

HUMAN RIGHTS COMMITTEE

Kavanagh v. Ireland

Communication No 819/1998

4 April 2001

CCPR/C/71/D/819/1998

VIEWS

Submitted by: Mr. Joseph Kavanagh (represented by Mr. Michael Farrell)

Alleged victim: The author

State party: Ireland

Date of communication: 27 August 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 April 2001,

Having concluded its consideration of communication No. 819/1998 submitted to the Human Rights Committee by Joseph Kavanagh, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 27 August 1998, is Mr. Joseph Kavanagh, an Irish national, born 27 November 1957. The author alleges breaches by the Republic of Ireland of article 2, paragraphs 1 and 3(a), article 4, paragraphs 1 and 3, article 14, paragraphs 1, 2 and 3, and article

26 of the Covenant. The Covenant and Optional Protocol entered into force for Ireland on 8 March 1990. The author is represented by counsel.

Background

2.1 Article 38(3) of the Irish Constitution provides for the establishment by law of Special Courts for the trial of offences in cases where it may be determined, according to law, that the ordinary courts are "inadequate to secure the effective administration of justice and the preservation of public peace and order". On 26 May 1972, the Government exercised its power to make a proclamation pursuant to Section 35(2) of the Offences Against the State Act 1939 (the Act) which led to the establishment of the Special Criminal Court for the trial of certain offences. Section 35(4) and (5) of the Act provide that if at any time the Government or the Parliament is satisfied that the ordinary courts are again adequate to secure the effective administration of justice and the preservation of public peace and order, a rescinding proclamation or resolution, respectively, shall be made terminating the Special Criminal Court regime. To date, no such rescinding proclamation or resolution has been promulgated.

2.2 By virtue of s. 47(1) of the Act, a Special Criminal Court has jurisdiction over a "scheduled offence" (i.e. an offence specified in a list) where the Attorney-General "thinks proper" that a person so charged should be tried before the Special Criminal Court rather than the ordinary courts. The scope of "scheduled offence" is set out in the Offences Against the State (Scheduled Offences) Order 1972 as encompassing offences under the Malicious Damage Act, 1861, the Explosive Substances Act, 1883, the Firearms Acts, 1925-1971 and the Offences against the State Act, 1939. A further class of offences was added by Statutory Instrument later the same year, namely offences under s.7 of the Conspiracy and Protection of Property Act 1875. The Special Criminal Court also has jurisdiction over non-scheduled offences where the Attorney-General certifies, under s.47(2) of the Act, that in his or her opinion the ordinary courts are "inadequate to secure the effective administration of justice in relation to the trial of such person on such charge". The Director of Public Prosecutions (DPP) exercises these powers of the Attorney-General by delegated authority.

2.3 In contrast to the ordinary courts of criminal jurisdiction, which employ juries, Special Criminal Courts consist of three judges who reach a decision by majority vote. The Special Criminal Court also utilises a procedure different from that of the ordinary criminal courts, including that an accused cannot avail himself or herself of preliminary examination procedures concerning the evidence of certain witnesses.

The facts as presented

3.1 On 2 November 1993, a serious and apparently highly-organised incident took place in which the chief executive of an Irish banking company, his wife, three children and a baby-sitter were detained and assaulted in the family home by a gang of seven members. The chief executive was thereafter induced, by threat of violence, to steal a very large amount of money from the bank concerned. The author admits having been involved in this incident, but contends that he himself had also been kidnapped by the gang prior to the incident and acted under duress and threat of violence to himself and his family.

3.2 On 19 July 1994, the author was arrested on seven charges related to the incident; namely false imprisonment, robbery, demanding money with menaces, conspiracy to demand money with menaces, and possession of a firearm with intent to commit the offence of false imprisonment. Six of those charges were non-scheduled offences, and the seventh charge (possession of a firearm with intent to commit the offence of false imprisonment) was a 'scheduled offence'.

3.3 On 20 July 1994 the author was charged directly before the Special Criminal Court with all seven offences by order of the Director of Public Prosecution (DPP), dated 15 July 1994, pursuant to s.47(1) and (2) of the Act, for the scheduled offences and the non-scheduled offences respectively.

