

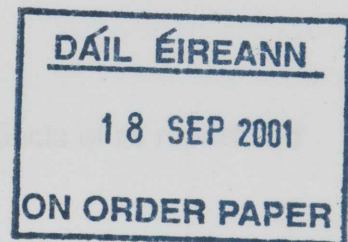
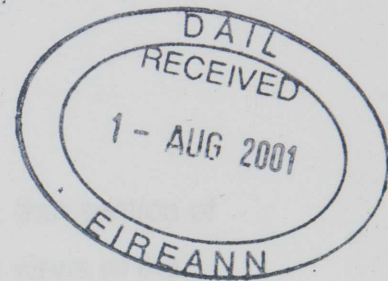
PN. 10353

Committee to Review the  
Offences Against the  
State Acts 1939 - 1998  
and Related Matters

COMMITTEE TO REVIEW THE OFFENCES  
AGAINST THE STATE ACTS, 1939-1998

INTERIM REPORT

THE SPECIAL CRIMINAL COURT



June 2001

PN 10353



Committee to Review the  
Offences Against the  
State Acts 1939 - 1998  
and Related Matters



Coiste Athbhreithnithe na  
nAchtanna um Chionta in  
Aghaidh an Stáit 1939 - 1998  
agus Cúrsaí Gaolmhara

Chairman/Cathaoirleach The Hon. Justice Anthony J. Hederman

Secretary/Runaí Eamon Saunders

Mr. John O'Donoghue, T.D.,  
Minister for Justice, Equality and Law Reform,  
72 - 76 St. Stephen's Green  
Dublin 2.

**Private and Confidential**

6 June 2001

Dear Minister,

The Committee have decided to forward to you, as an interim report, that section of its report dealing with the Special Criminal Court so that the differing views of the Committee may be considered by the Government before it responds to the view of the United Nations Human Rights Committee on the role of the Director of Public Prosecutions in relation to the Special Criminal Court.

The Committee is now at the difficult stage of finalising all aspects of its report and as soon as it is complete it will be forwarded to you.

Yours sincerely,

The Hon. Mr. Justice Anthony J. Hederman  
Chairman



## 1. Historical background

1.1 The drafters of the Constitution of the Irish Free State evidently thought that it would be possible to have trial by jury as the norm for all serious offences. Article 72 enshrined the right to jury trial save in respect of minor offences and in cases of charges triable by military law. Article 70 provided in relevant part that:

“No one shall be tried save in due course of law and extraordinary courts shall not be established, save only such Military Tribunals as may be authorised by law for dealing with military offences against military law. The jurisdiction of Military Tribunals shall not be extended to or exercised over the civil population save in time of war or armed rebellion and for acts committed in time of war or armed rebellion and in accordance with the regulations to be prescribed by law.”

1.2 The drafters' expectations proved in time to be hopelessly unrealistic. By 1931, a system of standing military tribunal with drastic powers - including the right to impose the death penalty in any case where the tribunal thought it expedient to do so, even if the offence of which the accused was found guilty did not so provide and from whose decisions no appeal lay - had been established following the insertion of Article 2A<sup>1</sup> into the Constitution.<sup>2</sup> Article 2A was, in reality, an elaborate form of Public Safety Act which had been inserted into the Constitution. This arrangement was widely perceived as unsatisfactory,<sup>3</sup> but the 1934

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<sup>1</sup> This Article was inserted by means of ordinary legislation without a referendum. The constitutionality of this amendment was upheld by a majority of the Supreme Court in *The State (Ryan) v. Lennon* [1935] IR 170.

<sup>2</sup> The Government had originally hoped to have ordinary judges sitting in a non-jury court to try criminal cases, but two members of the Supreme Court informed the then President of the Executive Council (WT Cosgrave TD) that that they would resign rather than sit in such a court: see 40 *Dáil Debates* at 45 (October 14, 1931).

<sup>3</sup> In a memorandum to the Constitution Review Committee of 1934, the then Secretary to the Department of Justice argued that:

“With particular reference to Article 2A, I agree that *in form* that Article is grotesque as an Article of the Constitution. It must go. On the other hand, so long as we keep to the ideal of a ‘normal’ written Constitution, with all the sorts of snags and pit-falls for the Executive, we must have something, somewhere, on the lines of Article 2A.”



Constitution Review Committee's recommendations<sup>4</sup> contained the outline of what was ultimately to become Article 38.3 of the Constitution, permitting the establishment by law of the Special Criminal Court.

## 2. Constitutional provisions

2.1 Article 38.3 of the Constitution is in the following terms:

- “1. Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order.
2. The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.”

2.2 Article 38.5 permits the trial without a jury of persons tried by the Special Criminal Court.

2.3 In addition, Article 38.6 provides that:

“The provisions of Articles 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section 3 or section 4 of this Article.”

2.4 Although Articles 34 and 35 guarantee, *inter alia*, the public administration of justice by independent judges enjoying security of tenure and the existence of a right of appeal, the potentially sweeping effects of this exclusion have been diluted by the Supreme Court's decision in *Eccles v. Ireland*<sup>5</sup> which held that, Article 38.6 notwithstanding, judges of the Special Criminal Court enjoyed a constitutional guarantee of independence derived from an accused's right to trial in due course of law as protected by Article 38.1 of the Constitution.

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<sup>4</sup> Hogan, “The Constitution Review Committee of 1934” in O Muircheartaigh, *Ireland in the Coming Times: Essays to Celebrate TK Whitaker's 80 Years* (IPA, 1997) 342, 350-353.

<sup>5</sup> [1985] IR 545.





2.5 Part V of the Offences against the State Act 1939 provided for the establishment of the Special Criminal Court<sup>6</sup>. Section 35(1), reproducing the formula of Article 38.3.1, is in the following terms:

“if and whenever and so often 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 and that it is therefore necessary that this Part of this Act should come into force, the Government may make and publish a proclamation declaring that the Government is satisfied as aforesaid and ordering that this Part of this Act shall come into force.”

2.6 The Special Criminal Court sat between 1939-1946; 1961-1962 and from May 1972 to date. While earlier Special Criminal Courts were staffed by military officers, since 1972 only judges or former judges have sat on the Court and, indeed, since 1986 the almost invariable practice has been that only serving judges have sat. Unlike the former Article 2A regime, the Special Criminal Court is required by section 41(4) of the 1939 Act to follow “as far as practicable” the practice and procedure of the Central Criminal Court<sup>7</sup> and there is a right of appeal (subject to purely formal leave requirements) against conviction and sentence to the Court of Criminal Appeal.<sup>8</sup>

2.7 Contrary to what is sometimes asserted, the Special Criminal Court - bound as it is by the Constitution and the law and whose practice and procedure is statutorily assimilated to that of the Central Criminal Court - must and does apply the ordinary rules of evidence. If legislation did, in fact, provide for special rules of evidence in the Special Criminal Court, it is clear from the decision of the Supreme Court in *Cox v. Ireland*<sup>9</sup> that such arrangements would be unconstitutional.

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<sup>6</sup> See generally, Kelly, *The Irish Constitution* (Dublin, 1994) at 639-656; Casey, *Constitutional Law in Ireland* (Dublin, 2000) at 327-331; Hogan and Walker, *Political Violence and the Law in Ireland* (Manchester, 1989) at 227-244; Robinson, *The Special Criminal Court* (1974) and Charleton and McDermott, “Constitutional Aspects of Non-Jury Courts” (2000) 6 *Bar Review* 106 (Part I); 142 (Part II).

<sup>7</sup> 1939 Act, s. 41(4).

<sup>8</sup> 1939 Act, s.44.

<sup>9</sup> [1992] 2 IR 532.



**3. The right of the Director of Public Prosecutions to prosecute accused persons before the Special Criminal Court**

- 3.1 Section 45(1) of the 1939 Act provides that, in the case of a person who is charged in the District Court with a scheduled offence which that Court has jurisdiction to deal with summarily, whenever the Director of Public Prosecutions requests that such person be sent forward for trial to the Special Criminal Court the District Judge shall send such person for trial before that Court.
- 3.2 Section 45(2) provides that in the case of a person charged with a scheduled offence which is also an indictable offence and the District Judge decides to return that person for trial, such person shall be returned for trial to the Special Criminal Court unless the Director otherwise directs.
- 3.3 Section 46(1) and (2) contain corresponding provisions in respect of non-scheduled offences, save that that they provide that such persons are to be tried in the ordinary courts unless the Director otherwise directs.
- 3.4 Section 47(1) enables the Director to direct that an accused be charged with a scheduled offence directly before the Special Criminal Court and section 47(2) enables the Director to prefer charges in respect of non-scheduled offences directly before that Court provided that the appropriate certificate is given.
- 3.5 Finally, section 48 completes the picture in that it provides for the automatic transfer of a trial pending before either the Circuit Court or the Central Criminal Court following an application in that behalf by the Director.
- 3.6 Section 36(1) gives the Government power to schedule offences for so long as Part V of the Act is in force. The scheduled offences at present<sup>10</sup>

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<sup>10</sup> Offences under the Malicious Damage Act 1861 were scheduled in the Offences against the State Act 1939 (Scheduled Offences) Order 1972 (SI No. 142 of 1972). However, as most of the 1861 Act was repealed and replaced by the Criminal Damage Act 1991 and as only a small number of relatively minor offences remain under the 1861 Act, the practical significance of scheduling offences under the 1861 Act is nowadays rather slight. Likewise, the Offences against the State Act 1939 (Scheduled Offences) (No.2) Order 1972 (SI No. 282 of 1972) provided that s. 7 of the Conspiracy and Protection of Property Act 1875 was a scheduled offence, but this section has now been repealed by s. 31 of the Non-Fatal Offences against the Person



are the Explosives Substances Act;<sup>11</sup> the Firearms Acts 1925 to 1971 and offences under the Offences against the State Act 1939<sup>12</sup>; and sections 6 to 9 and 12 of the Offences against the State (Amendment) Act.<sup>13</sup>

#### 4. Challenges to the operation of the Special Criminal Court

- 4.1 Ever since the Special Criminal Court was first established its operation has been the subject of frequent - but unsuccessful - legal challenges. In *Re McCurtain*<sup>14</sup> the Supreme Court rejected the argument that the accused's trial by a Special Criminal Court consisting exclusively of army officers was unconstitutional since it was in reality a form of military tribunal of the sort contemplated by Article 38.4 and permissible in the case of civilians only in time of war or armed rebellion. Sullivan C.J. stressed that the actual composition of the Court was a matter for the Oireachtas by virtue of Article 38.3.2. The Court also rejected the argument that the powers given to the Government to establish the Court and to the Attorney General (now the Director of Public Prosecutions) to certify the inadequacy of the ordinary courts amounted to the administration of justice by non-judicial personages, contrary to Article 34.<sup>15</sup>
- 4.2 A number of the submissions received by the Committee argued that in recent years an increasing number of persons charged with offences which were thought to have been the work of members of organised criminal groups found themselves facing trial before the Special Criminal Court, so extending the remit of the Court beyond its intended purpose. They consider that organised crime is a serious problem, but

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Act 1997.

