of oral hearing, pages 62 to 65.

As to the 11th July interview, Mr. MacBride thought that there were three salient matters:

(i) that Inspector McMahon offered to take a verbal undertaking in a modified form from the Applicant,

(ii) that the Applicant had given him the impression that he would consider the offer of money to become a police agent,

(iii) that the Applicant told Inspector McMahon that he would be assassinated.

Inspector McMahon swore an affidavit on 24th September 1957, in which he made no mention of those matters although they were relevant to the application for habeas corpus, particularly as regards the Minister's decision in ordering the Applicant's imprisonment.

Inspector McMahon also made a report on 25th September 1957, in which he made no mention of the threat to assassinate him and also stated that he had offered the Applicant not money, but work;

(b) that no reference had been made in any of the Government's written pleadings, until the Counter-Memorial of 12th January 1959, which was after the decision on admissibility, that the Applicant had directly or indirectly admitted to Inspector McMahon on 11th July 1957, that he was engaged in illegal activities;

(c) that Inspector McMahon had in his evidence repeated two accusations as to armed raids which had been made against the Applicant before the Detention Commission, but the Applicant had never been charged or tried for these matters. Similarly, if, on 11th July 1957, he had admitted membership of an illegal organisation he should have been charged and tried by the Irish Courts. This had not taken place.

During the Applicant's cross-examination, he was never asked about the two armed raids at Moorestown and The Swan and had therefore no opportunity of replying to those accusations. The Attorney-General had also confused the dates. It was 28th May and not 16th May 1957 when the two other men were on trial in the District Court for participating in The Swan raid;

(d) that Inspector McMahon, in his evidence as to the events in the Bridewell Prison on 14th and 15th May 1957, said that there had been no force used on the Applicant. The latter, in his affidavit of 10th December 1957, concerning the proceedings before the Detention Commission, stated, on the other hand, that Chief Superintendent Carroll had alleged that the Applicant had made false accusations of ill-treatment by the police. Inspector McMahon, according to the press reports, had said before the District Court that: 'There was not very much force used at all... That is not a true account /by the Applicant/. He is exaggerating.'

The Respondent Government had been misinformed by the police as it had stated in the Memorial that the police had enquired at the hospital and that the Applicant had not been treated there for injuries. Hospital records had now been produced on behalf of the Applicant.

The Respondent Government had been invited to produce medical records from Mountjoy Prison to show that the Applicant had a black eye;

(e) that the Respondent Government had tried to establish not that the Applicant had taken part in any illegal activities but that he was guilty of taking part because of his association;

(i) with the Bodenstown commemoration. All political parties attended this and any such presumption regarding his attendance was far-fetched;

(ii) with Fianna Eireann. This was simply a Boy Scout organisation;

(iii) with the Prisoners' Dependents' Fund. This was an authorised and charitable organisation. Association with it, although possibly indicating sympathy with political prisoners, should not prejudice the Applicant;

(f) that, as to the question of the Applicant's membership of I.R.A., nothing had been put to him which displaced his categorical statements that he had ceased, at the end of 1956, to be a member of any illegal organisation. An Irish Court had acquitted him of such a charge and the Commission was bound by that decision.

The Court had convicted him of possession of an incriminating document but the Applicant had now explained why he still possessed that document and he had not been challenged.

Inspector McMahon had produced no evidence to show that the Applicant was still a member at that period. He had referred to the reports of police informers but these were not always reliable. The decision in the case of Jencks against the United States was to the effect that the U.S. Courts could not rely upon undisclosed police evidence

(g) that, as to the question of the Applicant's refusal to sign an undertaking to 'respect the Constitution' it should be pointed out that the Applicant, as appeared in his affidavit of 21st February 1958, had been asked orally, not in writing, to sign an undertaking 'to respect the Constitution' and not 'to observe the law'. He had stated in his evidence that he would have been ready to sign the latter form of undertaking. The Applicant stated that he did not esteem the Constitution and this was a view shared by very many people in Ireland.