3.4 On 14 November 1994, the author sought leave from the High Court to apply for judicial review of the DPP's order. The High Court granted leave that same day and the author had his application heard in June 1995. The author contended that the offences with which he was charged had no subversive or paramilitary connection and that the ordinary courts were adequate to try him. The author challenged the 1972 proclamation on the basis that there was no longer a reasonably plausible factual basis for the opinion on which it was grounded, and sought a declaration to that effect. He also sought to quash the DPP's certification in respect of the non-scheduled offences, on the grounds that the DPP was not entitled to certify non-scheduled offences for trial in the Special Criminal Court if they did not have a subversive connection. In this connection, he contended that the Attorney-General's representation to the Human Rights Committee at its 48th session that the Special Criminal Court was necessitated by the ongoing campaign in relation to Northern Ireland gave rise to a legitimate expectation that only offences connected with Northern Ireland would be put before the Court. He further contended that the decision to try him before the Special Criminal Court constituted unfair discrimination against him.

3.5 On 6 October 1995, the High Court rejected all of the author's arguments. The Court held, following earlier authority, that the decisions of the DPP were not reviewable in the absence of evidence of mala fides, or that the DPP had been influenced by improper motive or policy. In the Court's view, certifying non-scheduled offences of a non-subversive or non-paramilitary nature would not be improper. The Court concluded that a proper and valid decision was reasonably possible, and the certification was upheld. As regards the underlying attack upon the 1972 proclamation itself, the High Court considered that it was limited to examining the constitutionality of the Government's action in 1972 and the Court could not express a view on the Government's ongoing obligation under s.35(4) to end the special regime. The High Court considered that for it to presume to quash the proclamation would be to usurp the legislative role in an area in which the courts had no role.

3.6 Concerning the contention that the author was subject to a mode of trial different from those charged with similar offences but who were not certified for trial before the Special Criminal Court, the High Court found that the author had not established that such a difference in treatment was invidious. Finally the High Court held that no utterance by a representative of the State before an international committee could alter the effect of a valid law or tie the discretion of the DPP exercised pursuant to that law.

3.7 On 24 October 1995, the author appealed to the Supreme Court. In particular, the author contended that the 1972 proclamation was intended to deal with subversive offences and the remit

of the Special Criminal Court was never intended to encompass 'ordinary crime'. It was further argued that the Government was under a duty to review and revoke the proclamation as soon as it was satisfied that the ordinary courts were effective to secure the effective administration of justice and the preservation of public peace and order.

3.8 On 18 December 1996, the Supreme Court dismissed the author's appeal from the decision of the High Court. The Supreme Court held that the Government's decision in 1972 to issue the proclamation was essentially a political decision, and was entitled to a presumption of constitutionality which had not been rebutted. The Supreme Court held that both Government and Parliament were under a duty under s.35 of the Act to repeal the regime as soon as they were satisfied that the ordinary courts were again adequate for their tasks. Although the existence of the Special Criminal Court could in principle be judicially reviewed, the Supreme Court considered that it had not been shown that maintenance of the regime amounted to an invasion of constitutional rights in the light of evidence that the situation was being kept under review and the Government remained satisfied as to its need.

3.9 Following its earlier jurisprudence in The People (Director of Public Prosecutions) v Quilligan¹, the Supreme Court considered that the Act also allowed for the trial of "non-subversive" offences by the Special Criminal Court, if the DPP was of the view that the ordinary courts were inadequate. With the dismissal of the appeal, the author claims therewith to have exhausted all possible domestic remedies within the Irish justice system in respect of these issues.

3.10 After denial of a series of bail applications, the author's trial before the Special Criminal Court commenced on 14 October 1997. On 29 October 1997, he was convicted of robbery, possession of a firearm, to wit a handgun, with intent to commit an indictable offence, namely false imprisonment, and demanding cash with menaces with intent to steal. The author was sentenced to terms of imprisonment of 12, 12 and 5 years respectively, backdated to run concurrently from 20 July 1994 (the date from which the author was in custody). On 18 May 1999, the Court of Criminal Appeal dismissed the author's application for leave to appeal against his conviction.