<sup>11</sup> Note that the original section 3 of this Act was amended by the substitution of a new section 3 by the Criminal Law (Jurisdiction) Act 1976. In *The State (Daly) v. Delap*, High Court, June 30, 1980 it was held that this amendment by substitution did not mean that section 3 of the 1883 Act ceased to be a scheduled offence for the purposes of the Offences against the State Act 1939 (Scheduled Offences) Order 1972 (SI No. 142 of 1972). This reasoning was subsequently approved by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Tuite* (1983) 2 Frewen 175.

<sup>12</sup> As so provided by the Offences against the State Act 1939 (Scheduled Offences) Order 1972 (SI No. 142 of 1972).

<sup>13</sup> As so provided by the Offences against the State (Amendment) Act 1998, s.14(2).

<sup>14</sup> [1941] IR 83.

<sup>15</sup> This decision has been applied in a series of subsequent cases, see, e.g., *The State (Bollard) v. Governor of Portlaoise Prison*, High Court, December 4, 1972.



that any developed system of criminal justice must be able to confront this problem and that to refer persons charged with purely subversive criminal offences to the Special Criminal Court gives rise to concerns that a dual criminal justice system is now effectively in operation and that the constitutional right to jury trial is being thereby devalued.

4.3 Many submissions<sup>16</sup> were critical of the power of the Director of Public Prosecutions to direct that a person charged with a non-scheduled offence should be tried in the Special Criminal Court. They argue that the use of this power has resulted in the Special Criminal Court trying persons charged with such diverse offences as murder, receiving stolen goods, vehicle theft, the theft of computer parts and the possession of drugs for supply. Some submissions also argued that a system where an accused with no obvious paramilitary connections can be sent for trial to the Special Criminal Court is open to abuse, particularly since the Director does not reveal the reasons for issuing certificates and there is no effective mechanism whereby the decisions of the Director may be reviewed.

4.4 In more recent times the Supreme Court has confirmed in two major decisions that, first, the operation of the 1939 Act is not necessarily confined to subversive cases and, secondly, that the decision of the Government to keep the Court in operation and that of the Director to send an accused for trial before the Special Criminal Court is essentially unreviewable. In *The People v. Quilligan (No.1)*<sup>17</sup> the Supreme Court rejected the argument that the powers of arrest under s.30 were confined to subversive cases. Walsh J. noted that the Special Criminal Court was very frequently engaged in trying "black market" cases during and in the immediate aftermath of the Second World War. He then continued:

"It is common knowledge, and, indeed, was discussed in the debates in the Oireachtas leading to the enactment of the 1939 Act that what was envisaged were cases or situations of a political nature where juries could be open to intimidation or threats of various types. However, a similar situation could well arise in types of cases far removed from what one could call 'political type' offences. There could well be a grave situation in dealing

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<sup>16</sup> E.g., the submission of British Irish Rights Watch of October 15, 1999, at paras. 2.3 to 2.4; submission of the Irish Council for Civil Liberties of October 6, 1999, page 6.

<sup>17</sup> [1986] IR 485.





with ordinary gangsterism or well financed...drug dealing or other situations where it might be believed or established that juries were for some corrupt reason, or by virtue of threats, or illegal interference, being prevented from doing justice<sup>18</sup>.

4.5 In *Kavanagh v. Ireland*<sup>19</sup> the applicant had been charged with false imprisonment, robbery and firearms offences. The Director gave the appropriate certificate in respect of the non-scheduled offences and the applicant was charged directly before the Special Criminal Court. The applicant, however, first challenged the decision of the Government to maintain the Court in operation, claiming that the establishment of the Court was a direct consequence of the civil conflict in Northern Ireland<sup>20</sup> and that, in the wake of the para-military ceasefires, the Government had a duty to keep the situation under review.

4.6 On this point Barrington J. said that the affidavits filed on behalf of the Government indicated that it had kept the situation under review. Keane J. added that, while the decision to maintain the Special Criminal Court in operation was essentially a political one and although the applicant had failed in the present case to discharge the onus of demonstrating that the Government's decision in this regard was not factually justifiable, nevertheless:

“A decision of this nature taken by the Government...cannot be regarded as forever beyond the reach of judicial control...the powers conferred by Part V of the Act are indeed far reaching and allow for the trial of persons on serious offences, not merely

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<sup>18</sup>*Ibid.*, 509-510.

<sup>19</sup> [1996] 1 IR 321.

<sup>20</sup>The applicant relied to this end on a statement made by the then Attorney General to the Human Rights Committee of the United Nations and referred to in the Committee's Report (October 7 1993) at para. 575

“With respect to the Special Criminal Court, the representative stressed that the court was needed to ensure the fundamental rights of citizens and protect democracy and the rule of law from the ongoing campaign relating to the problem of Northern Ireland. The Special Criminal Court differed from ordinary courts only in two respects: there was no jury and that instead of one judge there were three judges. Otherwise the same rules of evidence applied and the decisions of the courts were subject to review by the Court of Criminal Appeal”

<sup>21</sup> [1996] 1 IR 321, 359.



without a jury, but by tribunals composed of persons without any legal qualifications. Save in the exceptional circumstances envisaged by Article 28.3, the courts at all times retain their jurisdiction so as to ensure that the exercise of these drastic powers to abridge the citizen's rights is not abused by the arm of government to which they have been entrusted<sup>22</sup>.

- 4.7 The applicant also challenged the decision of the Director to grant the appropriate certificate in respect of the non-scheduled offences, contending that the "offences in respect of which he stood charged were ordinary crimes with no political or subversive connection."<sup>23</sup> Barrington J. first referred with approval to the earlier *dictum* of Walsh J. in *Quilligan* and then added:

"All the offences in respect of which the applicant was charged are scheduled offences or offences in respect of which the Director of Public Prosecutions has issued a certificate under section 47(2) of the Act. Under these circumstances it avails the applicant nothing to submit that the offences in respect of which he has been charged are not of a 'subversive' nature, for the issue involved is not the nature of the offences but the adequacy, in the opinion of the Government or the Director of Public Prosecutions, of the ordinary courts to secure the effective administration of justice in relation to them."<sup>24</sup>

- 4.8 The practical effects of this decision are, first, to render it all but impossible to mount a legal challenge to a decision of the Government to establish or maintain in force the Special Criminal Court (provided that this question is kept under review by the Government) and, secondly, to challenge a decision of the Director to direct that an accused face trial in that Court in respect of either a scheduled or non-scheduled offence.<sup>25</sup>

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<sup>22</sup> At 365-6.

<sup>23</sup> At 356, per Barrington J.

<sup>24</sup> At 358. Cf. the comments of Kearns J. In *Eviston v. Director of Public Prosecutions*, High Court, January 26, 2001: "The prosecutorial discretion is regarded as almost completely immune from judicial scrutiny except in extremely limited circumstances." In *Kavanagh v. Ireland*, decision of the UN Human Rights Committee, April 4, 2001 (CCCPR/C/71/D/819/1998) the Committee observed that judicial review of the Director's decisions "is effectively restricted to the most exceptional and virtually undemonstrable grounds"

<sup>25</sup> Of course, by virtue of s.35(5) of the 1939 Act, it is open to Dáil Éireann to annul "the proclamation [relating to the Special Criminal Court] by virtue of which



This principle has been confirmed in a series of decisions which either preceded<sup>26</sup> or post-dated<sup>27</sup> the Supreme Court's decision in *Kavanagh*. One consequence of these decisions has been effectively to sanction the development of a prosecutorial practice of referring such cases to the Special Criminal Court and that Court has been employed in recent years as a venue for the trial of persons charged with offences arising from the operation of organised crime, as opposed to offences committed by members of para-military groups.

## 5. The view of the UN Human Rights Committee

5.1 Following the decision of the Supreme Court, the applicant in *Kavanagh v. Ireland* applied to the UN Human Rights Committee and complained that the procedures adopted in the reference of his case to the Special Criminal Court violated his entitlement to equality before the law as guaranteed by Article 26.1 of the International Covenant on Civil and Political Rights.<sup>28</sup> The UN Committee upheld this complaint, observing that:

"No reasons are required to be given for the decisions that the Special Criminal Court would be 'proper' or that the ordinary courts are 'inadequate', and no reasons for the decision in the particular case have been provided to the Committee. Moreover, judicial review of the DPP's decisions is effectively restricted to the most exceptional and virtually undemonstrable circumstances.

The Committee considers that the State party has failed to demonstrate that the decision to try the author before the Special

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this Part of this Act shall cease to be in force."

<sup>26</sup> *Savage v. Director of Public Prosecutions* [1982] ILRM 385; *O'Reilly v. Director of Public Prosecutions* [1984] ILRM 224; *Foley v. Director of Public Prosecutions*, *The Irish Times*, September 25, 1989.