Further there was no law or sanction, or 'other procedure prescribed by law' as under Article 5 of the Convention, which required a person to sign an undertaking in order to obtain his freedom. The Courts could effect this by binding a person 'to the peace and to be of good behaviour' but this was due process of law and not an arbitrary function. There were two cases (Kent versus John Foster Dulles and Briehl versus John Foster Dulles,) in which the U.S. Supreme Court decided that regulations, under which the Secretary of State could require an applicant for a passport to swear an affidavit disclaiming membership of the Communist Party, did not delegate that power to the Secretary of State. If it was not permissible under the rule of law to compel a person to sign an undertaking to secure a passport, it was a fortiori not permissible to impose such requirement as a condition of liberty. The right to liberty was absolute and not subject to any test of 'reasonableness' regarding the Applicant's refusal to sign such undertaking (1).

./.

(1) Verbatim record of oral hearing, pages 78 to 82, 91, 93, to 95.

135. The Attorney-General then made his observations on behalf of the Respondent Government. His submissions were as follows:

(a) that Inspector McMahon had not mentioned in his affidavit of September 1957 the implied admission of the Applicant during the interview of 11th July 1957 that he was a member of the splinter group as the High Court had decided in 1940 that any question other than the existence of the Ministers' opinion was irrelevant in proceedings concerning a warrant of arrest issued by a Minister under Section 4 of the 1940 Act;

(b) that the suggestion was untrue that the Government had concealed information about the Applicant's attendance for medical treatment at Jervis Street Hospital. The matter was insignificant but the police had found an entry of a man called LAWLER of a different address in the hospital records while the record card had not been made available to them;

(c) that, as regards the commemoration ceremony at Bodenstown, the Applicant had been asked whether he had attended as a member of a splinter group. The Applicant said he had been there under the organisation of Fianna Eireann. Fianna Eireann was a youth organisation founded in 1909 and associated with republican activities and of which today there was a splinter group engaged in military activities with the 'concurrence' of the Applicant;

(d) that Saor Uladh (Free Ulster) was a military organisation which, although not declared unlawful, was by reason of its activities in Ireland in fact unlawful as were other organisations of a similar character;

(e) that, as regards the question whether the Applicant had ceased in July 1957, to be a member of the I.R.A. or the splinter group, the fact of his acquittal of such membership in May 1957, did not, as was suggested, bind the Sub-Commission. The Applicant had been a member in 1956 and had left the main organisation about June 1956. He admitted taking part, when a member of the splinter group, in the larceny of firearms from the house of a man named Fowler and was acquitted on technical reasons on a charge of being found in possession of firearms in County Leitrim. It was not until December that he said he had had a change of heart and dissociated himself from the group.

It was true that, on the occasion of the raid at The Swan on 6th May 1957, the only evidence available to the Government was that Inspector McMahon had confidential information that the Applicant took part in the raid but was not identified. Similar confidential information had been correct in the cases of Geraghty and Chrystle who were later identified. This was hearsay evidence, but international tribunals were not bound by the same rules of evidence as domestic courts and should attach much significance to it;

(f) that, when charged on 16th May 1957, for being in possession of an incriminating document, he did not take the obvious course of giving the explanation he had now given to the Sub-Commission but, as Inspector McMahon had stated, challenged the right of the Court to try him as a soldier of the Republic. He had denied this now before the Sub-Commission but had never done so in any written pleading. The map found in the Applicant's pocket was undated but the document which he left at home and which was of a more incriminating nature was dated 1956. Nothing suggested that the map was of 1956 date;

(g) that, as to his acquittal on 16th May 1957, the District Justice may, as was often the practice, have acquitted him of being a member of an illegal organisation because he had already convicted him on another charge, namely that of possession of an incriminating document;

(h) that the Irish Times of 3rd July 1957 (1) reporting the trial of Chrystle and Geraghty, contained the following statement of Geraghty:

> "Regardless of the consequences that may happen here I will return to that and continue the fight against the army of occupation in Northern Ireland."

It then added:

> "District Justice O'Flynn said that he would dismiss the charge of being a member of an illegal organisation as the evidence did not support a conviction on that charge."

This appeared to be a freak decision unless the Court decided not to regard Geraghty's statement from the dock as evidence;

./.

(1) Government's Counter-Memorial of 12th January 1959. Document No. 4.

(i) that, as regards the Applicant's imprisonment in Mountjoy Prison, the Governor's Report of 2nd January 1959, stated that the Applicant associated at his own request with Walsh, Geraghty and Chrystle in 'C' block. There were no contemporary reports. The Applicant had now been asked whether he wished to say if these men were members of the organisation, which by their activities they clearly were, and had answered 'in a strange fashion' from which the Sub-Commission was entitled to make a very clear deduction. He refused to reply in regard to Chrystle, Geraghty and Walsh but stated that Doyle was to his knowledge not a member of any illegal organisation.