The Complaint

4.1 The author claims that the DPP's order to try him before the Special Criminal Court violated the principles of fairness and full equality of arms protected by Article 14, paragraphs 1 and 3. The author complains that he has been seriously disadvantaged compared to other persons accused of similar or equal criminal offences, who unlike him were tried by ordinary courts and therefore could avail themselves of a wider range of possible safeguards. The author emphasises that in his case the trial by jury, as well as the possibility of preliminary examinations of witnesses, would be particularly important. The assessment of the credibility of several key witnesses would be the main issue of his case. Thus the author alleges to have been arbitrarily restrained and unequally treated in his procedural rights, since the DPP has not given any reasons or justification for his decision.

4.2 The author accepts that the right to be tried by jury and preliminarily to examine witnesses are not explicitly listed in article 14, paragraph 3, but states that the requirements of article 14, paragraph 3, only set out some but not always all requirements of fairness. He argues that the clear intention of the article as a whole is to provide significant safeguards that are equally available to

all. The author argues accordingly that these rights, which he states are key safeguards in the State party's jurisdiction, equally are protected by article 14.

4.3 The author further complains that the decision of the DPP pursuant to s.47 of the Act was issued without any reason or justification and thereby violated the guarantee of Article 14, paragraph 1, to a public hearing. The State party's highest court, the Supreme Court, had held in H v Director of Public Prosecutions² that the DPP cannot be compelled to give reasons for the decision, short of exceptional circumstances such as *mala fides* being shown. The author claims that a crucial decision in relation to his trial, namely the choice of procedure and forum, was made in secret and on the basis of considerations which were not revealed to him or to the public and which therefore were not open to any rebuttal.

4.4 Furthermore, the author alleges that the decision of the DPP violated the presumption of innocence protected by article 14, paragraph 2. He considers that the re-installation of the Special Criminal Court by the Irish government in 1972 was due to growing violence in Northern Ireland, with the intention to better insulate juries from improper influence and external interference. The author argues that the decision of the DPP involves a determination either that the author is a member of, or is associated with, a paramilitary or subversive group involved in the Northern Ireland conflict, or that he, or persons associated with him, are likely to attempt to interfere with or otherwise influence a jury if tried before an ordinary court. He also states that being detained until trial in these circumstances also involves a determination of some measure of guilt.

4.5 The author denies that he is, or ever was, associated with any paramilitary or subversive group. He argues that the decision of the DPP in his case therefore implies that he would have to be associated with the criminal gang responsible for the abduction on 2 November 1993, which would be likely to interfere with, or otherwise influence, the decision of a jury. The author denies his involvement in the criminal gang, which he sees as the main issue to be solved in the trial and which therefore could not be decided upon by the DPP in advance.

4.6 The author argues that the State party has failed to provide an effective remedy, as required by article 2. In the circumstances of his case, a decision raising clear issues under the Covenant has been made and is not subject to effective judicial remedy. With the Courts tying their own hands and restricting their scrutiny to exceptional, and almost impossible to demonstrate, reasons of *mala fides*, improper motives or considerations on the part of the DPP, it could not be said that an effective remedy existed. As the author does not contend any such exceptional circumstances exist, no remedy is available to him.

4.7 The author also alleges a violation of the principle of non-discrimination under Article 26, since he has been deprived, without objective reason, of important legal safeguards available to other accused persons charged with similar offences. In this regard, the author argues that the 1972 proclamation of the Irish government re-establishing the Special Criminal Court is a derogation pursuant to Article 4, paragraph 1, of certain rights protected by Article 14 of the Covenant. He states that the situation of growing violence in Northern Ireland leading to the government's decision has ceased and can no longer be characterised as a public emergency which threatens the life of the nation. The author argues that the continuing derogation from parts of the Covenant would therefore no longer be required. By maintaining the Special Criminal Court in existence, Ireland would be

in violation of its obligations under Article 4, paragraph 1.

4.8 Finally, the author alleges that Ireland has also breached its obligation under article 4, paragraph 3. He claims that by not renouncing its proclamation of 1972, Ireland has, at least by now, de facto or informally derogated from Article 14 of the Covenant without notifying the other State Parties to the Covenant as required.