<sup>27</sup> *Byrne & Dempsey v. Government of Ireland*, Supreme Court, March 11, 1999; *Gilligan v. Ireland* [2001] 1 ILRM 473. In the latter case the Court refused the applicant leave to challenge by way of judicial review the 1972 Proclamation establishing the Special Criminal Court, but indicated that he could do so in the ordinary way by means of the plenary summons. This decision thus appears to turn in part on the fact that there had been undue delay on the part of the applicant in seeking an order which would have had the effect of delaying a pending criminal trial. The Court nevertheless also appeared to re-affirm the decision in *Kavanagh* and the subsequent case-law.

<sup>28</sup> April 4, 2001 (CCPR/C/71/D/819/1998).



Criminal Court was based on reasonable and objective grounds. Accordingly, the Committee concludes that the author's right under Article 26 to equality before the law and to equal protection of the law has been violated."

5.2 The Committee will presently examine ways in which the view of the UN Committee can be complied with in order to ensure that, henceforth, persons are not tried before the Special Criminal Court "unless reasonable and objective criteria for the decision are provided."

## 6. Retention of the Special Criminal Court

6.1 The workload of the Special Criminal Court has steadily declined since the mid-1970s. In 1973, 286 persons were charged with offences before that Court, but that figure had declined by 1995 to just 12. While 37 persons were charged in 1998 and while there also appears to be a small increase in that figure projected for the years 1999 and 2000, there is every reason to believe that such an increase will be temporary. Indeed, following the commencement of the operation of the Good Friday Agreement in December 1999, it may be expected that the workload of the Court will decline over the long term. At the same time, the possibility of a resurgence of violence caused by the operations of disaffected republican and loyalist para-military groupings cannot be discounted.

6.2 It should be noted, however that caseload figures alone might give a slightly false impression, since many of the cases awaiting trial before the Court at the moment are likely to be difficult and lengthy and are cases where the accused have been charged with very serious offences. In many respects, it is the nature and seriousness of the case coming before it - rather than the actual numbers of the caseload - which must be considered.

6.3 It is understood that, in the wake of the first IRA ceasefire and prior to the Supreme Court's decision in *Kavanagh v. Ireland*<sup>29</sup> (where the Court indicated that the necessity for the Special Criminal Court should be kept under review), the Government decided that such a review procedure should be put in place. Reviews took place in 1997, 1998, 1999 and 2000 and involved consultations with the Department of Justice, Equality and Law Reform, the Attorney General, the Director of Public

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<sup>29</sup> [1996] 1 IR 321.





7.2 Prosecutions and the Gardai. In each review to date the continuing necessity for the Special Criminal Court was considered to be warranted on a number of grounds, including the continuing threat to the security of the State posed by subversive organisations and the ruthlessness of certain organised criminal gangs operating within the State. Concerns were also expressed that attempts might be made to interfere with juries or witnesses in some cases. In these circumstances, the view was taken that the ordinary courts were inadequate to secure the effective administration of justice and the preservation of public peace and order.

6.4 As things stand the issue as to whether the continued security threat from para-militaries alone at present is sufficient to justify the continued operation in force of the Special Criminal Court must be considered. A majority of the Committee are of the view that the security risk is sufficiently high to justify the retention of the Court on this ground alone, albeit that they are also of the view that this issue should be kept under constant review. They take the view that for so long as there is in existence a para-military threat to public peace and order, the need for the Special Criminal Court will probably remain. In this regard, they are of the view that comparisons with jury practice in the United States (where trials with anonymous juries often take place in sensitive cases) are essentially misplaced. Unlike a vast country with a huge population such as the United States, the small and dispersed nature of Irish society means that the risk of jury-tampering and intimidation will remain a significant one. This would seem to be especially true of para-military groups, as they have demonstrated in the past (including the recent past) that they retain the power to wield a sinister influence in respect of certain communities; to discipline their members and supporters by the use of violence (including murder) and generally to intimidate and threaten witnesses. The majority of the Committee has little doubt but that such groups would have no hesitation in attempting to intimidate jurors and potential jurors if jury trial were to be restored in such cases.

## **7. Use of the Special Criminal to deal with organised crime**

7.1 The other main justification for the continued existence of the Special Criminal Court is the very real threat posed by organised crime. If the Court were to be retained on this ground, it would seem to give rise to two issues of principle.



7.2 First, it may be contended that this ground was not the original rationale for the establishment of the Special Criminal Court in its present phase of operation in May 1972. The reason for the establishment of the Court in 1972 is commonly believed to have been associated with the overspill in violence from the civil conflict in Northern Ireland. However, it may be noted that the Government statement announcing the establishment of the Special Criminal Court did not expressly state that this was the reason for the decision. Instead, the statement merely recorded that:

“The Government are satisfied that this step is necessary on the grounds that the ordinary courts are inadequate at the present time to secure the effective administration of justice and the preservation of public peace and order.”<sup>30</sup>

7.3 Nevertheless, given that the original justification for the establishment of the Special Criminal Court is commonly believed to be directly associated with the civil conflict in Northern Ireland, should the Government wish to rely on the organised crime ground as justification for the maintenance of the Court in operation, it is arguable that this ought to be clearly and openly stated to the Houses of the Oireachtas.

7.4 Secondly, the argument for maintaining the Special Criminal Court to deal with cases of organised crime is contingent on the premise that the ordinary courts are inadequate to deal with such cases. Recent experience has shown that juries have been distinctly uncomfortable - and have been made to feel distinctly uncomfortable - in dealing with certain cases involving organised crime.

7.5 The Committee was under no illusions about the potential threat to the administration of justice posed by such organised criminals. As Charleton and McDermott have argued:

“It is undesirable to deprive people of jury trials where it is their ordinary constitutional entitlement. However, in the case of armed gangs, be they subversive or not, who are determined not just to commit crime, but to set up structures to subvert the State and destroy the administration of justice as it applies to them, it seems

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<sup>30</sup> *The Irish Times*, May 27, 1972. It may be noted that in a subsequent Dáil question regarding the establishment of the Special Criminal Court, the Minister for Justice (Mr. D. O'Malley TD) declined to elaborate further on the reasons for the decision: see 261 *Dáil Debates* at Col. 599 (May 30, 1972).



to us that it is expecting too much to expect citizens to sit on juries and face the prospect of intimidation or trickery.....The extent to which [organised crime] can grow and dominate society, the arrogance of those involved with their gangs and their determination not to abide by any rules of decency and standards makes for us, at least, a reasonable case for the measured use of multi-judge non-jury courts on an emergency basis. Nor should one forget that the European system of criminal trial does not employ a jury. The model in Holland, for example, involves a trial by three judges, a right of re-hearing on appeal by three High Court judges and finally an appeal on a point of law to the Dutch Supreme Court. Why is that system any less fair than the common law system of jury trial? ”<sup>31</sup>

7.6 In *Director of Public Prosecutions v. Special Criminal Court*<sup>32</sup> Carney J. put it even more graphically:

“Those engaged in [organised] crime require a wall of silence to surround their activities and believe that its maintenance is necessary for their protection. They have at their disposal the resources including money and firearms to maintain this wall of silence and will resort to any necessary means including murder to further this objective.”<sup>33</sup>

7.7 Indeed, there have been instances in recent times where it appears that attempts have been made to tamper with juries in high-profile criminal trials in the ordinary courts.

7.8 A majority of the Committee was of the view that the threat posed by organised crime was sufficiently serious to justify the continuation of the Special Criminal Court on this ground alone. Individual members of the Committee expressed some concern that the Court was now being used for a purpose which was different from that which it had been originally intended. To this end it was suggested that it might be useful to draw on the experience of other common law jurisdictions whose criminal justice system had to confront problems posed by organised crime. Concern was also expressed that if the use of the Court to deal with organised

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<sup>31</sup> Charleton and McDermott, *loc.cit.*, 141, 142.

<sup>32</sup> [1999] 1 IR 60.

<sup>33</sup> *Ibid.*, 63.



crime were to be officially sanctioned this would amount to a tacit admission that the Court was now to remain a more or less permanent feature of our system of criminal justice.

### **Recommendation**

- 7.9 A majority of the Committee is of the view that the threat posed by para-militaries alone is sufficient to justify the retention of the Court. A majority of the Committee is also of the view that the threat posed by organised crime alone is also sufficient to justify the maintenance of the Special Criminal Court. On either or both grounds, therefore, a majority of the Committee is of opinion that the Court ought to be retained. This recommendation is, however, subject to two important qualifications.
- 7.10 First, the necessity for the Court must be kept under regular review. Secondly, the Oireachtas should enact as speedily as possible amending legislation which would, first, remove objectionable features of the 1939 Act so far as it concerns the Special Criminal Court (e.g., the provisions permitting members of the Defence Forces to sit as judges of that Court) and, secondly, take steps to ensure that judges of the Court enjoy traditional guarantees in respect of tenure, salary and independence. The nature of these safeguards is discussed below.
- 7.11 The opportunity should also be taken at an appropriate time - in line with the recommendations of the Constitution Review Group - to seek to have Article 38.6 of the Constitution amended to provide that judges of the Special Criminal Court are brought expressly within the protections contained in Articles 34 and 35 of the Constitution, which protections apply to all other judges.
8. **Supervision of the necessity for the Special Criminal Court**
- 8.1 Section 35(1) of the 1939 Act - which follows the language of Article 38.3.1 of the Constitution - 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 and that it is therefore necessary that this Part of this Act should come into force, the Government may make and publish a proclamation declaring that the Government is satisfied as





aforesaid and ordering that this Part of this Act shall come into force.”

8.2 Section 35(5) of the 1939 Act provides that Dáil Éireann may by resolution annul such a proclamation. The Government established the Special Criminal Court by resolution in May 1972 and no motion to annul such a resolution has ever been considered by Dáil Éireann.

8.3 While the Committee is aware that annual reviews of the necessity for the Special Criminal Court have been conducted by the Government since 1997, it is of opinion that, in addition, there ought to be parliamentary reviews at regular intervals and that the present open-ended arrangements regarding the continuing in operation of the Special Criminal Court are inherently unsatisfactory. It is, accordingly, of the view that if the operation of the Special Criminal Court is to be retained, this should be contingent on a positive resolution passed by both Houses of the Oireachtas continuing the Court in operation for a further specified period of years.