He associated with those three men in prison and there could be no stronger evidence of his continued participation in such illegal activities;

(j) that the Political Prisoners' Fund had applied for a lottery licence in December 1957. Mr. Sorahan, junior Counsel for the Applicant, had supported that application and said that the Fund had no written constitution although the Applicant stated that its constitution denied membership to any member of an illegal organisation;

(k) that, as to the Applicant's refusal to give an undertaking, he now stated that he had conscientious objections which he had not mentioned at the time to Inspector McMahon. In regard to his objection to Article 44 of the Constitution on religious grounds, the Constitution could not give rise to any reasonable objection on such grounds. If he had indicated his objections, the authorities would have doubtless met them, but it was not until 10th December 1957, that the Applicant had said, in reply to a direct offer, that he was prepared to give an undertaking as to his future conduct;

(l) that, as to the incident on 16th May 1957, there was a report in the Irish Times of 17th May 1957. There was also a photograph of the Applicant leaving court with a police officer. (1)

./.

---

(1) Verbatim record of oral hearing, pages 119 to 131.

136. In reply to the observations made on behalf of the Respondent Government, Mr. MacBride made the following submissions:

(a) that, in regard to the allegations of the Applicant's participation in raids at The Swan and Moorestown and in illegal activities since his release, no questions were put to the Applicant and no direct evidence had been submitted to sustain those allegations. The Respondent Government had made these unfounded allegations in order to prejudice the Sub-Commission;

(b) that the Respondent Government had not referred to the United States cases cited by him and had, therefore, presumably accepted his propositions concerning them;

(c) that, as to the trial of Chrystle and Geraghty before the District Court on 29th May 1957, the newspaper reports showed that the accused had not been definitely identified and that the judge directed the jury to acquit them. The 'Report of the Commissioner of Police for 1957' stated that;

> "At the Circuit Court both were acquitted by direction of the Judge through lack of satisfactory evidence of identification."

Chrystle was released and was in State employment;

(d) that Saor Uladh could have been declared illegal if the Government considered it as such. This could have been done by a 'suppression order' under Section 19 of the 1939 Act. Ex-Senator Kelly, with whom the Applicant was alleged to be in association, had never been interned and addressed meetings throughout the country;

(e) that the alleged I.R.A. manifests contained in Schedules 5 and 6 to the Respondent Government's Observations of 12th January 1959, were dated respectively 12th December 1956, namely after the Applicant had left I.R.A., and August 1957, namely when the Applicant was interned. They could not, therefore, be held against him;

(f) that the Applicant when in prison was ostracised by the I.R.A. prisoners as was mentioned in the Governor's letter and Inspector McMahon's report;

(g) that, in regard to the 'beating up' of the Applicant at the Bridewell Prison on 15th May 1957, the Respondent Government had stated in its memorandum of 25th March 1958, that a police investigation had disclosed no record of the Applicant's attendance at Jervis Street Hospital. It later stated that the record was of the wrong name and address but the mistake was slight and should not have prevented identification. The doctor concerned had been cross-examined at length by the police and had lodged the index card with the solicitors of the Medical Protection Council in order that the police should not remove it. The facts appeared from the Hospital Register and Medical Index card;

(h) that there had been several misleading statements by the Respondent Government. The newspaper reports did not support the allegations that the Applicant had challenged the jurisdiction of the Court on 16th May 1957 but he had done so, as he had stated, in October 1956;

(i) that it had also been alleged that the Applicant had been discharged in writing by registered post on 13th December 1956, from membership of the Defence Forces. That was untrue as the envelope had been wrongly addressed and had been returned with the letter to, and kept in the files of, the Department of Defence;

(j) that the Applicant did not accept the contents of the letter signed by the Governor of Mountjoy Prison on 2nd January 1959, dealing with events in May 1957. That letter stated that on 23rd May 1957, the Applicant asked to see a solicitor with a view to bringing an action against Inspector McMahon in regard to his having been 'beaten up'. The letter further stated:

> "I asked him to put his application in writing and he said he would, but eventually he let the matter drop on the advice, I was given to understand, of Chrystle."