The State party's observations with regard to the admissibility of the communication

5.1 The State party argues that the communication should be considered inadmissible under article 5, paragraph 2(b), of the Optional Protocol for failure to exhaust domestic remedies. At the time of submission, the author had not prosecuted his appeal against conviction to the Court of Criminal Appeal. The State party also argues that aspects of the present complaint had not been brought before the local courts at all. The State party contends that the author never argued in the domestic courts that he did not receive a public hearing, or that his constitutional right to be presumed innocent had been violated. The State therefore argues that those aspects are inadmissible. Annexed to its submissions, the State party does provide a 1995 decision of its highest court, the Supreme Court, which held that the DPP decision did not violate the presumption of innocence³. (In subsequent submissions, the State party admits that the issue of presumption of innocence was raised at both levels in the judicial review proceedings.)

5.2 The State party also argues at length that the author has enjoyed the full protection of the Covenant in relation to his arrest, detention, the charges against him and his trial. It further argues that various portions of the Covenant are inapplicable to the complaints, that the complaints are incompatible with the provisions of the Covenant, and that the complaints are insufficiently substantiated.

Author's comments on the State party's submissions on admissibility

6.1 In addition to responding to the State party's arguments on substantiation and applicability of the Covenant, the author comments on the exhaustion of domestic remedies. He indicates that he was pursuing an appeal against conviction and that such an appeal deals only with the evidence given at trial and the inferences to be drawn therefrom. He argues that the issues raised concerning the DPP certification and his unequal and unfair treatment were fully litigated, prior to his trial, all the way to the Supreme Court. In response to the State party's contentions that failure to receive a 'public' hearing and breach of the presumption of innocence were not raised before the domestic courts, the author declares that the substance of these claims was fully argued throughout the judicial review proceedings.

The State party's observations with regard to the merits of the communication

7.1 The State party declares that its Constitution specifically permits the creation of special courts as prescribed by law. The State party notes that, following the introduction of a regular Government review and assessment procedure on 14 January 1997, reviews taking into account the views of the

relevant State agencies were carried out on 11 February 1997, 24 March 1998, and 14 April 1999, have concluded that the continuance of the Court was necessary, not only in view of the continuing threat to State security posed by instances of violence, but also of the particular threat to the administration of justice, including jury intimidation, from the rise of organised and ruthless criminal gangs, principally involved in drug-related and violent crime.

7.2 The State party submits that the Special Criminal Court regime satisfies all the criteria set out in Article 14 of the Covenant. The State party notes that neither article 14, nor the Committee's General Comment on Article 14, nor other international standards require trial by jury or a preliminary hearing where witnesses could be examined under oath. The requirement, rather, is simply that the trial be fair. The absence of either or both of those elements does not, of itself, make a hearing unfair. Within many States, different trial systems may exist, and the mere availability of different mechanisms cannot of itself be regarded as a breach.

7.3 As to the author's allegation that his inability to examine witnesses preliminarily under oath violates Article 14 guarantees of fair trial, the State party emphasises that the parties were placed in the identical position, and therefore on an equal and level footing at the hearing. In any event, such a preliminary hearing serves simply to raise likely issues for cross-examination at trial and has no impact on the trial itself.

7.4 Concerning the author's argument that his rights were breached in that he was tried by a Special Criminal Court on 'ordinary' criminal charges, the State party argues that the proper administration of justice must be protected from threats which undermine it, including threats arising from subversive groups within society, from organised crime and the dangers of intimidation of jurors. In a case where such a threat to the integrity of the normal jury process exists, as the DPP had certified here, the accused's rights are in fact better protected by a bench of three impartial judges who are less vulnerable to improper external influence than a jury would be. The State party points out that an inadequacy of the ordinary courts, as to which the DPP must be satisfied before the Special Criminal Court can be invoked, may arise not merely from 'political', 'subversive' or paramilitary offences but also from "ordinary gangsterism or well financed and well organised drug dealing, or other situations where it might be believed that juries were for some corrupt reason, or by virtue of threats, or of illegal interference, being prevented from doing justice".⁴ The author's contention that his offence was not 'political' as such is therefore not a bar to the Special Criminal Court being invoked.

