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Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Submission of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin to the Independent Review Group to Examine the Offences Against the State Acts in Ireland

The Special Rapporteur on the promotion and protection of human rights while countering terrorism is pleased to provide some preliminary views to the *Independent Review Group to Examine the Offences Against the State Acts in Ireland*. The Special Rapporteur on the promotion and protection of human rights while countering terrorism (A/HRC/RES/15/15) reports regularly to the United Nations Human Rights Council and General Assembly on a range of matters connected to the protection of human rights while countering terrorism and advancing national security broadly defined. The Special Rapporteur understands this review process to be independent of government and that the review process is currently engaged in a public and targeted consultation. Due to the demands on the Special Rapporteur's mandate, she is unable to provide a comprehensive technical review of the legislation and its compatibility with international law to ensure that any counter-terrorism or national security legalisation is compatible with obligations of the Republic of Ireland under International Law. However, the mandate of the Special Rapporteur has provided sustained guidance to States through its reporting to the General Assembly and the Human Rights Council on how best to ensure compatibility of national legislation with international law obligations, and I commend those reports to this Review Group.

(<https://www.ohchr.org/EN/Issues/Terrorism/Pages/LegislationPolicy.aspx>)

The Review Group is charged with assessing the current threat posed by international terrorism and organized crime for Ireland; the duty to protect a fair and effective criminal justice system for Ireland in the context of the protection of communities and the security of the State; and Ireland's obligations under its constitutional arrangements as well as the ECHR and international law broadly defined.

The Special Rapporteur starts by noting that the risk of terrorism in Ireland is generally assessed as low. The Global Terrorism Index (2020)¹ ranks Ireland 62nd placing the country in the category of countries with low levels of global terrorism threat and experiencing high levels of security and stability. In parallel, she underscores the significant concerns my mandate has

¹ Global Terrorism Index (Nov, 2020).

identified in classifying threats of terrorism and challenges of organized crimes in the same category of regulation,² noting the distinction between both phenomena as a matter of international law and the problematics from a rule of law and human rights perspective of treating both highly distinct challenges as similarly situated from a regulatory perspective. The Special Rapporteur recognizes the serious challenge and threat to international security posed by linkages between terrorism and organized crime³ and highlights that this issue has received significant attention from my office and from the Office of the High Commissioner for Human Rights, the United Nations Secretary General,⁴ the UN Office of Counter-Terrorism and UNCTED. Human rights entities including her mandate have identified profound concerns about regulatory approaches which consolidate these two phenomena. I stress that, as regards international law there are a clear set of regulatory and normative perimeters addressing organized crime,⁵ and correspondingly and distinctly there are distinct and specific normative standards regulating terrorism.⁶ The elision between two at national level has been associated with significant incidents of human rights violations, shrinkage of civic space, and a weakening of due process and liberty protections.

National counter-terrorism in most legal systems, including in the Irish Republic function as a *de facto* exceptional legal regime,⁷ with exceptions to the general criminal justice system and process embedded in counter-terrorism regulation. This includes the operation of Special Courts, non-jury trial, *de facto* and *de jure* limited access to legal counsel, distinct sentencing practices, exceptionally high conviction rates as compared with ‘ordinary’ criminal trials, modified rules of evidence and procedure and in some contexts historic or contemporary practices of torture, inhuman and degrading treatment for persons detained and/or charged with terrorism or related offence.

Background

The Offences Against the State Act was enacted in 1939 where the Irish legislature used its ordinary, as opposed to emergency legislative power to legislate while simultaneously declaring a state of emergency. The centrepiece of the legislation was the establishment of

² Fionnuala Ní Aoláin, “A Post-Mortem on UN Security Council Resolution 2482 on Organized Crime and Counter-Terrorism”, Just Security, (12 August 2019), <<https://www.justsecurity.org/65777/a-post-mortem-on-un-security-council-resolution-2482-on-organized-crime-and-counter-terrorism/>>.

³ United Nations Security Council adopted resolution 2482 (2019)

⁴ Report of the Secretary-General on actions taken by Member States and United Nations Global Counter-Terrorism Coordination Compact Entities to address the issue of linkages between terrorism and organized crime

⁵ See e.g. the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, the International Tracing Instrument, UNODC (OP4), UN Commission on Crime Prevention and Criminal Justice (PP2), and UN Commission on Narcotic Drugs (PP2), UNCTED (OP22 & 23), the Financial Action Task Force (FATF) and its Global Network of FATF-style regional bodies (OP 3 & 9), as well as the Global Counterterrorism Forum (GCTF)(PP19).

