

# REPUBLIC OF IRELAND

## Submission to the Committee to Review the Offences Against the State Acts and Other Matters

Amnesty International welcomes the initiation by the Irish Government of the Review of the Offences Against the State Acts 1939-1998 (OAS Acts) and Related Matters, which was contemplated by the Multi-Party Agreement. The organization also welcomes the fact that the Committee established to conduct the Review has been requested, as part of its mandate, to examine these laws in the light of Ireland's obligations under international law. Particularly in the light of concerns that provisions of the OAS Acts violate international human rights standards, Amnesty International assumes that the Committee's mandate to make recommendations for reform is broad enough to encompass making recommendations to repeal provisions, as was contemplated in the Multi-Party Agreement.<sup>1</sup>

### Special Criminal Courts

Amnesty International urges the Review Committee to recommend that:

(a) the government make a proclamation to disestablish the Special Criminal Court, because the circumstances specified by international standards that might justify the operations of such a court are not apparent in Ireland, and

(b) if the legislation is not repealed and should future circumstances as set out in Article 38 of the Constitution justify the establishment of a special court, then

- legislation should be amended to ensure that, both in law and practice, the court conforms strictly with international standards which require, among other things, that all courts be independent and impartial;
- the necessity for the court should be subject to review by the courts and to regular periodic review by an independent body;
- its jurisdiction should be restricted to offences directly connected with the extraordinary circumstances which justified the establishment of the court.

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<sup>1</sup> In the Multi-Party Agreement, (Paragraph 5 of the subsection entitled Security, within the Section entitled "Rights Safeguards and Equality of Opportunity), the Irish Government committed itself to undertaking "a wide-ranging review of the Offences Against the State Acts 1939-85 with a view to **both** reform and dispensing with those elements no longer required as circumstances permit". (emphasis added)

### *Discussion*

Article 38 of the Constitution permits the establishment by law of special courts for trial, without jury, of offences “where it may be determined in accordance with such laws that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order”. Part V of the OAS Acts permits the government to make proclamations establishing a Special Criminal Court to try offences under the OAS Acts, scheduled offences and cases certified by the Director of Public Prosecutions, as often and for as long as it is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and preservation of public peace and order.

A Special Criminal Court was first established in 1939 and, although it did not function between 1946-1961, it was not disestablished until 1962.<sup>2</sup> It was re-established in 1972 in response to the situation of violence related to Northern Ireland<sup>3</sup> and remains in operation.

#### *a. Disestablishment of the Court*

While international standards do not prohibit the establishment of special courts that conform fully with fair trial standards, the Human Rights Committee has clarified that “the trying of civilians by such courts should be very exceptional...”.<sup>4</sup>

In 1993 the Human Rights Committee reviewed Ireland’s implementation of the International Covenant on Civil and Political Rights and concluded that “that the continued existence of the court is not justified under the present circumstances”.<sup>5</sup> Since then, most of the armed political groups in Northern Ireland have declared a cessation of military activity and there has been a significant reduction of politically related violence.

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<sup>2</sup> See UN Doc.: CPR/C/58/D/593/1994, para 4.8 (22 November 1996).

<sup>3</sup> In 1993 this was the rationale provided by the then Attorney General to the Human Rights Committee for the government’s 1972 proclamation re-establishing the Special Criminal Court. Summary Record of the 1239<sup>th</sup> Meeting of the Human Rights Committee, UN Doc.: CPR/C/SR.1239 (20 July 1993), paras 13-14.

<sup>4</sup>The Human Rights Committee is the expert body that monitors States Parties’ implementation of the International Covenant on Civil and Political Rights. Human Rights Committee General Comment 13, para 4.

<sup>5</sup> UN Doc.: CCPR/C/79/Add.21 (3 August 1993), para 11.

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Amnesty International considers that under international standards and the law of Ireland, the onus is upon the government to demonstrate that special courts are essential in current circumstances in the words of the law because “the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order”. The government has not done so.

On the contrary, the jurisdiction of the Special Criminal Court is not restricted to offences related to the extraordinary circumstances which led to its establishment. Amnesty International is informed that an increasing number of cases which are not obviously related to offences against the state are being tried in the Special Criminal Court, largely as a result of the exercise by the Director of Public Prosecutions (DPP) of the power to certify cases involving other than scheduled offences for trial in the Special Criminal Court. It is significant to note in this regard that the DPP is not required by the OAS Acts to give reasons for the certification of cases, and courts have refused to require the DPP to do so in the absence of a showing of *male fides* or improper motives, which would seem an almost insurmountable burden for the defence in view of reports that the DPP has not routinely provided such reasons. Amnesty International notes the concern voiced by the Irish Council for Civil Liberties and others that the continued existence of the Special Courts is in effect creating a permanent two-tier justice system without an explicit rationale.