#### **Recommendation**

8.4 The Committee is of opinion that section 35 should be amended to ensure that any such resolution establishing the Special Criminal Court should automatically lapse unless it is positively affirmed by resolutions passed by both Houses of the Oireachtas at three-yearly intervals.<sup>34</sup> Any such resolution should expressly set out the basis on which the Court is to be established or (as the case may be) continued in force. Any such legislation should also provide for a three-yearly report by the Government to the Oireachtas on the working of the Special Criminal Court and the necessity (if such be the case) for its continued existence.

### **9. Composition and independence of the Court**

9.1 Article 35 of the Constitution contains standard guarantees designed to protect the tenure of the judiciary and to ensure their independence. These include an express guarantee of judicial independence in the exercise of judicial functions “subject only to this Constitution and the

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<sup>34</sup> In the view of the Committee it would suffice if the review took place within three calendar years (*e.g.*, January 2002 to December 2005), thus leaving the Government and the Oireachtas a certain flexibility regarding the date on which any such review or vote might take place.



law”<sup>35</sup>; a guarantee of non-removal from office except for “stated misbehaviour or incapacity” and then only on resolutions passed by Dáil Éireann and by Seanad Éireann<sup>36</sup> and a guarantee that the remuneration of a judge “shall not be reduced during his continuation in office.”<sup>37</sup>

9.2 However, Article 38.6 expressly provides that these guarantees do not apply to any court established under Article 38.3, i.e., the Special Criminal Court. Section 39(3) of the Offences against the State Act 1939 accordingly provides that:

“No person shall be appointed to be a member of a Special Criminal Court unless he is a judge of the High Court or the Circuit Court or a justice of the District Court, or a barrister of not less than seven years standing or a solicitor of not less than seven years standing, or an officer of the Defence Forces not below the rank of commandant.”

9.3 Section 39(4) allows the Minister for Finance to fix the remuneration and allowances to be paid to members of the Special Criminal Court and section 39(5) enables the Government to remove members of the Court. In practice, the Government chooses a number of judges (who are generally experienced trial judges in criminal cases) from the High Court, Circuit Court and District Court to be judges of the Special Criminal Court. However, this method of appointment is open to criticism.

9.4 The constitutionality of section 39 was challenged in *Eccles v. Ireland*<sup>38</sup> where the applicants had been convicted of capital murder by the Special Criminal Court. The contention was that section 39 was unconstitutional in that it allowed the Government to remove the judges of that Court at will and thus to deprive the Court of the benefit of the guarantees of judicial independence. While the Supreme Court acknowledged that Article 38.6 did not apply to the Special Criminal Court, Finlay C.J., relying on the presumption of constitutionality, said that it was incorrect in law to say, for example, that the power of the Minister for Finance to fix the remuneration of the members of the Court under section 39(3) extended to the power to refuse to pay such remuneration for the reason

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<sup>35</sup> Article 35.2.

<sup>36</sup> Article 35.4.

<sup>37</sup> Article 35.5

<sup>38</sup> [1985] IR 545.



only that their decisions did not suit the executive. Finlay C.J. continued:

“If [the executive were] to seek to exercise its power in a manner capable of interfering with the judicial independence of the Court in the trial of persons charged before it, it would be attempting to frustrate the constitutional right of persons charged before that court to trial in due course of law. Any such attempt would be prevented and corrected by the courts established under the Constitution. Whilst, therefore, the Special Criminal Court does not attract the express guarantees of judicial independence contained in Article 35, it does have, derived from the Constitution, a guarantee of independence in the carrying out of its functions.”<sup>39</sup>

9.5 Following this decision the applicants unsuccessfully complained to the European Commission of Human Rights that the appointments system did not comply with the requirements of Article 6(1) of the European Convention of Human Rights which, inter alia, guarantees a hearing before “an independent and impartial tribunal”: see *Eccles, McPhillips & McShane v. Ireland*.<sup>40</sup> That decision was based, in part, on existing practice - no serving judge of the Court has ever been removed from that Court against his will - but it is questionable whether that decision of the Commission would now be followed by the new European Court of Human Rights. In this regard, it may be noted that the Scottish High Court of Justiciary has held that a judge who had no security of tenure and whose appointment was subject to annual renewal was not independent within the meaning of Article 6(1) ECHR: see *Starrs v. Ruxton, Procurator Fiscal, Linlithgow*.<sup>41</sup> Likewise in *Lauko v. Slovakia*<sup>42</sup> the Court found a violation of Article 6 where the adjudication of certain minor offences had been committed to local and district officials. The European Court observed that:

“in order to determine whether a body can be considered ‘independent’ of the executive it is necessary to have regard to the manner of its appointment of its members and the duration of their terms of office, the existence of guarantees against outside

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<sup>39</sup> *Ibid.*, 549.

<sup>40</sup> (1988) 59 DR 212.

<sup>41</sup> (1999) SCCR 1052.

<sup>42</sup> [1998] Reports, IV-2492.



pressures and the question whether the body presents an appearance of independence.”

9.6 The appointment of those officials was in the hands of the executive and their status was that of salaried officials. As such, there were insufficient “guarantees against outside pressure” so that these bodies could not be judged independent for the purposes of Article 6(1) ECHR.

9.7 In this regard it should be noted that the Constitution Review Group was of the view that special courts should be brought within the ambit of Articles 34 and 35:

“The provision in Article 38.6 which exempts special courts (as distinct from military courts) from the provisions of Articles 34 and 35 of the Constitution does not appear to be warranted. The proposal is that the phrase ‘section 3 or’ should be deleted from that sub-section. This would have the result that special courts would function under the same constitutional regime as the ordinary courts with the exception, of course, of a jury.”<sup>43</sup>

9.8 This was also the view of the All-Party Oireachtas Committee on the Constitution in their 4<sup>th</sup> *Report The Courts and the Judiciary*.<sup>44</sup> This Committee respectfully agrees with these views and endorses the appropriateness of the suggested constitutional change. Of course, if this change were to be adopted, it would have the effect of rendering section 39 unconstitutional.

9.9 A majority of the Committee is also of the view that District Court Judges should continue to be eligible to sit as members of the Special Criminal Court. Such judges have considerable experience sitting in criminal cases without a jury where they are required to form conclusions as to facts in general and with regard to the credibility of individual witnesses in particular.

9.10 A minority of the Committee disagree with this conclusion. Without in any way wishing to reflect on the quality of District Court Judges, they observe that the judicial experience of District Court Judges is confined to summary trial. Such judges have no judicial experience of jury trial and trial on indictment. Given that the Special Criminal Court is

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<sup>43</sup> Pn. 2632 at 198.

<sup>44</sup> Pn. 7831, at pp. 34-35.





required by s.41(4) of the 1939 Act to follow "as far as practicable" the practice and procedure applicable to the trial of a person on indictment in the Central Criminal Court, a minority of Committee is of opinion that it would be appropriate that members of the Court should have prior judicial experience of trial on indictment. They also draw attention to the fact that the Special Criminal Court has a sentencing jurisdiction which far exceeds the constitutional limitations imposed on the District Court. They also expressed concerns that, given the hierarchical structure prevailing among the judiciary, there is a risk that such a disparity in judicial status might tend to inhibit District Judges from disagreeing with their more senior judicial colleagues.

### Recommendations

9.11 The Committee is of the view that section 39 requires to be overhauled in order to bring it into line with modern practice and our international obligations. Specifically, the Committee is of the view that the present section 39 should be replaced since it contains provisions - e.g., section 39(4) (which allows the Government to remove members of the Special Criminal Court at will) - which are manifestly inappropriate. It, accordingly, recommends that a re-cast section 39 should provide that:

- Only serving judges of the High Court, Circuit Court and District Court should be liable to serve as judges of the Special Criminal Court. This, in any event, is in line with practice since 1986.<sup>45</sup>
- The Government should no longer appoint particular High Court, Circuit Court or District Court judges to be judges of the Special Criminal Court. Instead, all serving members of the High Court, Circuit Court and District Court should be liable to serve as members of the Special Criminal Court.<sup>46</sup> The President of the High Court would act *ex officio* as President of that Court and, having consulted with the President of the Circuit Court and the President of the District Court, he or she would be exclusively responsible for the designation of which judges should sit on any particular case. Such arrangements would not only be more flexible than those which

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<sup>45</sup> Military officers have not served during the present phase of the Court's existence from 1972 to date, but retired judges did serve during the period from 1972 to 1986.

<sup>46</sup> Special transitional arrangements would have to be made in respect of existing judges. No such judge could be compelled to sit on the Special Criminal Court unless he or she consented to so sitting.



10.3 currently prevail, but would also further underscore the independence of the Court.

9.12 In addition, the Committee endorses the recommendation of the Constitution Review Group that Article 38.6 of the Constitution should be amended so as to provide that the traditional guarantees of independence and tenure contained in Articles 34 and 35 should apply to judges of the Special Criminal Court.

#### 10. Scheduled/non-scheduled offences distinction

10.1 The Committee is of the view that the scheduled/non-scheduled distinction should no longer be retained, at least as far as the triggering of the jurisdiction of the Special Criminal Court is concerned. The Committee considers that this distinction does not provide a sufficiently clear and transparent basis for depriving an accused of the right to jury trial to which he or she is otherwise *prima facie* constitutionally entitled. We are of the view that it would be preferable that any such decision would be based on the merits of the individual case instead of some pre-conceived statutory assumption that persons charged with certain types of offences should be sent to the Special Criminal Court unless the Director of Public Prosecutions otherwise orders.