7.5 The State party argues that the author was also afforded all the rights contained in article 14, paragraph 3, of the Covenant. These rights are enjoyed by all persons before an ordinary criminal court in Ireland, but also by all before the Special Criminal Court pursuant to s.47 of the 1939 Act.

7.6 Concerning the author's allegation that he did not have a 'public' hearing as guaranteed by article 14, paragraph 1, because the DPP was not required to, and did not, give reasons for the decision certifying the ordinary courts as inadequate, the State party argues that the entitlement to a public hearing applies to the court proceedings, which in the Special Criminal Court too at all stages and at all levels were conducted openly and publicly. The right to a public hearing does not extend to the DPP's pre-trial decisions. Nor would it be desirable to require the DPP's decision to be justified or explained, for that would open up enquiries into information of a confidential nature with security

implications, would nullify the very purpose for which the Special Criminal Court was established and would not be in the overall public interest.

7.7 Regarding the author's allegation that his right to be presumed innocent in accordance with article 14, paragraph 2, was violated, the State party asserts that this presumption is a fundamental principle enshrined in Irish law, to which the Special Criminal Court must and does adhere. The same burden of proof must be discharged in the Special Criminal Courts as in the ordinary criminal courts, that is, proof of guilt beyond all reasonable doubt. If this burden was not met, the author would therefore be entitled to an acquittal.

7.8 The State party notes that the accused successfully challenged one offence at the commencement of trial, was acquitted in respect of three offences, and was convicted with respect to a further three. More generally, the State party observes that of 152 persons indicted before the Special Criminal Court between 1992 and 1998, 48 pleaded guilty, 72 were convicted, 15 were acquitted and 17 had *nolle prosequi* entered. With respect to the author's trial, the issue was raised before the Court of Criminal Appeal, which held that, on the totality of evidence, the presumption of innocence had not been violated.

7.9 The State party argues that, given that these elements as a whole demonstrate that the process applied by the Special Criminal Court process is fair and consistent with article 14 of the Covenant, the DPP's decision to try the author before that Court cannot be a violation of article 14.

7.10 As to the author's allegations concerning unequal and arbitrary treatment contrary to article 26, the State party contends that all persons are treated alike under the statutory regime set up in the Act. All persons are equally subject to the DPP's assessment that the ordinary courts may not be adequate to secure the effective administration of justice and the preservation of public peace and order. Further, the author was treated identically to anyone else whose case had been certified by the DPP. Even if the Committee regards a distinction to have been made between the author and other persons accused of similar or equally serious offences, reasonable and objective criteria are applied in all cases, namely that the ordinary courts had been assessed as being inadequate in the particular case.

7.11 The State party claims, contrary to the author's assertion, that its police authorities believe that the author was a member of an organised criminal group, and points to the gravity of the crimes, the highly planned nature of the criminal operation, and the brutality of the offences. Even though the author was in custody before trial, a risk of jury intimidation from other members of the gang could not be excluded. Nothing has been supplied to suggest that this assessment by the DPP was taken in bad faith, directed by improper motive or policy, or was otherwise arbitrary.

7.12 Finally, as to the author's allegations that the State party has not provided an effective remedy for violations of rights as required by article 2, the State party observes that its Constitution guarantees extensive rights to individuals and that a number of violations were alleged by the author and pursued in the courts, through to the highest court in the land. The courts fully addressed the issues placed before them by the author, accepting some of the author's contentions and rejecting others.

7.13 The State party also rejects as misplaced the author's argument that it is derogating, *de facto* or informally, from the Covenant, pursuant to article 4. The State party argues that article 4 permits derogation in certain circumstances, but the State is not invoking that right here and it is not applicable.

The author's comments upon the State party's observations with regard to the merits of the communication

8.1 In response to the State party's argument that there could have been a risk of jury or witness intimidation from other members of the gang, supporting the DPP's decision to try the author before the Special Criminal Court, the author states that at no time has the State party disclosed the DPP's reasons for that decision. Moreover, the DPP never argued at any bail application that there existed a risk of intimidation by the author. In any event, for the DPP to decide that the author or others in the gang would engage in such conduct – if indeed that was the reason for the decision – would be for the DPP to prejudge the outcome of the trial. Nor was the author given any opportunity to rebut the DPP's assumption.

