

**Irish Council for Civil Liberties
An Comhairle um Chearta Daonna**

ICCL Briefing Paper

**Human Rights Compatibility of the Criminal Justice (Terrorist Offences) Bill
2002**

April 2003

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The ICCL

The Irish Council for Civil Liberties (An Chomhairle um Chearta Daonna) is an independent non-governmental organisation that works to promote and defend

human rights and civil liberties. It was founded in 1976 by, among others, Mary Robinson, Kader Asmal and Donal Barrington.

Since its foundation the ICCL has consistently campaigned in the sphere of criminal justice and emergency legislation. The ICCL has a number of previous publications on criminal justice legislation including position papers on the Criminal Justice (Public Order) Act 1994, the Criminal Justice Bill 1997 a submission to the Committee to Review the Offences Against the State Acts, 1939-98, and Related Matters, and a variety of material relating to the Special Criminal Court.

The ICCL has also been very active in a wide range of other human rights issues and constitutional reform campaigns and it has championed the rights of minorities including gay and lesbian rights, travellers' rights, women's rights, the rights of refugees and asylum-seekers.

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Introduction

As set out in the Explanatory Memorandum to the Bill as published, the **Criminal Justice (Terrorist Offences) Bill 2002** purports to

"[G]ive effect to a number of international instruments directed to terrorism and to meet commitments the State has undertaken as part of the European Union and the broader international community, including UN Security Council Resolution 1373 adopted in response to the events of September 11th, 2001".

The agreements that the bill gives effect to are the European Union Framework Decision on Combating Terrorism; the International Convention against the Taking of Hostages; the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomats; the International Convention for the Suppression of Terrorist Bombings; and the International Convention for the Suppression of the Financing of Terrorism.

The Memorandum also states that the Bill makes other more general amendments to "enhance the capacity of the State to address the problem of

international terrorism". In this regard the Bill includes a number of provisions directed at the financing of terrorism.

ICCL supports the efforts of the Irish Government to combat international terrorism. However, we also believe that all such measures must be proportionate and maintain proper respect and protection for fundamental principles of international human rights law including the right to association, the right to expression of political beliefs and the rights of all suspects in criminal proceedings to due process.

General Observations

Emergency/Counter-Terrorist Laws

Any counter-terrorism powers or emergency powers carry particular dangers for the protection of human rights. International and domestic experience of emergency powers has shown that the common characteristics of such laws are that they involve suspensions of the constitutional protections inherent in the ordinary criminal law of the State. It is a general principle of international human rights law that states of emergency or the use of emergency laws should be limited "exclusively to situations sufficiently serious to justify them, in order to avoid making the use of states of emergency commonplace and thus possibly perpetuating them" (see *Proceedings of UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 44th Session, August 1992*).

Assessing the human rights compatibility of such laws, then, involves the application of two closely connected tests: whether the powers in question are strictly necessary with a view to the threat posed to the security of the State and wider international security; and whether such measures are limited in time and application to the circumstances justifying their introduction. In answering these two questions, regard must be had not only to the stated purposes of such laws, but one must also look at the possible indirect impact the laws in question will have on other associated democratic rights.

The approach outlined above is the one that we have employed in assessing the current Bill. Before looking in detail at the provisions of the Bill we will also look at the context of the international agreements, which the Bill purports to implement, in particular the European Union Framework Decision on Combating Terrorism. We will also look at the context of existing emergency or counter-terrorist legislation in force in the State, with a view to analysing the necessity of introducing additional powers here.

Background of European Union Framework Decision on Combating Terrorism

Although the Bill involves giving effect to a number of international agreements in the area of international terrorism, by far the most significant of these in an Irish context is the European Union Framework Decision on Combating Terrorism. The United Nations agreements referred to in the Bill contain a much broader type of legal obligations on the Irish Government and, by their nature, afford a wide discretion on the national authorities of the State in their implementation. Furthermore, the specific obligations in the UN agreements in questions generally reflect measures that are already covered by Irish law, that is they do not contain any significant new undertakings.

The European Framework Decision, however, contains many novel and far-reaching provisions that impose an onerous legislative burden on the State. The Decision was formally adopted by the Council of the European Union on 13 June 2002, but it had already been approved by the Oireachtas in December 2001. There are three important aspects of the context of how the Decision came to be approved which give rise to concern.