He challenged the Government to produce the prison records showing that the Applicant had a black eye when he arrived at the prison. This was a matter which affected the credibility of the two witnesses and, according to the known facts, the Applicant had on 16th May 1957 made a charge in open court that he had been 'beaten up' under the supervision of Inspector McMahon. The latter had now stated that the Applicant was 'exaggerating'. Some days later, the Applicant asked to see a solicitor in order to start an action.

In July, after being arrested, he refused Inspector MacMahon's offer to become a police agent and had been, therefore, considered sufficiently reliable for that task. It might be that his consequent imprisonment was a result of his refusal. (1)

137. The Attorney-General stated in his turn as follows:

(a) that, as regards the Chrystle and Geraghty cases, the depositions in the District Court showed that his submission as to the evidence of Kelly and Nash was correct;

(b) that, as regards the Discharge Certificate, it had been returned to the Department of Defence as the Applicant had left his previous address and it had later, at his solicitor's request, been forwarded to him or his solicitor together with the original letter and envelope in order that he might be fully aware of the facts;

(c) that, as regards the alleged 'beating up' incident, the matter was not material to these proceedings. Inspector MacMahon had denied it on oath. The photograph of the Applicant hardly showed a man suffering from serious assault about which he had just been complaining. The address and name in the hospital records were not those of the Applicant and the index-card could not be seen or obtained by the Government's Representatives;

(d) that he wished to put in the depositions in the District Court as to the Chrystle and Geraghty cases.

In regard to these last observations, the Agent of the Applicant, with the permission of the President stated that he wished to put in newspaper reports concerning the Chrystle and Geraghty trial as the Attorney-General had put in the deposition concerning that trial. As regards the photograph of the Applicant, there was a date on the back of August 1957. Inspector MacMahon had recently certified that it had been taken on a certain date in 1957 but it was submitted that it had been taken on another date. He also replied

./.

(1) Verbatim record of oral hearing, pages 133, 134, 143 to 151.

to a question put by a member of the Commission that detainees, on the day after their arrival at the camp, were given a copy of Section 8 of the 1940 Act which set up the Detention Commission. The Commission, according to the Attorney-General had first been set up on 16th July 1957. (1)

138. OPINION OF THE COMMISSION

The Commission, having taken account of the written and oral submissions by the Parties, and with particular regard to the information given in the oral hearing of 17th-19th April 1959, recalls that the Applicant was at a certain time, on his own admission, a member of the I.R.A. Although the Applicant has stated that he had severed his links with the I.R.A. before the end of 1956, the Commission feels bound to observe that his general conduct, his association with persons known to be active members of the I.R.A., his conviction for carrying incriminating documents and other circumstances were such as to draw upon the Applicant the gravest suspicion that, whether or not he was any longer a member, he still was concerned with the activities of the I.R.A. at the time of his arrest in July 1957.

- B -

Does the operation of Article 17 preclude an Applicant from invoking the provisions of Articles 5 and 6 of the Convention?

139. Memorial and Reply of the Applicant

The Applicant in his Memorial (entitled 'Arguments and Conclusions'), of 20th November 1958, and in his Reply of 19th February 1959, referred to the European Commission's decision of 30th August 1958, in which it was stated that the principles applied by the Commission in its decision on the admissibility of the German Communist Party application (No. 250/57) might be applicable in the present case. It was submitted by the Applicant:

(a) that the former case had been based on Articles 9, 10 and 11 of the Convention which were subject to specific limitations not applicable to Articles 5 and 6. Article 17 could not, however, be used to nullify such fundamental Articles as 2, 3, 4, 5 and 6 of the Convention;

./.

(1) Verbatim record of oral hearing, pages 152, 159 to 161.

(b) that Article 17 was by its terms inapplicable to claims under Articles 5 or 6 of the Convention. Article 17 related to a claim of a right to 'engage in any activity' or 'perform any act' and could therefore be properly applied to a claim under Articles 9, 10 or 11 which dealt with such issues. As an illustration, it was asked whether the claim of a German Communist alleging torture under Article 3 of the Convention could be defeated by the plea that the case was governed by Article 17. (1)

140. Counter-Memorial and Rejoinder of the Respondent Government

The Respondent Government, in its Counter-Memorial of 12th January 1959, and in its Observations of 12th March 1959, submitted:

(a) that the European Commission in its decision on the admissibility of the German Communist Party application had based that decision on Article 17 of the Convention. It had deliberately not chosen to proceed on the restrictive paragraphs of Articles 9, 10 and 11 but on the basis that Article 17 was a fundamental provision to which all other Articles of the Convention were subject. The Commission had stated in its decision:

> "It is clear from the foregoing that the application by the German Communist Party cannot rest upon any provision of the Convention, least of all on Articles 9, 10 and 11.";

(b) that the Applicant's suggestion that the application of Article 17 would make him an outlaw was false. The Applicant could have recourse to the Irish High Court and Supreme Court and to the Detention Commission. He had not, however, a right of recourse to the European Commission. (2)

---

(1) Paragraph 5 (b) (iv) to (vi) of Memorial.
Paragraph 3 of Reply.