8.2 Concerning the State party's assertion that the author was indeed a member of an organised criminal group, the author takes strong exception, observing that this is the first occasion the State party has ever made such an assertion. Indeed, at a bail application to the court the police specifically disclaimed any such link, and, during trial, no evidence to that effect was adduced beyond the evidence of participation in the offences themselves. In any event, the State party does not state whether this was the reason for the DPP's decision; if it was, that decision prejudged what was a trial issue.

8.3 Regarding the State party's specific submissions on article 14, the author points out the Committee's observation in its General Comment No. 13 that the requirements of paragraph 3 of article 14 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of hearing guaranteed by paragraph 1.

8.4 With regard to the Government reviews of the Special Criminal Court carried out in February 1997, March 1998 and April 1999, the author observes that these reviews were unannounced, that no input was invited from the public, NGOs or professional bodies, and that no information was given about who carried out the reviews or the detailed reasons why the Government decided that the Court remained necessary. Accordingly, the author argues that the reviews appear to be purely internal, with no independent content, and thus of no real value as a safeguard.

8.5 Regarding the State party's contention that the Court remains necessary due, *inter alia*, to the rise of highly organised criminal gangs, often involved in drug and violent crime, the author points out that the 1972 proclamation was clearly issued in the context of 'politically-inspired violence' and that successive Government statements, including some made to the European Court of Human Rights in 1980 and the Human Rights Committee in 1993,⁵ confirm this. No other reason for the Court's establishment could have existed. Any threat from modern criminal gangs is outside the scope of the 1972 proclamation, and a new proclamation would be needed to deal with that threat. In any event, many cases involving drug dealing and violence by gangs are dealt with in ordinary

courts, and there is no apparent reason why the author's case was treated differently from those others.

8.6 The author rejects the State party's contention that he was not disadvantaged by being denied a preliminary examination, as the prosecution was in the same position. The author states that the prosecution was able to deprive the author of that right, and did so after having already seen and interviewed the relevant witnesses, but the author was not able to deprive the prosecution of that right to a preliminary examination. Therefore, the author contends, there was no equality of arms.

8.7 Concerning the State party's assertion that there had been a "fair and public hearing", the author states that he does not argue that the trial proceedings themselves were not public, but that the DPP's decision, which was an integral and essential part of the determination of the charges, was not public. Nor was that hearing fair, for neither notice nor reasons were given, and there was no opportunity for rebuttal. Citing various decisions of the European Court of Human Rights⁶ which suggest that effective judicial review of decisions cannot be entirely negated by the invocation of security concerns, the author argues that in this case there was no real avenue for effective independent review. The courts had strictly limited their jurisdiction to examine the DPP's decisions.

8.8 As to the right to a be presumed innocent, the author argues that the DPP's decision to send him for trial before the Special Criminal Court was a part of the determination of the charges and that the DPP also is bound by this presumption. The DPP's decision, according to the author, effectively determined that the author was involved in a subversive organisation or was a member of the gang carrying out the kidnapping. The author argues that being sent for trial in the Special Criminal Court sent a signal to the Court that he was part of a dangerous criminal gang, and it is difficult to believe this factor had no influence on the outcome.

8.9 In response to the State party's arguments on equal treatment before the law, the author argues that the State party's contention that he was treated the same way as are others charged before the Special Criminal Courts, only means that he was treated in the same way as the small number of others who were tried before the Special Criminal Court but not like the majority of persons charged with similar offences, who were tried before the ordinary courts. In any event, most of the other 18 persons tried by special courts were charged with subversive-type offences. He was singled out to join this small group with no reasons given and with no effective means of challenging the decision to do so.

8.10 As to whether such differentiation is objective, reasonable and in pursuit of a legitimate aim under the Covenant, the author questions whether the continued use of the Court was appropriate in view of the sharp drop of paramilitary violence. Even if these procedures are a proportionate response to subversive activity, which the author does not concede, the question arises whether it is a legitimate response to non-subversive activity. The author argues that is impossible to determine whether the differentiation is reasonable and since the DPP's criteria are unknown and the DPP was responsible for the prosecution.