10.2 Indeed, the Committee notes that it might well be argued that the present scheduling procedure does not accord with the requirements of Article 38.3 of the Constitution. This latter provision allows for the trial of offences in the Special Criminal Court "in cases where it may be determined in accordance with law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order." It could thus be contended that the constitutional jurisdiction to try an accused in the non-jury courts rests on an assessment *in that individual case* that the ordinary courts are inadequate and that these constitutional requirements are not satisfied by the scheduling of certain offences by the Oireachtas itself (as in the case of the 1998 Act) or in a manner permitted by the Oireachtas (as in the case of orders made under s.36 of the 1939 Act), since the very act of scheduling permits the trial of those very offences (unless the Director of Public Prosecution otherwise directs) without any consideration of the individual merits of the case at hand and whether the ordinary courts are inadequate *to try that particular case*.



10.3 Although some members of the Committee expressed concern that such a move would potentially widen the ambit of the Court, the fact remains that, as things stand, the Director can ensure that the accused stands trial in the Special Criminal Court in respect of any offence, irrespective of whether it is presently scheduled or not. Moreover, the guiding principle in all such cases must remain the basic constitutional mandate of jury trial save where it is determined in accordance with law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in any given case. In addition, if the Committee's recommendations were to be accepted, there would be in existence a new review mechanism which would provide a further safeguard in respect of the Director's decision to charge.

## 11. Review of the decision of the Director Of Public Prosecutions to refer cases to the Court

11.1 Many of the submissions to the Committee were critical of the fact that a decision of the Director of Public Prosecutions to direct a trial in the Special Criminal Court was effectively unreviewable.<sup>47</sup> Thus, the submission of the Law Society argued that:

“...it is clearly discriminatory that two persons charged with the same type of offence, e.g., receiving stolen property or drug dealing, should be tried by different courts, one with a jury and the other without. Even if such discrimination could be justified on any grounds absent a state of emergency, in order to comply with international standards the reasons for depriving the individual of the right to jury trial should be given in each particular case and that decision should be subject to review by some independent authority to which the accused person would be entitled to make representations.”<sup>48</sup>

11.2 The Committee further notes that the present practice regarding prosecution choice of venue was the subject of unfavourable comment by the United Nations Human Rights Committee who expressed concern that:

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<sup>47</sup> E.g., the submission of the Irish Council for Civil Liberties of October 15, 1999; submission of Amnesty International of October 30, 1999 (requirement to show *mala fides* or improper motives amounts to “almost insurmountable burden for the defence in view of reports that the DPP has not routinely provided such reasons.”)

<sup>48</sup> Submission of the Law Society of Ireland, November 19, 1999 at p. 10.



“The law establishing the Special Criminal Court does not specify clearly the cases which are to be assigned to that Court but leaves it to the broadly defined discretion of the Director of Public Prosecutions.”<sup>49</sup>

- 11.3 As we have already seen, a similar conclusion was reached by the UN Human Rights Committee in *Kavanagh v. Ireland*. It is important to add, of course, that in neither instance had the Committee a difficulty with the concept of non-jury courts as such, but only with the present mechanism for referring cases to it.
- 11.4 In addition, it has also been argued that the present arrangements are unsatisfactory inasmuch as (i) a citizen might, in effect, thereby be unfairly deprived of his constitutional right to jury trial and (ii) it violated the principle of “equality of arms”, i.e., it conferred a right to choice of venue on the prosecution which was denied to the defence.
- 11.5 The Committee has taken note of these criticisms. Accordingly, it recommends that any decision of the Director of Public Prosecutions to send an accused for trial to that Court should be subject to a positive review mechanism. The Committee gave consideration to four types of possible review mechanisms.
- 11.6 In considering these four alternatives the Committee believes that an independent counsel option might be employed, with advantage, in conjunction with any of them. Traditionally, in cases involving the disclosure of sensitive information from one party to another, the courts have been reluctant to impose conditions on the use of such information such as to prevent counsel revealing this information to their clients.<sup>50</sup> In the context of a review of a decision of the prosecution to prosecute before the Special Criminal Court, it would be invidious if counsel for

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<sup>49</sup> At para. 13 of the Committee’s Final Conclusions on the 2<sup>nd</sup> Periodic Report of Ireland (July 2000).

<sup>50</sup> See, e.g., *Burke v. Central Independent Television Plc* [1994] 2 IR 61, 80 (“an unprecedented and wholly undesirable breach in duty which counsel would owe to their client”; *R v. Davis* [1993] 1 WLR 613 (“..it would wholly undermine counsel’s relationship with his client if he were privy to issue in client but could reveal neither the discussion nor even the issues to his client”); *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 IR 60, 88 (“possibility that the lawyers for the [accused] might see the documents is not a feasibly compromise solution”).





the accused became aware of information regarding their client which they were not at liberty to disclose to him.

11.7 If the independent counsel procedure were employed, the case against the choice of the Special Criminal Court as venue for the trial would be made by court-appointed independent counsel. Such counsel would represent the interests of the accused, although they would not act for him. Such counsel would be appraised of the material on which the prosecution sought to rely to justify the decision to prosecute before the Special Criminal Court. Having argued the case as *legitimus contradictors* of the prosecution's position in an *in camera* before the High Court, they would have no further connection with the case. Such a procedure would go some distance towards meeting the legitimate concerns of the prosecution identified above, but would also provide an effective mechanism for the protection of the interests of the accused, without compromising the integrity or independence of the accused's own counsel.

**11.8 Option 1: Review by the High Court following *inter partes* hearing**

Under this proposal, any decision of the Director of Public Prosecutions to send an accused forward for trial in the Special Criminal Court would have to be approved by the High Court following an *inter partes* hearing with prosecution and defence. The Court would have to be satisfied that there were valid grounds for such a decision in that there was a real or significant risk that the ordinary courts would be inadequate to deal with the case by reason of the threat of intimidation of actual or potential jurors.

In order to ensure that this review mechanism did not unduly delay the ultimate hearing of the trial, the Oireachtas might give consideration to legislative measures such as requiring the High Court to give priority to any such application and restricting the right of appeal from any decision of the High Court on this matter to the Supreme Court.

The disadvantages with such a proposal would be that the prosecution might find itself coerced to reveal sensitive security information to the accused, his counsel and to the wider public and, moreover, many of the prosecution's concerns might not be susceptible of exact legal proof. These difficulties might be overcome in part if the High Court were given the jurisdiction to order that all or part of the hearing might be heard *in camera* if it considered that the interests of justice so required.



Nevertheless, in the absence of an independent counsel procedure, the in camera hearing would not avoid this information coming to the attention of the accused or his own counsel.

### 11.9 Option 2: Application to the High Court *ex parte*, but in camera

Another possible manner of circumventing these possible difficulties would be to provide that the Director would be required to apply *ex parte* (i.e. without notice to the accused) to the High Court, sitting otherwise than in public, for an order approving the trial venue. Absent the use of the independent counsel procedure, it seems to us unsatisfactory, not least because the constitutional requirement of fair procedures would seem to render any such proposal to be unconstitutional: if the Oireachtas were to confer such powers on the High Court, fair procedures requires that both sides be present before any final order is made.

### 11.10 Option 3: Administrative review by a retired judge

The third proposal is that the decision of the Director of Public Prosecutions to send an accused for trial in the Special Criminal Court should be reviewed by a retired judge (or some other senior non-practising legal figure with the requisite experience) within a very short period thereafter. This review process might be in the nature of an administrative review in much the same way as the review mechanism under the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993.<sup>51</sup> The retired judge would have access to the entire file and would have the right to pose questions to the Director and his staff regarding that decision. Unless the retired judge was satisfied that the Director's decision "to try [the accused] before the Special Criminal Court was based upon reasonable and objective grounds" (adopting the language of the UN Human Rights Committee in *Kavanagh v. Ireland*), then the Director would be obliged to apply to have the case re-transferred to the ordinary courts.

The disadvantage with such a proposal is that, while undoubtedly an improvement on present practice, some might argue that it is not sufficiently objective and transparent to meet the objections already discussed. It might also be contended that this suggestion amounts to the *de facto* administration of justice in private.

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<sup>51</sup> Save that in the case of the 1993 Act, the review is conducted by a serving High Court judge.



#### 11.11 Option 4: Review by a Judge of the Supreme Court

The fourth proposal would require the Director of Public Prosecutions within 28 days (or such further limited time which might be permitted) of the charging of an accused before the Special Criminal Court to submit to a serving member of the Supreme Court nominated by the Chief Justice both the decision to refer the case to the Special Criminal Court and the reasons which gave rise to that decision.

If the nominated Supreme Court judge were so satisfied, he or she could then issue a certificate indicating that the decision had been reviewed and that the Director's decision to try the accused before the Special Criminal Court was based "upon reasonable and objective grounds" (again adopting the language of the UN Human Rights Committee). The certificate would then be produced in the Special Criminal Court before the date fixed for the trial. In the absence of such a certificate or in circumstances where the certificate was refused, the Special Criminal Court would have power to remand the accused to the ordinary courts if it saw fit. Provision might also be made for the Director to seek a certificate from a nominated Supreme Court judge in advance of the charging of an accused in the Special Criminal Court.

The disadvantages associated with this proposal are that the accused would still not have access to the information grounding the decision to refer the case to the Special Criminal Court. In addition, some might argue that this proposal entailed a serving member of the Supreme Court in what amounted to the administration of justice in private without notice to the accused to open to objection. Here again, some of these potential difficulties might be mitigated through the use of an independent counsel procedure.

#### Recommendation

- 11.12 The Committee recognises that the current arrangements have been subject to criticism. In view of this, a majority of the Committee suggest that while the present arrangements have worked reasonably well in practice, perhaps the fourth option - review by a serving Supreme Court judge, perhaps in conjunction with the independent counsel procedure - should be considered. If experience were to show that this option was unsatisfactory in practice, then, perhaps, at a later stage, other options might be considered.



11.13 The Committee is of the view that all of the above options would meet the objections identified by the UN Human Rights Committee in *Kavanagh v. Ireland*. The objection of the UN Committee was not, of course, to the concept of non-jury trial as such. It rather considered that the absence of "reasonable and objective criteria" against which the transfer of the accused to the Special Criminal Court could be measured gave rise to a violation of the principle of equality before the law. A majority of the Committee believes that its proposals would meet these objections inasmuch as they would provide a mechanism whereby the existence of such grounds could be objectively assessed as far as any given case was concerned.