⁶ Cf. 19 Sectoral Conventions on Terrorism including International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997; International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999; Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970; Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991.

⁷ A/HRC/37/52

Special Criminal Court, consisting of judicial trial, sitting without a jury. In 2022, Ireland maintains a substantial body of anti-terrorist legislation, mainly contained in the Offences Against the State (OAS) Acts, 1939-1998, as well as more recent legislation, including the Criminal Justice (Terrorist Offences) Act 2005. Notably the Irish Government, as part of the Good Friday/Belfast Agreement committed itself to a wide-ranging review of The Offences Against the State Acts with a view both to reform and to dispensing with those elements no longer required, as circumstances would permit. A Committee established to carry out that review (the Hederman Committee) reported in May 2002, but fundamental review and reform of the legislation has not, in the Special Rapporteur's view, been implemented.

The Special Criminal Court

The exceptional Irish terrorism court (the Special Criminal Court) has been maintained and expanded in operation and function since 1972. The Court was established as a temporary, exceptional measure in the context of ongoing conflict in Northern Ireland, and the threat from identified paramilitary organizations. Precisely 50 years from its establishment this exceptional Court appears to have been normalized in Irish law and practice, notwithstanding the formal end to the emergency which gave rise to its establishment. The Special Rapporteur notes that this is in distinct contrast with the review and operation of the Diplock Courts (Northern Ireland) raising significant concern as to the continued operation of this Special Criminal Court and the compatibility of the Court's operation with the State's international human rights obligations regarding fair trial and deprivation of liberty.

The Special Rapporteur notes that there have been consistent concerns raised about the operation and legal status of the Court by independent civil society, scholars, and international review.⁸ In particular, she highlights deep apprehension about the evolution of an exceptional and temporary Court addressing terrorism crimes to expand its remit to hold jurisdiction over organized crime. She is concerned that the continued operation of a counter-terrorism court, past the existence of a declared emergency, is inconsistent with Ireland's international law obligations.⁹ Such obligations include protection and promotion of individual rights guaranteed under the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights. She identifies concerns with the abrogation of the right to jury trial, the expansive powers of the Director of Public Prosecutions to forward matters to the Court, and the right to a full defence and equality of arms for persons processed by this Court as protected by article 14 of the International Covenant on Civil and Political Rights to which Ireland is a party. The Special Rapporteur also highlights the relevance of the Basic Principles on the Role of Lawyers and in the UN Basic Principles and Guidelines on Remedies and Procedures on the Right of

⁸ See e.g. UN Human Rights Committee, Report on Ireland, CCPR/C/79/Add.21, August 1993; Concluding Observations of the Human Rights Committee, Ireland, UN Doc A/55/40 2000; UN Human Rights Committee, Concluding Observations, Ireland UN Doc CCPR/C/IRL/CO/3, 2008; UN Human Rights Committee Concluding Observations, Ireland, UN Doc, CCPR/C/IRL/CO/4.

⁹ Article 4, ICCPR

Anyone Deprived of Their Liberty to Bring Proceedings Before a Court in assessing the compatibility of the legislation with Ireland's international law obligations.

The Special Criminal Court is a hybrid Court by virtue of its dual military and civilian status. This defining feature is legitimised by parallel recognition of the role of military courts in Article 38(4)(1) of the Irish Constitution where it stipulates that military courts can be established 'for the trial of offences against military law alleged to have been committed by persons while subject to military law and also deal with a state of war or armed rebellion'. Moreover, Article 43(1)(c) allows for jurisdiction in order to facilitate '[t]he detention of and to detain in civil or military custody ... any person sent, sent forward, transferred, or otherwise brought for trial by that Court'. The dual inclusion of provisions for both military and exceptional courts confirm the strong executive model contained in the constitutional ordering, as well as fears of instability and conflict rooted in the establishment of a new legal system. However, the continued shadow of military trial and the extended use of this exceptional court has serious implications for the rule of law and the full protection of human rights in Ireland. Unlike the Special Courts which operated from 1939–62 where military officers presided, the contemporary Court has, in the main, consisted of regularly appointed judges, although Irish barristers and solicitors and military officers are still by law eligible to hear trials. The Special Rapporteur notes that as a matter of good practice this eligibility poses a tension with fair trial obligations, where international human rights law has consistently found that civilians should not be tried by military officers.¹⁰

The significance of non-jury trials and the impact of such trials in common law systems on the rights of defendants and the integrity of the legal system as a whole has been well-cavassed.¹¹ Juryless trials create significant obstacles to ensuring that the fundamental evidential rules supporting criminal trials are observed in a regular way. Specifically, Anglo-American common law rules of evidence include prohibitions on hearsay and requirement that any confessions be both voluntary and supported by independent corroboration of the crime. These rules, in particular, come under particular stress in non-jury common law courts and that pressure point is co-related with deep concern about the full protection of fair trial requirement under international human rights treaties is not met (Article 14, ICCPR).