Amnesty International believes that the continuing existence of this special court is normalising what is intended under national law to be an exceptional and temporary measure and is contrary to the spirit of international law. Unless the government can prove that the ordinary courts are currently “inadequate to secure the effective administration of justice and the preservation of public peace and order”, then it should issue, without delay, a proclamation to disestablish the Special Criminal Court.

*b. Provisions that violate international standards*

International standards for fair trials require courts to be independent and impartial (e.g. Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR); Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)). The Human Rights Committee has made clear that fair trial provisions enshrined in the ICCPR apply to trials in all courts, whether ordinary or special.<sup>6</sup>

The right to an independent and impartial court is so basic that the Human Rights Committee has stated that “it is an absolute right that may suffer no exception”.<sup>7</sup> Due to its

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<sup>6</sup> Human Rights Committee General Comment 13, para 4.

<sup>7</sup> *González del Rio v. Peru* (263/1987), 28 October 1992, Reports of the Human Rights Committee, vol.II (A/48/40) 1993, para 20.

fundamental nature, it requires compliance in appearance as well as fact; in the words of the European Court, it requires that “justice must not only be done it must also be seen to be done”.<sup>8</sup> Among the elements that are seen to be critical to independence and impartiality are:

- people selected as judges must have “appropriate training or qualifications in law”
- the term of office of judges, as well as their independence, security and remuneration must be adequately secured by law and
- judges must have guaranteed tenure until a mandatory retirement age or the expiry of a term of office.<sup>9</sup>

Provisions of Part V of the OAS Act 1939 establishing the Special Criminal Court permit the government to act in a manner which would violate these standards. In particular

- Article 39(3) permits the government to appoint Commandants of the Defence Forces and their superiors, regardless of legal and judicial training, rather than professionally qualified judges, as judges of the Special Criminal Court. Under this provision military officers sat on the Special Criminal Court from 1939-1946 and in 1961-1962;
- Article 39(4) grants discretion to the Minister of Finance whether and how much to pay each Special Criminal Court judge. Thus the law does not adequately secure their remuneration as mandated in Principle 11 of the UN Basic Principles on the Independence of the Judiciary.
- Article 39(2) specifies that Special Criminal Court judges are removable by the government at will. Amnesty International notes that the Supreme Court has ruled that the government could not lawfully terminate the appointment of a member of the Special Criminal Court for disagreeing with their decisions (*Eccles v. Ireland* [1985] I.R. 545) but the provision remains and is at the very least inconsistent with the requirement that judges not be seen to be subject to pressure by government.

### **Internment**

Amnesty International urges the Review Committee to recommend the repeal of provisions which permit a Minister to order to be detained without charge or trial a person who they are satisfied is engaged in activities calculated to prejudice the preservation of peace and order (OAS (Amendment) Act 1940). Internment without trial violates fair trial rights enshrined

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<sup>8</sup> See European Court Judgment , *Delcourt Case*, 17 January 1960, 11 Ser. A 17, para 31.

<sup>9</sup> These are Principles 10, 11 and 12 of the United Nations Basic Principles on the Independence of the Judiciary.

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in Article 5 of the European Convention; among other things it is a deprivation of liberty for reasons other than those set out in the exhaustive list in Article 5(1).

### **Extended detention and limitations on access to a lawyer**

Amnesty International urges the Review Committee to recommend the repeal of provisions in the law and practice that permit the authorities to detain people for extended periods without charge and prohibit access to counsel during questioning. ( Section 30, OAS Act 1939, Section 10 of the OAS (Amendment) Act 1998). Amnesty International is also concerned about the failure to provide legal aid to cover lawyers' visits to police stations. These provisions and practices violate international standards.

Section 30 of the OAS Act 1939 permits police to detain for 24 hours a person who an officer suspects

- has committed or is about to commit a scheduled offence or an offence under the OAS Act, or
- has information relating to the commission or intended commission of a scheduled offence or an offence under the OAS Act.