The first area of concern arises from the nature of the legal instrument itself. Under the Treaty of the European Union, the Council of Ministers (the 15 Governments) can adopt Framework Decisions for the purpose of approximating the national laws of the Member States. The Decisions are not legally binding in themselves, but they are politically binding on the members and even though, in theory Framework Decisions are intended to afford discretion to national legislatures. Generally, Framework Decisions are widely considered to be a particularly undemocratic means of quasi-legislation, due to the weak role of the European Parliament in their drafting and enactment.

Secondly, the political climate in late 2001 was perhaps uniquely hostile to voicing civil liberties concerns about anti-terrorist legislation at an international level. The Decision was one of a number of measures that were proposed by the European Union in the aftermath of the attacks on the United States on 11 September 2001, in response to a letter from President Bush calling on the Union to enact anti-terrorist measures as a matter of urgency. At the time the original draft of the Decision was first discussed, on 21 September 2001, no Member State expressed serious reservations about the package of measures being put forward by the Commission. Similarly, when the Council of Ministers made the political agreement to adopt this Decision and the Decision on the European Arrest Warrant, at a special Justice and Home Affairs meeting in December 2001, it would be no exaggeration to say that these measures were rushed through in an unprecedented manner.

While the "September 11th" context is important, it would be misleading to think that the Governments of Member States had not contemplated the Framework

Decision having a wider application than one purely against international Islamic fundamentalism. The anti-globalisation protests in Genoa and Gothenburg were fresh in the minds of many Governments and the few civil liberties groups that were raising concerns about the possible impact of the Decision on political protest were not addressing a receptive audience. The Irish Government invoked a parliamentary reservation to the decision, which means that, unlike most Member States, the Oireachtas did have the opportunity to consider the Decision. However, the low level of scrutiny afforded to the Decision at the Council of Minister level was replicated at the national level where a cursory Dáil debate of just over an hour was deemed sufficient for considering a comprehensive international agreement.

Existing Irish Emergency Legislation

Since its establishment in 1976, ICCL has consistently monitored the use of emergency legislation in this jurisdiction, and called for its constant review for the purpose of determining whether its retention is necessary. On several occasions, international human rights institutions, both at the United Nations and the Council of Europe levels, have raised serious questions about the proportionality of Irish emergency powers legislation, including the Offences Against the State Acts. The UN Human Rights Committee has criticised many aspects of the continuing use of the non-jury Special Criminal Court and the arbitrary manner in which right to jury trial is denied to suspects in criminal trials, particularly where emergency legislation is applied to suspects in non-terrorist related cases.¹ The European Court of Human Rights held that section 52 of the Offences Against the State Act of 1939 violated the right to fair trial. The Court noted that the security and public order concerns relied on by the Government could not justify a provision which extinguished the very essence of the rights to silence and against self-incrimination, as the impugned provision did.²

As part of the provisions of the Belfast Agreement of 1998, the Irish Government undertook to review the continuing application of the Offences Against the State Act. In May 2002, the Hederman Review Committee, set up to look at the continuing operation of the Offences Against the State Acts, submitted its final report recommending a number of reforms. In the end the majority supported the retention of the Special Criminal Court. A minority of the committee, including its chair and number of leading constitutional lawyers, dissented on this central recommendation of the report and the majority view was also strongly criticised by human rights and civil liberties groups.

We further recall that in January of this year the Commissioner of the Garda Síochána, addressing the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights, stated that the Garda already had sufficient

powers to deal with the threat posed to the State by subversive or terrorist organisations.

In this context, ICCL believes that the introduction of additional emergency/counter-terrorist legislation is both unnecessary and unwarranted, and also constituted a direct affront to the principle of normalisation of criminal law and procedure contained in the Belfast Agreement of 1998.

Key Issues Arising from the Bill

1. Definition of Terrorist Activity

The definition of "Terrorist Activity" and "Terrorist-linked Activity" in Section 4 of the Bill corresponds to Article 1 of the Framework Decision, which says that each EU Member State must ensure that their national prohibition of terrorist offences covers:

"intentional acts which, given their nature and context, may seriously damage a country or an international organisation, as defined as offences under national law, where committed with the aim of:

- (i) seriously intimidating a population, or**
- (ii) unduly compelling a Government or international organisation to perform or abstain from performing any act, or**
- (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation"**

Although many States including Ireland have previously introduced specialist legislation dealing with terrorism or subversive organisation, it is notable that others, such as Sweden, have found the ordinary criminal law sufficient to deal with this category of crime. However, a general feature of European law, even in jurisdictions where a category of terrorist offences has been proscribed, has been the preference to list a number of serious crimes where international cooperation is desirable, in favour of an attempt to find a common definition of what constitutes terrorism.