8.11 As to the State party's argument that it was not relying on its right to derogate from the provisions of the Covenant under article 4, the author submits that, while the State party had not

declared any state of emergency, the 1972 proclamation establishing the Special Criminal Court in effect introduced a measure appropriate only in an emergency. The author states that the condition for permissibility of such a measure - that is, a threat to the life of the nation - did not exist then and does not now. In any case, if the State party disclaims reliance on article 4, it cannot seek to justify its conduct under the exceptions there provided for.

Issues and proceedings before the Committee:

9.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant.

9.2 As required under article 5, paragraph 2(a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 As to the State party's contention that available domestic remedies have not been exhausted, the Committee notes that the pre-trial litigation on the DPP's decision was pursued through to the Supreme Court. Moreover, the author's appeal against conviction, raising trial issues affected by the DPP's decision, was rejected by the Court of Criminal Appeal. A complainant bringing the issues in question before the domestic courts need not use the precise language of the Covenant, for legal remedies differ in their form from State to State. The question is rather whether the proceedings in their totality raised facts and issues presently before the Committee. In the light of these proceedings, other controlling authority from the State party's courts and the absence of any suggestion that there are additional remedies available, the Committee accordingly finds that it is not precluded under article 5, paragraph 2(b), of the Optional Protocol from considering the communication.

9.4 With respect to the author's claims under article 2, the Committee considers that the author's contentions in this regard do not raise issues additional to those considered under other articles invoked, which are considered below. With respect to the alleged violation of article 4, the Committee notes that the State party has not sought to invoke that article.

9.5 As to the State party's remaining arguments on admissibility, the Committee is of the view that these arguments are intimately linked with issues on the merits and cannot meaningfully be severed from a full examination of the facts and arguments presented. The Committee finds the communication admissible as far as it raises issues under articles 14 and 26 of the Covenant.

Consideration of the merits:

10.1 The author claims a violation of article 14, paragraph 1, of the Covenant, in that, by subjecting him to a Special Criminal Court which did not afford him a jury trial and the right to examine witnesses at a preliminary stage, he was not afforded a fair trial. The author accepts that neither jury trial nor preliminary examination is in itself required by the Covenant, and that the absence of either or both of these elements does not necessarily render a trial unfair, but he claims that all of the circumstances of his trial before a Special Criminal Court rendered his trial unfair. In the

Committee's view, trial before courts other than the ordinary courts is not necessarily, *per se*, a violation of the entitlement to a fair hearing and the facts of the present case do not show that there has been such a violation.

10.2 The author's claim that there has been a violation of the requirement of equality before the courts and tribunals, contained in article 14, paragraph 1, parallels his claim of violation of his right under article 26 to equality before the law and to the equal protection of the law. The DPP's decision to charge the author before the Special Criminal Court resulted in the author facing an extra-ordinary trial procedure before an extra-ordinarily constituted court. This distinction deprived the author of certain procedures under domestic law, distinguishing the author from others charged with similar offences in the ordinary courts. Within the jurisdiction of the State party, trial by jury in particular is considered an important protection, generally available to accused persons. Under article 26, the State party is therefore required to demonstrate that such a decision to try a person by another procedure was based upon reasonable and objective grounds. In this regard, the Committee notes that the State party's law, in the Offences Against the State Act, sets out a number of specific offences which can be tried before a Special Criminal Court at the DPP's option. It provides also that any other offence may be tried before a Special Criminal Court if the DPP is of the view that the ordinary courts are "inadequate to secure the effective administration of justice". The Committee regards it as problematic that, even assuming that a truncated criminal system for certain serious offences is acceptable so long as it is fair, Parliament through legislation set out specific serious offences that were to come within the Special Criminal Court's jurisdiction in the DPP's unfettered discretion ("thinks proper"), and goes on to allow, as in the author's case, any other offences also to be so tried if the DPP considers the ordinary courts inadequate. 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.