The person's detention may be extended to 48 hours without presentation to a court, upon the authorization of a Garda Chief Superintendent. Section 10 of the OAS (Amendment) Act 1998 allows the period of such detention to be extended to 72 hours on application of a Garda Superintendent to a court.

These detention provisions violate Article 5(1) of the European Convention, which sets out an exhaustive list of the circumstances in which people may be deprived of their liberty, in two respects. First, Section 30 does not require that a police officer have **reasonable** suspicion that a person has committed an offence or is about to commit an offence. Second, Section 30 and Section 10 permit people to be detained for up to 72 hours for purposes other than bringing them before a competent legal authority. For example, detention is permitted for questioning on the suspicion that a person may have information relevant to a crime.

Amnesty International's concern about these provisions is compounded by the fact that people detained for criminal matters in Ireland are not entitled to have access to counsel during questioning. In addition, as a result of the fact that there is no provision for legal aid for lawyers to attend police stations, those people who are detained who are without sufficient means are often denied assistance of counsel throughout the investigation. Such practices are inconsistent with international standards including the UN Basic Principles on the Role of Lawyers and the (UN) Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which establish the right of all detained people to have access to a lawyer during pre-trial phases and the investigation. The Human Rights Committee has also stated that "all

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persons must have immediate access to counsel."<sup>10</sup> Similarly, in July 1996, the European Court concluded in the case of *Murray v. UK* that delay of 48 hours in granting a detained person access to counsel violated the European Convention in circumstances in which the detainee was being questioned by police and his decision to exercise his right to remain silent could result in adverse inferences being drawn against him. Indeed, the rights to be informed without delay of the charges and to have counsel present during interrogation are so fundamental that they have been guaranteed for persons suspected or accused of genocide, crimes against humanity and war crimes in the Rome Statute of the International Criminal Court and the Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda.

### **Failure to Account for Movements**

Amnesty International urges the Committee to recommend the repeal of a provision that makes it an offence for a person to fail to account for their movements (Part V Section 52, Offences Against the State Act 1939). This provision violates the presumption of innocence and the right of a person not to be compelled to incriminate her/himself.

Section 52 of the OAS Act 1939 criminalizes the failure or refusal of anyone detained under Part IV of the Act to provide to the police whenever asked "a full account of their movements and actions during any specified period and all information in his possession in relation to the commission or intended commission by another person of ..." any offence under the Act or a scheduled offence. The provision is currently in force and may be imposed whenever the government makes a proclamation that it is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and preservation of public peace and order.

The provision punishes people who refuse to speak. It thereby violates the right to the presumption of innocence and the right not to be compelled to admit guilt or testify against oneself which are enshrined in Articles 14(2) and 14(3)(g) of the ICCPR. The law permits the imprisonment of a person simply for exercising their right to silence although they had not engaged in any criminal activity. It shifts the burden of proof onto the person being questioned to prove their innocence of crime. Further, a person who is in detention may be subjected to a term of imprisonment for each refusal to respond to a police officer's demand to account for their whereabouts at any specified period of time.

Noting the Supreme Court's judgment rendering inadmissible in evidence answers given following a warning under Section 52 and the fact that this provision so clearly violates the government's fair trial obligations, Amnesty International urges that Review Committee to adopt a recommendation to repeal this provision.

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<sup>10</sup> UN Doc. CCPR/C/79/Add.74, 9 April 1997, para 28.

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Retaining this provision and similar provisions relating to the offence of membership of an unlawful organization described below would be inconsistent with Ireland's obligations not to defeat the object and purpose of the Rome Statute of the International Criminal Court which it signed on 7 October 1998. The Statute guarantees the right of silence to people suspected or accused of the worst possible crimes known to the world and provides that the exercise of that right cannot be a factor in determining guilt or innocence.

### **Membership of an Unlawful Organization**

Amnesty International urges the Committee to recommend the repeal of provisions relating to the offence of membership of an unlawful organization which violate the presumption of innocence and the right to question witnesses. (Sections (3)(I) 3(2) Offences Against the State (Amendment) Act 1972, and Sections 4 and 2, Offences Against the State (Amendment) Act 1998).

A Chief Superintendent's opinion that a person is a member of an unlawful organization is admissible as evidence of that offence (Section 3(2) Offences Against the State (Amendment) Act 1972). Such an opinion is admissible even if the Chief Superintendent does not know the accused, or is relying on information provided by a subordinate or informer. Amnesty International considers that the fact that a Chief Superintendent need not identify the source on which their opinion is based (other than in general terms, for example 'it is based on confidential information') violates the right to question witnesses against the accused enshrined in Article 14(3)(e) of the ICCPR and Article 6(d) of the European Convention as well as the principle of equality of arms.