The right to a fair trial is one of the fundamental guarantees of human rights and the rule of law. It comprises various interrelated attributes and is often linked to the enjoyment of other rights. When confronting the challenge of terrorism in particular, the Human Rights Committee has stressed the importance of developing and maintaining effective, fair, humane, transparent, and accountable criminal justice systems which provide access to a fair and public hearing and to independent and adequate legal representation in accordance with obligations

¹⁰ Human Rights Committee, General Comment No. 32, CCPR/C/GC/32.; Subcommission on the Promotion and Protection of Human Rights, Report to the Commission on Human Rights containing the draft principles governing the administration of justice through military tribunals, E/CN.4/Sub.2/2005/9, ECtHR, *Ergin v. Turkey*, 4 May 2006; ECtHR, *Maszni v. Romania*, 21 September 2006; *Içen v. Turkey*, 31 May 2011; Report of the High Commissioner for Human Rights A/HRC/8/13.

¹¹ J Jackson and S Doran, *Judge Without Jury, Diplock Trials in the Adversary System* (Oxford, Clarendon Press, 1995)

under international law.¹² In this regard the Special Rapporteur recalls that Article 10 (1) of the UDHR, which constitutes customary international law, states that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”. The Special Rapporteur further affirms that various universal terrorism-related conventions also require compliance with the right to a fair trial. The International Convention for the Suppression of the Financing of Terrorism for example requires the fair treatment of any person taken into custody, including enjoyment of all rights and guarantees under applicable international human rights law (article 17) and also generally stipulates that “this Convention does not affect the enjoyment of other human rights obligations and responsibilities of States” (article 21).

In sum, the Special Rapporteur highlights these key issues for the review process and would welcome the opportunity to engage directly with the Review Committee schedules permitting.

Recommendations

1. Ireland should not link responses to terrorism and organized crime in a manner which results in unjustified overreach of counter-terrorism legislation. Counter-terrorism legislation should not be used against offences or conduct that do not bear the quality of terrorism even if they are committed by persons suspected of terrorist crimes.¹³ All legislation and measures taken in response to counter-terrorism and organized crime should adhere to the principles of legality and proportionality.
2. Ireland should, while undertaking efforts to tackle linkages between terrorism and organized crime, establish an independent and transparent counter-terrorism oversight mechanisms to ensure that these efforts are consistently in compliance with international human rights and humanitarian law. The Special Rapporteur recommends the Independent reviewer of terrorism model which has been adopted by the United Kingdom as a model of best practice in this regard.
3. Ireland should fundamentally reconsider the use of terrorism courts to try persons charged with serious crimes including organized criminal offences under domestic law. The precedent set by a democracy in using exceptional courts/terrorism courts for domestic crimes is particularly problematic given the lack of agreed international definitions of terrorism and organized crime under international law.

¹² Human Rights Committee, General Comment No. 32, CCPR/C/GC/32. *See also*, WGAD Opinions No. 41/2017; No. 42/2018; No. 43/2018; On fair trial rights see e.g. WGAD Opinions, Nos. 2/2020; 29/2020; 41/2017; 38/2017;43/2018; 84/2018; 53/2019. *See also* Report of the High Commissioner for Human Rights A/HRC/8/13 and Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, A/63/223.

¹³ Office of the United Nations High Commissioner for Human Rights, Human Rights, Terrorism and Counter-terrorism: Fact Sheet No. 32, July 2008.

4. The Special Rapporteur takes the view, consistent with the position set out by the United Nations Human Rights Committee that Ireland should consider abolishing the Special Criminal Court in order to be in full compliance with its international human rights treaty obligations.
5. Pending appraisal of the compatibility of the Special Criminal Court's with Ireland's international human rights obligations, action should be taken to strengthen human rights protections and fair trial rights. For example, providing for jury trials with the requisite protections to secure such trials, addressing deficits in the equality of arms for defence lawyers with respect to evidence and disclosure of materials, and providing for the Prosecutor's office to give reasons for forwarding criminal cases for trial in the Special Criminal Court.