## 12. Right of appeal from decisions of the Special Criminal Court

12.1 By virtue of section 44 of the 1939 Act, convictions and sentences of a Special Criminal Court are subject to an appeal to the Court of Criminal Appeal<sup>52</sup> in the same way as convictions or sentences of the Central Criminal Court. In theory, just as with appellants from the Central Criminal Court, leave to appeal is required before such an appeal can be taken - such leave to be granted by either the court of trial or the Court of Criminal Appeal itself. In practice, however, all convicted persons enjoy a full right of appeal to the Court of Criminal Appeal,<sup>53</sup> since even where (as is normal practice) leave to appeal is refused by the Special Criminal Court, the Court of Criminal Appeal invariably treats the application for leave as the hearing of the substantive appeal on the merits. In truth, the leave to appeal/appeal distinction is nowadays largely meaningless and is a hangover from a much earlier era when criminal appeals were still a novelty.<sup>54</sup>

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<sup>52</sup> Should Part II of the Courts and Court Officers Act 1995 come into operation, this appellate function would be transferred from the Court of Criminal Appeal to the Supreme Court.

<sup>53</sup> With the possibility of a further right of appeal by the appellant from decisions of the Court of Criminal Appeal to the Supreme Court if either the former Court or the Attorney General or the Director of Public Prosecutions grants leave to appeal: see Courts of Justice Act 1924, s.29. Such leave to appeal can only be granted where the point of law raised is of public importance and that it is desirable in the public interest that such leave be granted: see *The People v. Littlejohn* [1976-77] ILRM 147.

<sup>54</sup> There was no general right of appeal in respect of indictable crime prior to the establishment of the Court of Criminal Appeal by the Courts of Justice Act 1924.





- 12.2 At all events, this Committee considers it appropriate that persons convicted of serious crime should enjoy an untrammelled right of appeal against conviction and sentence.<sup>55</sup> It consequently recommends the amendment of section 44 to ensure that persons convicted by the Special Criminal Court should have a full and unqualified right of appeal against conviction and sentence to the Court of Criminal Appeal without the necessity for prior leave to appeal.
- 12.3 A minority of the Committee, while recognising the arguments made for an unqualified right of appeal from decisions of the Special Criminal Court, believes that this issue is not unique to the Special Criminal Court. Instead, this minority considers that the issue of a right of appeal from conviction on indictment is one which is of general application and which does not solely or even peculiarly concern the Special Criminal Court and, as such, does not fall to be considered by this Committee.

### **Recommendation**

- 12.4 Section 44 of the 1939 Act should be amended to ensure that persons convicted by the Special Criminal Court should have a full right of appeal against conviction and sentence to the Court of Criminal Appeal without the necessity for prior leave to appeal.

### **13. Requirement for unanimity**

- 13.1 Section 40 provides that the

“determination of every question before a Special Criminal Court shall be according to the opinion of the members of such Special Criminal Court present at and taking part in such determination....”

- 13.2 While a unanimity rule might not be practicable in respect of every determination of the Court, the Committee is nonetheless of the view that no person should be convicted unless there was unanimity on this particular issue on the part of the three judge Court. Such a requirement is not an unreasonable one and it provides a further safeguard for the

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<sup>55</sup> It may be noted that Article 2(1) of Protocol No. 7 ECHR (which Ireland has signed but not ratified) provides that:

“Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.”



accused. In a case where a majority were of the view that the accused should be acquitted, then, of course, the verdict must be one of acquittal.

- 13.3 A minority of this Committee does not agree that the case for such a change has been made out by the majority of the Committee. In the opinion of this minority, any consideration of such a change should be based on careful analysis of the case for unanimity, identifying, in particular, any difficulties which might be attributable to majority verdicts in the Special Criminal Court

#### **Recommendation**

- 13.4 A majority of the Committee recommends that no person should be convicted by the Special Criminal Court unless there is unanimity on this issue on the part of the three judges trying the case. If all members of the Court cannot agree on this question, then the Court would have jurisdiction to order one further re-trial before a differently composed panel of that Court. If, following a re-trial, there was still a lack of unanimity, then the accused must be acquitted.

#### **14. Statutory requirement for written reasons**

- 14.1 In practice, the Special Criminal Court will nowadays give a written judgment on all major issues coming before it. The Committee believes that it is important that a written judgment accompanies any decision to convict an accused. Not only is the giving of reasons nowadays regarded as an indispensable and constitutionally-required feature of the proper administration of justice and the determination of legal rights,<sup>56</sup> but the giving of such reasons in writing provides a basis by which the reasoning of the Court in arriving at its decision to convict the accused can be subject to the appropriate level of scrutiny by the Court of Criminal Appeal or the Supreme Court (as the case may be).

#### **Recommendation**

- 14.2 Where the Special Criminal Court proposes to convict an accused of an offence, then it ought to be required to give its decision and the reasons therefor in writing.

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<sup>56</sup> See, e.g., *The State (Daly) v. Minister for Agriculture* [1987] IR 165; *The State (Creedon) v. Criminal Injuries Compensation Tribunal* [1988] IR 51; *Breen v. Minister for Defence* [1994] 2 IR 34; *Ni Eili v. Environmental Protection Agency*, Supreme Court, July 31, 1999; *Orange Communications Ltd. v. Director of Telecommunication Regulation*, Supreme Court, May 18, 2000.



## Dissent

The Hon. Mr. Justice Anthony J. Hederman,  
Professor William Binchy, Professor Dermot Walsh

Trial by jury is a cornerstone of the criminal law system. It ensures that the innocence or guilt of a person charged with an offence is determined by twelve randomly chosen members of the community, each of whom brings to the process the benefit of his or her life-experience and individual perspective. Lord Devlin used somewhat colourful language when he observed that trial by jury is "the lamp which shows that freedom lives". His insight is, however, important in emphasising the liberal democratic basis of jury trial.

We are of the view that the case in favour of the continued existence of the Special Criminal Court has not been made out. We are not here principally concerned with specific unacceptable aspects of the legislation relating to the court (such as the facility for retired judges to sit on the court or the power of the Director of Public Prosecutions to decide who is to be charged before the court). In our view, there is a more fundamental difficulty. We consider that the arguments addressed in support of the very existence of the court do not stand up to scrutiny in the light of constitutional values and human rights norms.

Before we address those arguments, some rather obvious facts may be acknowledged. Resort to the Special Criminal Court is highly convenient from the standpoint of the prosecution. The risk of possible jury intimidation is reduced; the members of the Court can be relied on not to be swayed by political views from convicting where the offence was politically inspired; the prospects of conviction may be considered more likely, not because the members of the Court are unfair but because studies have consistently shown that non-jury courts have a higher conviction rate than courts with trial by jury.

The matter is not simply one of convenience, however, whether from the standpoint of the prosecution or that of the administration of justice in general. If convenience were the predominant test, trial by jury for any offence would be abolished. Jury trial is valuable, in spite of its inconvenience, because of deeper values relating to a liberal democracy.



If a pressing case for the necessity of a special criminal court could be made out, we naturally would heed it but in our view no such case has been proffered. All that has been indicated is a belief, based on an assessment of the undoubtedly violent and intimidatory disposition of certain criminals, that these criminals might successfully intimidate juries if they or their associates were tried by jury.

In measuring the weight of this concern, it is worth noting that no other common law jurisdiction has come to the conclusion that the risk of jury intimidation warrants non-jury trial in a special criminal court. In Northern Ireland, but not in England, Scotland or Wales, there is, at present, a system of criminal trial involving judges without a jury: the "Diplock Courts"; it is our understanding that the British Government is committed to move as quickly as circumstances allow to jury trial for all offences. Whilst Ireland unfortunately has experienced the growth of organised crime in recent years, it is not plausible to suggest that, in contrast to other common law jurisdictions such as the United States of America, England and Australia, Irish social conditions are so perilous as to warrant dispensing with jury trial. Few would suggest that had the 1939 Act not come into being in the context of concerns for subversion, legislation would have been enacted in recent years to dispense with jury trial for those suspected of organised crime.

With any system of jury trial there will be the possibility of jury intimidation. That risk will be greater in some cases than others, but there is no evidence, from any jurisdiction, that the risk is of such proportions as to warrant dispensing with trial by jury. Other common law jurisdictions have not taken such a suggestion seriously.

There are many steps that can be taken to reduce the possibility of jury intimidation. Juries can be anonymous; they can be protected during the trial; they can even be located in a different place from where the trial takes place, with communication by video link. It is true that in a small jurisdiction such as Ireland anonymity is hard to secure, but if the jury are anonymous and at a secure secret location, the risk of effective jury intimidation would not be very great. At some point, the theoretical risk of the possibility of jury intimidation becomes frankly implausible.

The existence of the Special Criminal Court can best be explained not by factually justified and specifically focused concerns relating to the risk of jury intimidation unique in the common law world, but by the desire to use strong





means to put down violent politically-inspired crime. That desire is understandable but the means are, unfortunately, inconsistent with the values of a modern liberal democratic society and the protection of human rights. In our judgment, the best course is for Ireland to join all other common law countries with jury trial and dispense with the Special Criminal Court.

The minority would also wish to make the following important point.

Even if non-jury trials were considered appropriate in certain circumstances, the Special Criminal Court is unacceptable to us, on the basis that the decision whether an individual forfeits his or her right to jury trial is made by the Director of Public Prosecutions on his own discretion, and with no reasons given - a position which is in practice unreviewable in most cases.

In finding this unacceptable, we do not wish to criticise in any way the Director of Public Prosecutions, who performs a most valuable independent role as a prosecuting officer on behalf of the People. Our concern springs from the fact that, in discharging that role, he represents one side of an adversarial process. As an active participant in that adversarial process, it is not just that he should be given powers relating to the trial of the accused which can detrimentally affect the interests of the accused. Even if these powers were to be exercised in good faith in all cases, they do not have the appearance of the impartial and objective protection of the right of accused persons to a fair trial.