(2) Paragraph 40 to 42 of Counter-Memorial.
Paragraph 3 (c) of Observations of 12th June 1959.

141. OPINION OF THE COMMISSION

Article 17 does not deprive persons who seek to destroy the rights and freedoms set forth in the Convention of the general protection of the rights and freedoms guaranteed therein. It merely precludes such persons from deriving from the Convention a right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the Convention. This means, for example, that no one may invoke the right to freedom of thought, freedom of press or freedom of assembly and association for the purpose of destroying the free, democratic order protected by the Convention. The rights set forth in Articles 5 and 6 of the Convention, on the other hand, are in no way diminished by Article 17. Thus, an agitator, who pursues communist, fascist, national, socialist or, generally, totalitarian aims is entitled to avail himself of the provisions on procedure contained in Articles 5 and 6. Those provisions are not concerned with rights relating to the actions of a group or of an individual but with the duties of the public authorities towards all individuals. Such duties are not affected by Article 17, which is concerned solely with the actions of a group or of an individual who makes use of positive rights for the purpose of destroying the free, democratic order. For this reason, the Applicant cannot be deprived under Article 17 of the rights guaranteed by Articles 5 and 6, even if it be admitted that he was acting with revolutionary intent, or in any case with an intent incompatible with the Convention.

Chapter IV

The question of any damages, compensation and costs to be awarded to the Applicant.

142. The claim of the Applicant

The Applicant's claim, already mentioned in Part II, paragraph 13 of this Report, was finally stated (1) to be for compensation and damages for his imprisonment, in violation of the Convention, by the Respondent Government:

(a) from 12th July 1957, (date of signature by the Minister for Justice of the warrant for his imprisonment under Section 4 of the 1940 Act) to 11th December 1957;

(b) in the alternative, from 6 a.m. on 13th July 1957, (time of his removal from Bridewell Police Prison) to 11th December 1957;

(c) in the further alternative, from 8 a.m. on 13th July 1957 (time of his imprisonment at the Military Internment Camp) to 11th December 1957.

The Applicant also claimed the payment by the Respondent Government of all the costs and expenses of the proceedings in the Irish Courts and before the European Commission.

143. Applicant's submission as to calculation of damages and costs

The Applicant in his Memorial (entitled 'Arguments and Conclusions') of 20th November 1958 and in his Reply of 19th February 1959 and at the oral hearings before the Sub-Commission on 17th to 19th April 1959, submitted:

(a) that, as a result of the violation of the Convention by the Respondent Government, he was entitled to compensation, damages and costs on the following basis:

(i) special damages for his loss of earnings during the period of his imprisonment and for the consequential loss suffered by him resulting from that imprisonment,

./.

(1) Statement of Claim of 20th June 1958.

(ii) general damages for the deprivation of liberty and of the amenities of life during his imprisonment, and,

(iii) punitive damages in respect of the aggravation of the injury to him caused by the false allegations made by the Respondent Government during the proceedings before the Detention Commission and before the European Commission:

(b) that, with reference to his claim for payment of costs, such costs should either be assessed and awarded separately or be added to the above compensation and damages;

(c) that conditions in the detention camp were very unsatisfactory and that this affected the question of damages. The Respondent Government should produce the Report of the Visitor of the International Red Cross, if it was considered relevant;

(d) that he had, in accordance with Article 5, paragraph 5, of the Convention, an absolute and enforceable right to compensation;

(e) that, in estimating the amount of damages, it should be taken into account that the Respondent Government had advanced three different reasons for the imprisonment of the Applicant:

(i) participation in illegal activities at the time of his arrest;

(ii) under Article 5, paragraph (1) (b) of the Convention to which Article 5, paragraph 3 did not apply;