The principal reason for the reluctance of legislatures such as ours to define the concept of terrorism is precisely because of the inherent difficulty in doing so. The experience of the United Kingdom in regard to the Terrorism Act 2000 and the Anti-Terrorism Crime and Security Act 2001 is illustrative of the potential dangers of an overly wide interpretation of the concept of political crime.³ It is remarkable, then, that Member States such as Ireland, which have traditionally balked from attempting to define terrorism (although the Offences Against the

State Act does give a narrow definition of terrorist organisation) would make such a fundamental shift in their approach to terrorism in a relatively unheralded fashion.

2. Terrorist Offences

Section 6.1 (a) of the Bill creates an offence of engaging in a terrorist activity inside the State or abroad. More significantly, Schedule 2 to the Act lists 32 offences that can constitute terrorist offences for the purposes of the Bill. Many of the offences are obvious (eg: murder). However, in line with Article 1.iii.e of the Framework Decision, the Schedule also includes offences such as criminal damage, malicious damage, a number of offences in relation to aircraft and vehicles, offences relating the obstruction of railways and maritime traffic, and forgery. This is in notable contrast to the UK Act, which, while its definition of what constitutes terrorism is somewhat broader than the Framework Decision, is limited to actions that involve "serious" personal violence, damage to property or risk to health and safety.

3. Impact on the Right to Protest

The combination of the wide definition of terrorism and the wide category of offences covered means that the impact of the Framework Decision and therefore of the Irish Act could potentially be much wider than a focussed application to 'classic' terrorist acts. Consider the following analysis of British NGO Statewatch in relation to the Framework Decision:

"The question that arises from this proposal to combat terrorism is whether it is solely intended to "combat terrorism" or does it have a wider purpose? Is it the intention to extend the definition of "terrorism" to cover demonstrations, protests and political dissent as well?"

The breadth of the definition is surprising if the proposal is intended to only combat terrorism.

1) The inclusion of the term "seriously altering...the political, economic or social structures" by "an individual or group" suggests a wider purpose is intended;

2) The inclusion in Article 3.f. of the "Unlawful seizure of or damage to state or government facilities, means of public transport, infrastructure facilities, places of public use, and property" (property covers public and private) could embrace a wide range of demonstration and protests - ...

3) The phrase in Article 3.h.: "endangering people, property, animals or the environment" could refer, for example, to animal right protests;

4) The inclusion in the "Penalties and sanctions" Article 5 of "community service, limitation of certain civil and political rights" and of fines suggests that the proposal might have a wider objective than dealing with terrorism. The seemingly soft end of the sentences and the deprivation of rights could see demonstrators being charged as "terrorists" and, for example, losing their vote.

The answer to these questions is spelt out in the "Explanatory Memorandum" [to the Framework Decision] accompanying the proposal. It says that Article 3 defining terrorist offences:

"could include, for instance, urban violence"

This would appear to confirm that the intention is to extend the definition of 'terrorism' "

4. Shift in Ordinary Burden of Proof

Section 6(5) includes a provision that where a person has committed an offence included in the schedule to the act, and there are "reasonable grounds" to assume that the act was committed for a what is considered a terrorist purpose, then the burden of proof would be on the accused person to show that his/her intention did not fall within the definition of terrorism contained in the Bill. This clause represents a fundamental shift in the ordinary criminal burden of proof.

Section 6(6) sets out the basis on which the assumption of terrorist intent set out in Section 6(5) will arise and the grounds are particularly wide, including the fact that the action complained of "caused or was likely to cause serious damage to a state or international organisation or ... major economic loss".

5. Extra-Territorial Effect of the Bill

Stephen Livingstone, of the Human Rights Centre Queens University Belfast, has also raised important questions about the effect of the Framework Decision, and hence the Bill, on persons involved in political protest or legitimate insurgency movements in other states. As Livingstone puts it:

"Few human rights lawyers in Europe are likely to argue that violence for political ends is legitimate in Europe, but some might well want to argue that such violence is legitimate to overthrow oppressive governments elsewhere. Indeed

European governments have accepted that this was legitimate in the case of Afghanistan and some appear to endorse the view that it is equally legitimate in the case of Iraq. The December text [the final draft of the Framework Decision] appears to characterize all such actions as terrorist and hence to leave it very much to the discretion of states which forms of such external terrorism they will prosecute and which they will not. It is unclear whether respect for human rights standards will play a role in any such decision."