It is worth noting that in the *Kavanagh* case, on 4 April 2001, the Human rights Committee concluded that Ireland had failed to demonstrate that the Director of Public Prosecutions election for trial before the Special Criminal Court had been based on reasonable and objective grounds and that accordingly there had been a violation of the equal protection of the law guaranteed by Article 26 of the International Covenant on Civil and Political Rights.

The majority has not proposed any acceptable reviewable mechanism or alternative decision-making process which would cure this fundamental defect in the proper operation of the Special Criminal Court.







## Extract from The Offences against the State Act 1939

### PART V SPECIAL CRIMINAL COURTS

35 Commencement and cesser of this Part of this Act.

35.— (1) This Part of this Act shall not come into or be in force save as and when and for so long as is provided by the subsequent sub-sections of this section.

(2) 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 and that it is therefore necessary that this Part of this Act should come into force, the Government may make and publish a proclamation declaring that the Government is satisfied as aforesaid and ordering that this Part of this Act shall come into force.

(3) Whenever the Government makes and publishes, under the next preceding sub-section of this section, such proclamation as is mentioned in that sub-section, this Part of this Act shall come into force forthwith.

(4) 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 and the preservation of public peace and order, the Government shall make and publish a proclamation declaring that this Part of this Act shall cease to be in force, and thereupon this Part of this Act shall forthwith cease to be in force.

(5) It shall be lawful for Dáil Eireann, at any time while this Part of this Act is in force, to pass a resolution annulling the proclamation by virtue of which this Part of this Act is then in force, and thereupon such proclamation shall be annulled and this Part of this Act shall cease to be in force, but without prejudice to the validity of anything done under this Part of this Act after the making of such proclamation and before the passing of such resolution.

(6) A proclamation made by the Government under this section shall be published by publishing a copy thereof in the Iris Oifigiúil and may also be published in any other manner which the Government shall think proper.

36 Schedule offences.

36.— (1) Whenever while this Part of this Act is in force 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 in relation to offences of any particular class or kind or under any particular enactment, the Government may by order declare that offences of that particular class or kind or under that particular enactment shall be scheduled offences for the purposes of this Part of this Act.



(2) Whenever the Government has made under the foregoing sub-section of this section any such declaration as is authorised by that sub-section, every offence of the particular class or kind or under the particular enactment to which such declaration relates shall, until otherwise provided by an order under the next following sub-section of this section, be a scheduled offence for the purposes of this Part of this Act.

(3) Whenever the Government is satisfied that the effective administration of justice and the preservation of public peace and order in relation to offences of any particular class or kind or under any particular enactment which are for the time being scheduled offences for the purposes of this Part of this Act can be secured through the medium of the ordinary courts, the Government may by order declare that offences of that particular class or kind or under that particular enactment shall, upon the making of such order, cease to be scheduled offences for the purposes of this Part of this Act.

37 Attempting, etc, to commit a scheduled offence.

37.— In addition to the offences which are, by virtue of an order made under the next preceding section, for the time being scheduled offences for the purposes of this Part of this Act, each of the following acts, that is to say, attempting or conspiring or inciting to commit, or aiding or abetting the commission of, any such schedule offence shall itself be a scheduled offence for the said purposes.

38 Establishment of Special Criminal Courts.

38.— (1) As soon as may be after the coming into force of this Part of this Act, there shall be established for the purposes of this Part of this Act, a court which shall be styled and known and is in this Act referred to as a Special Criminal Court.

(2) The Government may, whenever they consider it necessary or desirable so to do, establish such additional number of courts for the purposes of this Part of this Act as they think fit, and each court so established shall also be styled and known and is in this Act referred to as a Special Criminal Court.

(3) Whenever two or more Special Criminal Courts are in existence under this Act, the Government may, if and so often as they so think fit, reduce the number of such Courts and for that purpose abolish such of those existing Courts as appear to the Government to be redundant.

39 Constitution of Special Criminal Courts.

39.— (1) Every Special Criminal Court established under this Part of this Act shall consist of such uneven number (not being less than three) of members as the Government shall, from time to time determine, and different numbers of members may be so fixed in respect of different Special Criminal Courts.

(2) Each member of a Special Criminal Court shall be appointed, and be removable at will, by the Government.





(3) No person shall be appointed to be a member of a Special Criminal Court unless he is a judge of the High Court or the Circuit Court, or a justice of the District Court, or a barrister of not less than seven years standing, or a solicitor of not less than seven years standing, or an officer of the Defence Forces not below the rank of commandant.

(4) The Minister for Finance may pay to every member of a Special Criminal Court such (if any) remuneration and allowances as the said Minister may think proper, and different rates of remuneration and allowances may be so paid to different members of any such Court, or to the members of different such Courts.

(5) The Government may appoint such registrars for the purposes of any Special Criminal Court as they think proper, and every such registrar shall hold his office on such terms and conditions and shall receive such (if any) remuneration as the Minister for Finance shall from time to time direct.

#### 40 Verdicts of Special Criminal Courts.

40.— (1) The determination of every question before a Special Criminal Court shall be according to the opinion of the majority of the members of such Special Criminal Court present at and taking part in such determination, but no member or officer of such Court shall disclose whether any such determination was or was not unanimous or, where such determination was not unanimous, the opinion of any individual member of such Court.

(2) Every decision of a Special Criminal Court shall be pronounced by such one member of the Court as the Court shall determine, and no other member of the Court shall pronounce or indicate his concurrence in or dissent from such decision.

#### 41 Procedure of Special Criminal Courts.

41.— (1) Every Special Criminal Court shall have power, in its absolute discretion, to appoint the times and places of its sittings, and shall have control of its own procedure in all respects and, shall for that purpose make, with the concurrence of the Minister for Justice, rules regulating its practice and procedure and may in particular provide by such rules for the issuing of summonses, the procedure for bringing (in custody or on bail) persons before it for trial, the admission or exclusion of the public to or from its sittings, the enforcing of the attendance of witnesses, and the production of documents.

(2) A Special Criminal Court sitting for the purpose of the trial of a person, the making of any order, or the exercise of any other jurisdiction or function shall consist of an uneven number (not less than three) of members of such Court present at and taking part in such sitting.

(3) Subject and without prejudice to the provisions of the next preceding sub-section of this section, a Special Criminal Court may exercise any power, jurisdiction, or function notwithstanding one or more vacancies in the membership of such court.



(4) 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.

#### 42 Authentication of orders of Special Criminal Courts.

42.— (1) Every order or other act of a Special Criminal Court shall be authenticated by the signature of a registrar of that Court.

(2) Every document which purports to be an order or other act of a Special Criminal Court and to be authenticated by the signature of a registrar of that Court shall be received in evidence in all Courts and be deemed to be an order or other act (as the case may require) of such Special Criminal Court without proof of the signature by which such order or act purports to be authenticated or that the person whose signature such signature purports to be was a registrar of the said Special Criminal Court.

#### 43 Jurisdiction of Special Criminal Courts.

43.— (1) A Special Criminal Court shall have jurisdiction to try and to convict or acquit any person lawfully brought before that Court for trial under this Act, and shall also have the following ancillary jurisdictions, that is to say:—

- (a) jurisdiction to sentence every person convicted by that Court of any offence to suffer the punishment provided by law in, respect of such offence;
- (b) 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;
- (c) jurisdiction to order the detention of and to detain in civil or military custody, or to admit to bail in such amount and with or without sureties as that Court shall direct, pending trial by that Court and during and after such trial until conviction or acquittal, any person sent, sent forward, transferred, or otherwise brought for trial by that Court;
- (d) power to administer oaths to witnesses;
- (e) jurisdiction and power to punish, in the same manner and in the like cases as the High Court, all persons whom such Special Criminal Court finds guilty of contempt of that Court or any member thereof, whether such contempt is or is not committed in the presence of that Court;
- (f) power, in relation to recognisances and bail bonds entered into before such Special Criminal Court, to estreat such recognisances and bail bonds in the like manner and in the like cases as the District Court estreats recognisances and bail bonds entered into before it.



(2) The provisions of this Part of this Act in relation to the carrying out of sentences of imprisonment pronounced by Special Criminal Courts and the regulations made under those provisions shall apply and have effect in relation to the carrying out of orders made by Special Criminal Courts under the foregoing sub-section of this section for the detention of persons in custody, whether civil or military.

#### 44 Appeal to Court of Criminal Appeal.

44.— (1) A person convicted by a Special Criminal Court of any offence or sentenced by a Special Criminal Court to suffer any punishment may appeal to the Court of Criminal Appeal from such conviction or sentence if, but only if, either he obtains from that Special Criminal Court a certificate that the case is a fit case for appeal or, where such Special Criminal Court refuses to grant such certificate, the Court of Criminal Appeal on appeal from such refusal grants to such person leave to appeal under this section.

(2) Sections 28 to 30 and sections 32 to 35 of the Courts of Justice Act, 1924 (No. 10 of 1924), and sections 5, 6, and 7 of the Courts of Justice Act, 1928 (No. 15 of 1928), shall apply and have effect in relation to appeals under this section in like manner as they apply and have effect in relation to appeals under section 31 of the Courts of Justice Act, 1924.

#### 45 Proceedings in the District Court in relation to scheduled offences.

45.— (1) Whenever a person is brought before a justice of the District Court charged with a scheduled offence which such justice has jurisdiction to dispose of summarily, such justice shall, if the Attorney-General so requests; send such person (in custody or on bail) for trial by a Special Criminal Court on such charge.

(2) Whenever a person is brought before a justice of the District Court charged with a scheduled offence which is an indictable offence and such justice receives informations in relation to such charge and sends such person forward for trial on such charge, such justice shall (unless the Attorney-General otherwise directs) send such person forward in custody or, with the consent of the Attorney-General, at liberty on bail for trial by a Special Criminal Court on such charge.

(3) Where under this section a person is sent or sent forward in custody for trial by a Special Criminal Court, it shall be lawful for the High Court, on the application of such person, to allow him to be at liberty on such bail (with or without sureties) as the High Court shall fix for his due attendance before the proper Special Criminal Court for trial on the charge on which he was so sent forward.