10.3 The Committee considers that the State party has failed to demonstrate that the decision to try the author before the Special Criminal Court was based upon reasonable and objective grounds. Accordingly, the Committee concludes that the author's right under article 26 to equality before the law and to the equal protection of the law has been violated. In view of this finding with regard to article 26, it is unnecessary in this case to examine the issue of violation of equality "before the courts and tribunals" contained in article 14, paragraph 1, of the Covenant.

10.4 The author contends that his right to a public hearing under article 14, paragraph 1, was violated in that he was not heard by the DPP on the decision to convene a Special Criminal Court. The Committee considers that the right to public hearing applies to the trial. It does not apply to pre-trial decisions made by prosecutors and public authorities. It is not disputed that the author's trial and appeal were openly and publicly conducted. The Committee therefore is of the view that there was no violation of the right to a public hearing. The Committee considers also that the decision to try the author before the Special Criminal Court did not, of itself, violate the presumption of innocence contained in article 14, paragraph 2.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it

disclose a violation of article 26 of the Covenant.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The State party is also under an obligation to ensure that similar violations do not occur in the future : it should ensure that persons are not tried before the Special Criminal Court unless reasonable and objective criteria for the decision are provided.

13. Bearing in mind that, by becoming a party to the Optional Protocol, Ireland has recognised the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive, within ninety days, information from the Government of Ireland about the measures taken to give effect to the Committee's Views. The State party is requested also to give wide publicity to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be translated in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

* The following members of the Committee participated in the examination of the present communication: Nisuke Ando, Prafullachandra N. Bhagwati, Christine Chanet, Louis Henkin, Eckart Klein, David Kretzmer, Rajsoomer Lallah, Cecilia Medina Quiroga, Rafael Rivas Posada, Nigel Rodley, Martin Scheinin, Ivan Shearer, Hipólito Solari Yrigoyen, Ahmed Tawfik Khalil, Patrick Vella and Maxwell Yalden.

** The text of one individual opinion signed by five Committee members is appended to the present document.

Notes

¹ [1986] I.R. 495.

² [1994] 2 I.R. 589.

³ O'Leary v Attorney-General [1995] 1 I.R. 254.

⁴ Supreme Court, People (DPP) v Quilligan [1986] I.R. 495, 510.

⁵ Upon the consideration of the State party's initial periodic report, the State party's Attorney-General stated to the Committee that the Special Criminal Court "was needed to ensure the fundamental rights of citizens and protect democracy and the rule of law from the ongoing

campaign related to the problem of Northern Ireland". The State party registered the same point in its submissions in Holland v Ireland. (Communication 593/1994, declared inadmissible on 25 October 1996, CCPR/C/58/D/593/1994).

⁶ Tinnelly v United Kingdom (Case 62/1997/846/1052-3), Chahal v United Kingdom (Case 70/1995/576/662) and Fitt v United Kingdom (Appln. No. 29777/96, decided 16 February 2000).

**Individual opinion of Committee members
Louis Henkin, Rajsoomer Lallah, Cecilia Medina Quiroga,
Ahmed Tawfik Khalil and Patrick Vella**

1. While the complaint of the author can be viewed in the perspective of Article 26 under which States are bound, in their legislative, judicial and executive behaviour, to ensure that everyone is treated equally and in a non-discriminatory manner, unless otherwise justified on reasonable and objective criteria, we are of the view that there has also been a violation of the principle of equality enshrined in Article 14, paragraph 1, of the Covenant.

2. Article 14, paragraph 1, of the Covenant, in its very first sentence, entrenches the principle of equality in the judicial system itself. That principle goes beyond and is additional to the principles consecrated in the other paragraphs of Article 14 governing the fairness of trials, proof of guilt, procedural and evidential safeguards, rights of appeal and review and, finally, the prohibition against double jeopardy. That principle of equality is violated where all persons accused of committing the very same offence are not tried by the normal courts having jurisdiction in the matter, but are tried by a special court at the discretion of the Executive. This remains so whether the exercise of discretion by the Executive is or is not reviewable by the courts.

Louis Henkin [signed]

Rajsoomer Lallah [signed]

Cecilia Medina Quiroga [signed]

Ahmed Tawfik Khalil [signed]

Patrick Vella [signed]

[Done in English, French and Spanish, the English text being the original version. Subsequently to be translated in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]