(iii) under Article 5, paragraph (1) (c) of the Convention to which also Article 5, paragraph 3 did not apply;

(f) that, as to the 'special damages' claimed by the Applicant, his wages were about £10 per week. Damages for twenty-six weeks imprisonment would therefore be £260;

as to damages for deprivation of liberty, the Sub-Commission should assess whatever sum per day they thought fit. This should be substantial in view of the fact that the Applicant was able to earn a good living and was deprived of the opportunity to do so for five or six months;

as to punitive damages, these have been claimed by reason of the various unsupported allegations made against the Applicant (1);

as to the legal costs before the Irish Courts and the European Commission, a Law Cost Accountant had prepared a summary of costs (2) incurred before the Irish Courts and amounting to about £4,500. The costs of the proceedings before the European Commission might be taxed by an expert appointed as a Taxing Master by the Sub-Commission or Commission. Authorities could be cited to show that damages should include costs of proceedings resulting from the need to exhaust domestic remedies before bringing his case before the European Commission (3).

144. Submissions of the Respondent Government on the question of damages and costs

The Respondent Government submitted in its Counter-Memorial of 12th January 1959, its Rejoinder of 12th March 1959 and at the oral hearing before the Sub-Commission on 17th to 19th April 1959:

(a) that there had been no violation of the Convention in respect of the Applicant and that consequently the question of compensation or damages did not arise;

(b) that, if the question of damages did arise, it was not for the Sub-Commission to recommend an award of a fixed sum but to report whether or not the Irish laws provided for an award of damages under Article 5 of the Convention. The Committee of Ministers should then determine what steps, if any, should be taken by the Respondent Government to modify its laws in order to give effect to the report.

./.

(1) See also Part IV of this Report (Friendly Settlement) (para. 145).
(2) Exhibit G to verbatim record of oral hearing.
(3) Paragraphs 1, 12 of Memorial. Paragraph 32 of Reply. Verbatim record of oral hearing. Pages 83, 84, 96, 152.

145. The Sub-Commission in its Decision of 24th March 1959 (1) had referred to the Applicant's claim for damages and stated its wish to receive information from the Applicant and Inspector McMahon on two questions which it considered might affect the issue:

(a) whether the Applicant in July 1957 had in fact ceased to be a member of an illegal organisation and ceased all activities in support of such organisation;

(b) whether the Applicant acted unreasonably in refusing on 11th July 1957 to sign an undertaking to respect the Constitution and laws of Ireland and in continuing, until 11th December 1957 to refuse to sign an undertaking with regard to observance of the law.

The consequent statements by these witnesses at the oral hearing before the Sub-Commission on 17th to 19th April 1959, have been set out in full in Chapter III of this Part of the Report (2).

146. OPINION OF THE COMMISSION

The Commission, having regard to its majority opinion that there was no violation of the Convention on the part of the Respondent Government, considered that no award should be made to the Applicant in respect of his claim for damages and costs.

./.

(1) For relevant part see paragraph 127 above.

(2) See paragraphs 116 to 141 above.

PART IV

FRIENDLY SETTLEMENT

147. The Applicant's suggestion for a friendly settlement

The question of a friendly settlement between the Parties was first raised in the Memorial of the Applicant (entitled 'Arguments and Conclusions') of 20th November 1958. The Applicant proposed that a friendly settlement should be reached on the basis of payment by the Respondent Government of a sum adequate to compensate him for his imprisonment and of a sum to cover his expenses and costs.

He further suggested that compensation should be assessed as follows:

(a) special damages for the loss of earnings during the period of his imprisonment and for the consequential loss sustained by him resulting from imprisonment;

(b) general damages for the deprivation of liberty and of the amenities of life during the Applicant's imprisonment;

(c) punitive damages in respect of the aggravation of the injury caused by the Respondent Government to the Applicant by reason of the false allegations made against the Applicant in the course of the proceedings before the Detention Commission and the Commission of Human Rights.

The Applicant also claimed payment by the Respondent Government of all costs and expenses of and incidental to the proceedings instituted by him in the Irish Courts and before the Commission of Human Rights, such costs and expenses to be either assessed and awarded separately or added to the compensation and damages payable by the Respondent Government (1).

148. The Sub-Commission at its meeting on 23rd-24th March 1959, considered that it was premature to make any suggestions to the Parties as to a friendly settlement.