The opinion of a Chief Superintendent is alone sufficient to prove the offence of membership of an unlawful organization, in the absence of a denial, under oath, from the accused. If the accused, however, denies membership, other provisions - which also violate international standards - permit the evidence to corroborate the Chief Superintendent's opinion. First, a court is entitled to draw reasonable inferences that a person is a member of an unlawful organization by statements about the conduct of an accused including his or her associations with others (Sections (3)(I) of the OAS (Amendment) Act 1972 and Section 4 of the OAS (Amendment) Act 1998). Therefore, a person could be found guilty of the offence if seen in the company of someone who is believed to be a member of an unlawful organization coupled with the opinion of a police officer or information from an informant as provided in court through the opinion of a Chief Superintendent.

Second, inferences sufficient to corroborate an opinion of a Chief Superintendent's opinion may be drawn from a person's refusal or failure to answer questions put by police, before or after a person is charged with membership of an unlawful organization, which are

considered material to the investigation of the offence (Section 2, OAS (Amendment) Act 1998). The inference may be triggered by failure or refusal to answer questions about one's movements, activities, actions or associations (section 2(4)), or failure to deny a published report alleging membership (Section 4, OAS (Amendment) Act 1998).

Amnesty International believes that Sections 2 and 4 of the OAS (Amendment) Act 1998 provisions, which allow presumptions to be made as a result of a person's failure or refusal to provide answers to police questioning, violate the presumption of innocence, the right not to be compelled to testify against oneself or admit guilt enshrined in Articles 14(2) and 14(3) (g) of the ICCPR. They also violate the right to remain silent which has been deemed to be inherent in these two fundamental rights.

### **Forfeiture**

Amnesty International is concerned that the application of the provision permitting confiscation of property as a penal sanction (Section 17 of the OAS (Amendment) Act 1998) may result in collective punishment which is prohibited by international law and standards, rather than punishment of an individual for criminal conduct.

### **Conclusion**

Amnesty International urges the Review Committee to recommend that the government take the following measures, which are consistent with its international human rights obligations.

- The Government should make a proclamation to disestablish the Special Criminal Court.
- If Part V of the OAS Act 1939 is not repealed and should future circumstances as set out in Article 38 of the Constitution justify the establishment of a special court, then
  - legislation should be amended to ensure that, both in law and practice, the court conforms strictly with international standards which require, among other things, that all courts be independent and impartial;
  - the necessity for the court should be subject to review by the courts and to regular periodic review by an independent body;
  - its jurisdiction should be restricted to offences directly connected with the extraordinary circumstances which justified the establishment of the court.
- The following provisions of the OAS Acts 1939-1998 should be repealed:

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- those permitting internment (OAS (Amendment) Act 1940);
  - those permitting the arrest and detention of a person without reasonable suspicion of them having committed a recognizably criminal offence and for purposes other than bringing them before a court (Section 30 of the OAS Act 1939 and Section 10 of the OAS (Amendment) Act 1998);
  - those which criminalize the failure of a person to provide information about their movements (Section 52 of the OAS Act 1939);
  - those that permit adverse inferences to be drawn from a person's silence (Section 2 of the OAS (Amendment) Act 1998);
  - those which permit adverse inferences to be drawn from a person's failure to deny reports related to alleged membership of an unlawful organization (Section 4 of the OAS (Amendment) Act 1998) and those relating to permitting in evidence the opinion of police officers as to membership without affording the right to question about the source on which the opinion is based (sections 3(1) and (2) of the OAS (Amendment) Act 1972);
  - those which permit the authorities to detain people for extended periods without charge and without access to counsel during questioning (including Section 30, OAS Act 1939, Section 10 of the OAS (Amendment) Act 1998) .

Amnesty International also believes that the provision relating to forfeiture of property as a penal sanction (Section 17 of the OAS (Amendment) Act 1998) is in need of amendment to ensure that it cannot result in collective punishment.

Finally, Amnesty International urges the Committee to recommend that the government ensure that the internationally guaranteed rights of each person arrested or detained under the OAS Acts are respected, including among other things, the right to counsel and access to counsel including free assistance of counsel during the investigation and questioning.