#### 46 Proceedings in the District Court in relation to non-scheduled offences.

46.— (1) Whenever a person is brought before a justice of the District Court charged with an offence which is not a scheduled offence and which such justice has jurisdiction to dispose of summarily, such justice shall, if the Attorney-General so requests and certifies in writing that the ordinary courts are in his opinion inadequate to secure the effective administration of justice and the preservation of public peace and order in



relation to the trial of such person on such charge, send such person (in custody or on bail) for trial by a Special Criminal Court on such charge.

(2) Whenever a person is brought before a justice of the District Court charged with an indictable offence which is not a scheduled offence and such justice receives informations in relation to such charge and sends such person forward for trial on such charge, such justice shall, if an application in this behalf is made to him by or on behalf of the Attorney-General grounded on the certificate of the Attorney-General that the ordinary Courts are, in his opinion inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on such charge, send such person forward in custody or, with the consent of the Attorney-General, at liberty on bail for trial by a Special Criminal Court on such charge.

(3) Where under this section a person is sent or sent forward in custody for trial by a Special Criminal Court, it shall be lawful for the High Court, on the application of such person, to allow him to be at liberty on such bail (with or without sureties) as the High Court shall fix for his due attendance before the proper Special Criminal Court for trial on the charge on which he was so sent forward.

#### 47 Charge before Special Criminal Court in lieu of District Court.

47.— (1) Whenever it is intended to charge a person with a scheduled offence, the Attorney-General may, if he so thinks proper, direct that such person shall, in lieu of being, charged with such offence before a justice of the District Court, be brought before a Special Criminal Court and there charged with such offence and, upon such direction being so given, such person shall be brought before a Special Criminal Court and shall be charged before that Court with such offence and shall be tried by such Court on such charge.

(2) Whenever it is intended to charge a person with an offence which is not a scheduled offence and the Attorney-General certifies that the ordinary Courts are, in his opinion, inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on such charge, the foregoing sub-section of this section shall apply and have effect as if the offence with which such person is so intended to be charged were a scheduled offence.

(3) Whenever a person is required by this section to be brought before a Special Criminal Court and charged before that Court with such offence, it shall be lawful for such Special Criminal Court to issue a warrant for the arrest of such person and the bringing of him before such Court and, upon the issue of such warrant, it shall be lawful for such person to be arrested thereunder and brought in custody before such Court.





48 Transfer of trials from ordinary Courts to a Special Criminal Court.

48.— Whenever a person charged with an offence has been sent forward by a justice of the District Court for trial by the Central Criminal Court or the Circuit Court on such charge, then and in every such case the following provisions shall have effect, that is to say:—

- ( a ) if the Attorney-General certifies that the ordinary Courts are, in his opinion, inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on such charge, the Attorney-General shall cause an application, grounded on his said certificate, to be made on his behalf to the High Court for the transfer of the trial of such person on such charge to a Special Criminal Court, and on the hearing of such application the High Court shall make the order applied for, and thereupon such person shall be deemed to have been sent forward to a Special Criminal Court for trial on such charge;
- ( b ) whenever the High Court has made, under the next preceding paragraph of this sub-section, such order as is mentioned in that Paragraph, the following provisions shall have effect, that is to say:—
  - (i) a copy of such order shall be served on such person by a member of the *Gárda Síochána*,
  - (ii) a copy of such order shall be sent to the appropriate county registrar,
  - (iii) such person shall be brought before a Special Criminal Court for trial at such time and place as that Court shall direct,
  - (iv) if such person is in custody when such order is made, he may be detained in custody until brought before such Special Criminal Court for trial,
  - (v) if such person is at liberty on bail when such order is made, such bail shall be deemed to be for his attendance before a Special Criminal Court for trial at such time and place as that Court shall direct and, if he fails so to attend before the said Court, he shall be deemed to have broken his bail and his bail bond shall be estreated accordingly.

49 Selection of the Special Criminal Court by which a person is to be tried.

49.— Where a person is (in the case of an offence triable summarily) sent or (in the case of an indictable offence) sent forward by a justice of the District Court to a Special Criminal Court for trial or the trial of a person is transferred under this Act to a Special Criminal Court or a person is to be charged before and tried by a Special Criminal Court, such of the following, provisions as are applicable shall have effect, that is to say:—

- ( a ) where a person is so sent or sent forward, the justice shall not specify the particular Special Criminal Court to which he sends or sends forward such person for trial;
- ( b ) where the trial of a person is so transferred, the order effecting such transfer shall not specify the particular Special Criminal Court to which such trial is transferred;



- (c) if only one Special Criminal Court is in existence under this Act at the time of such sending or sending forward or such transfer (as the case may be), such sending, sending forward, or transfer shall be deemed to be to such one Special Criminal Court;
- (d) if only one Special Criminal Court is in existence under this Act when such person is to be so charged and tried, such person shall be charged before and tried by that Special Criminal Court;
- (e) if two or more Special Criminal Courts are in existence under this Act at the time of such sending or sending forward or such transfer or such charging (as the case may be), it shall be lawful for the Attorney General to cause an application to be made on his behalf to such Special Criminal Court as he shall think proper for an order that such person be tried by or charged before and tried by that Court and thereupon the said Court shall make the order so applied for;
- (f) upon the making of the order mentioned in the next preceding paragraph of this section, whichever of the following provisions is applicable shall have effect, that is to say:—
  - (i) such person shall be deemed to have been sent or sent forward for trial by the Special Criminal Court which made the said order and all persons concerned shall act accordingly, or
  - (ii) the trial of such person shall be deemed to have been transferred to the said Special Criminal Court and all persons concerned shall act accordingly, or
  - (iii) such person shall be charged before and tried by the said Special Criminal Court and all persons concerned shall act accordingly.

#### 50 Orders and sentences of Special Criminal Courts.

50.— (1) Save as shall be otherwise provided by regulations made under this section, every order made or sentence pronounced by a Special Criminal Court shall be carried out by the authorities and officers by whom, and in the like manner as, a like order made or sentence pronounced by the Central Criminal Court is required by law to be carried out.

(2) Every order, conviction, and sentence made or pronounced by a Special Criminal Court shall have the like consequences in law as a like order, conviction, or sentence made or pronounced by the Central Criminal Court would have and, in particular, every order made and every sentence pronounced by a Special Criminal Court shall confer on the persons carrying out the same the like protections and immunities as are conferred by law on such persons when carrying out a like order made or a like sentence pronounced by the Central Criminal Court.

(3) The Minister for Justice may make regulations in relation to the carrying out of sentences of penal servitude or of imprisonment pronounced by Special Criminal Courts and the prisons and other places in which persons so sentenced shall be imprisoned and the maintenance and management of such places, and the said Minister may also, if he so thinks proper, make by writing under his hand such special



provision as he shall think fit in relation to the carrying out of any such sentence in respect of any particular individual, including transferring to military custody any particular individual so sentenced.

(4) The Minister for Defence may make regulations in relation to the places and the manner generally in which persons transferred to military custody under the next preceding sub-section of this section shall be kept in such custody, and the said Minister may also, if he so thinks proper, make by writing under his hand such special provision as he shall think fit in respect of the custody of any particular such person.

#### 51 Standing mute of malice and refusal to plead etc.

51.— (1) Whenever a person brought before a Special Criminal Court for trial stands mute when called upon to plead to the charge made against him, that Court shall hear such evidence (if any) relevant to the issue as to whether such person stands mute of malice or by the visitation of God as may then and there be adduced before it, and

- (a) if that Court is satisfied on such evidence that such person is mute by the visitation of God, all such consequences shall ensue as would have ensued if such person had been found to be so mute by a Judge sitting in the Central Criminal Court, and
- (b) if that Court is not so satisfied or if no such evidence is adduced, that Court shall direct a plea of "not guilty" to be entered for that person.

(2) Whenever a person brought, before a Special Criminal Court for trial fails or refuses in any way, other than standing mute, to plead to the charge made against him when called upon to do so, that Court shall (without prejudice to its powers under the next following sub-section of this section) direct a plea of "not guilty" to be entered for such person.

(3) Whenever a person at any stage of his trial before a Special Criminal Court by any act or omission refuses to recognise the authority or jurisdiction of that Court, or does any act (other than lawfully objecting in due form of law to the jurisdiction of that Court to try him) which, in the opinion of that Court, is equivalent to a refusal to recognise that Court, or the authority or jurisdiction thereof, such person shall be guilty of contempt of that Court and may be punished by that Court accordingly.

#### 52 Examination of detained persons.

52.— (1) Whenever a person is detained in custody under the provisions in that behalf contained in Part IV of this Act, any member of the *Gárda Síochána* may demand of such person, at any time while he is so detained, a full account of such person's 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 any section or sub-section of this Act or any scheduled offence.

(2) If any person, of whom any such account or information as is mentioned in the foregoing sub-section of this section is demanded under that sub-section by a member of the *Gárda Síochána*, fails or refuses to give to such member such account or any



such information or gives to such member any account or information which is false or misleading, he 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.

### 53 Immunities of members, etc, of Special Criminal Courts.

53.— (1) No action, prosecution, or other proceeding, civil or criminal, shall lie against any member of a Special Criminal Court in respect of any order made, conviction or sentence pronounced, or other thing done by that Court or in respect of anything done by such member in the course of the performance of his duties or the exercise of his powers as a member of that Court or otherwise in his capacity as a member of that Court, whether such thing was or was not necessary to the performance of such duties or the exercise of such powers.

(2) No action or other proceeding for defamation shall lie against any person in respect of anything written or said by him in giving evidence, whether written or oral, before a Special Criminal Court or for use in proceedings before a Special Criminal Court.

(3) No action, prosecution, or other proceeding, civil or criminal, shall lie against any registrar, clerk, or servant of a Special Criminal Court in respect of anything done by him in the performance of his duties as such registrar, clerk, or servant, whether such thing was or was not necessary to the performance of such duties.