149. The position of the Respondent Government

The Respondent Government in its Counter-Memorial of 12th January 1959, repeated its case that there had been no violation of the Convention; alternatively if it was found otherwise, that Articles 15 or 17 of the Convention should be applied in

./.

(1) Paragraphs 2, 12 of Memorial. See also Part III, Chapter IV, of this Report.

its favour. The Government contended, therefore, that no question of compensation or damage arose (1).

150. Decision of the Sub-Commission

The Sub-Commission, in its Decision of 20th April 1959 decided to invite the Parties to inform it before 1st June 1959, "whether they desired to make use of the assistance of the Sub-Commission for the purpose of attempting to obtain a friendly settlement and, in that event, to submit in writing their suggestions in regard to the question of a friendly settlement".

151. The Applicant's Reply

The Applicant replied on 25th May 1959, and stated:

(a) that he would be glad to avail himself of the Sub-Commission's assistance in order to obtain a friendly settlement. He referred to his previous remarks to that effect in his Memorial of 20th November 1958;

(b) that his proposals were made without prejudice;

(c) that his object was simply to vindicate his personal rights and he was not directly concerned with any issues of general application. His personal rights would be adequately vindicated by the payment of damages, compensation and costs. He again estimated the compensation due to him as follows:

(i) compensation for loss of earnings during the period of his imprisonment from 12th July 1957, to 11th December 1957. Also compensation for deprivation of liberty taking into consideration the very unsatisfactory nature of the conditions in the Prison Camp as mentioned in paragraph 32 of the Applicant's Reply of 19th February 1959;

(ii) very substantial compensation by reason of the serious and reckless allegations made against him during the proceedings. He was accused of committing various crimes, of swearing untrue statements and of giving an account on oath regarding his ill-treatment which was "a complete fabrication". The reckless manner in

./.

(1) Paragraph 25 of Counter-Memorial.

which the Respondent Government had conducted its case had gravely aggravated the amount of compensation and damages. During the last hearing, new allegations had been 'hurled' at the Applicant who had not even been cross-examined on some of the most serious ones;

(iii) a compromise figure of £2,500 for compensation which was far below the sum to which the Applicant was entitled;

(iv) costs and expenses incurred by or on behalf of the Applicant in respect of the proceedings before the Detention Commission, the Irish Courts, and the Commission and Sub-Commission of Human Rights. These costs could be awarded separately or additionally to the agreed sum for compensation.

The Applicant added that he had already furnished details of legal costs incurred in the Irish proceedings. A bill of costs was being prepared of the proceedings before the Commission and Sub-Commission of Human Rights and could, if necessary, be vouched and taxed before an expert appointed by the Commission or Sub-Commission.

152. The Respondent Government's reply

The Respondent Government replied on 30th May 1959, to the effect:

(a) that the Applicant, by contending that the Government was not justified in exercising powers which it considered necessary, had put in issue the bona fides of the Government. A claim so founded could not be the subject of a friendly settlement;

(b) that the Applicant's proposals, as set out in his Memorial of 20th November 1958, were such as to indicate the absence of an intention on his part to reach a friendly settlement.

153. Further Comments by the Parties

The Applicant's solicitors, in a letter to the Secretariat on 22nd June 1959, referred to the Respondent Government's letter of 30th May, and stated that, contrary to the suggestions of the Government, the Applicant had at all stages been desirous of reaching a friendly settlement.

The Respondent Government in a further letter of 23rd June 1959, stated, with reference to the Applicant's letter of 25th May that its attitude was unchanged.

154. Subsequent action by the Sub-Commission and position of the Parties

The Secretariat, acting on the instructions of the Sub-Commission, wrote a letter to the Parties on 9th July 1959. It took note of the previous letters of the Parties which did not apparently provide sufficient basis for a friendly settlement but pointed out that the Sub-Commission continued to hold itself at the disposal of the Parties with a view to facilitating a friendly solution of the case.

The Secretariat added in its letter, that the Sub-Commission was continuing with the preparation of its report which it intended to submit to the plenary Commission in December 1959.

The Applicant replied on 14th July simply acknowledging the receipt of the Secretariat's letter of 9th July 1959.

155. It was in these circumstances that the Sub-Commission found that it should not pursue its efforts with a view to obtaining a friendly settlement between the Parties. The Commission, when adopting its Report on 19th December 1959, confirmed the view of the Sub-Commission that there was not a sufficient basis for a friendly settlement between the Parties.