The extra-territorial effect of the Bill, then, could well have serious implications for national liberation movements and civic society in oppressive and undemocratic states.

6. Financing of Terrorism

Section 13 of the Bill creates an offence of financing terrorism. The definition of what constitutes financing is again drawn in a wide fashion as covering any person who

"by any means, directly or indirectly, unlawfully and wilfully provides, collects or receives funds intending that they be used or knowing that they will be used, in whole or in part in order to carry out-

(a) an act that constitutes an offence under the law of the State and within the scope of ... any treaty that is listed in the annex to the Terrorist Financing Convention, or

(b) an act

i. that is intended to cause death or serious injury, and

ii. the purpose of which is, by its nature or context, to intimidate a population or to compel a government or an international organisation to do or abstain from doing an act.

In one sense, the definition of terrorism in this section is narrower than that prevailing in the other parts of the Bill, in that it is limited to offences causing death or serious injury. However, the wide construction of what constitutes financing, in particular the clauses that moneys given may be only partially used for this purpose and that funding can be indirect, could potentially criminalise a wide group of people with little direct link to the offences committed. For example, some commentators have posited the case of a Turkish citizen who makes a small donation to a pro-Kurdish political party asserting the right to self-determination of Kurds in the face of well-documented oppression by the Turkish authorities. One such party, the Kurdish Workers Party (the PKK) has a political wing but also a military wing which has been involved in direct action and terrorist acts⁴. Other Kurdish parties, have no paramilitary links, but have been repeatedly and cynically closed by the Turkish authorities allegedly for fronting the PKK.

This Bill could classify any citizen making a donation to such a party a funder of terrorism. Similarly, funding of Palestinian groups and even Irish republican groupings could be covered by the Bill if it is applied in a broad manner.

There is also no monetary limit contained in the Bill. Therefore "financing" includes all contributions, however small. It is inappropriate that a piece of legislation which creates such a serious offence as the funding of terrorism, should permit such broad definition of a crime and leave its potential application so wide and arbitrary.

7. Safeguards in the Framework Decision

The final draft of the Framework Decision includes a clause stating that the Decision "shall not have the effect of amending the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union." However, many commentators have pointed out that all Union agreements are automatically bound by Article 6 and consider that this clause is mainly rhetorical in nature.

However, a more significant clause appears in Recital 10 to the Framework Decision

"Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the freedom of assembly or association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate."

This position is supported by the addition of non-binding Declaration that was issued accompanying the Framework Decision, which stated that

"The Council declares that the framework decision on the fight against terrorism covers acts which are considered by all Member States of the European Union as serious infringements of their criminal laws committed by individuals whose objectives constitute a threat to their democratic societies respecting the rule of law and the civilisation upon which these societies are founded. It has to be understood in this sense and cannot be construed so as to argue that the conduct of those who have acted in the interest of preserving or restoring these democratic values, as was notably the case in some Member States during the Second World War, could now be considered as "terrorist" acts. Nor can it be construed so as to incriminate on terrorist grounds persons exercising their legitimate right to manifest their opinions, even if in the course of the exercise of such right they commit offences."

One notable element of the Irish Bill is that it does not include any clause specifically excluding legitimate political protest from the application of the Bill. Neither the recital nor the Declaration are reflected in the Bill and although the rights and freedoms protected by the Irish Constitution are of course superior to the proposed legislation, it is not at all clear how the Bill will be viewed by either the President or the Irish Courts, should questions as to its constitutionality be raised.

The ICCL also notes that the Bill does not provide for safeguards in respect of any time limit for the legislation, or a requirement that it be subject to regular review and periodic renewal by the Oireachtas. For example, the UK Anti-Terrorism Crime and Security Act 2001 must be renewed annually by Parliament. Such a provision would, as a minimum, seem to be required by international law, whereby derogations from normal legislation should be periodically reviewed to determine whether they are necessary and continue to be a proportionate response to an established and verifiable threat.

8. Associated JHA Developments

The Framework Decision must be seen in the context of other recent developments within the Justice and Home Affairs competence (known as the "Third Pillar") of the European Union. One associated measure of particular relevance is the development of a European Union Database on "suspected" protesters under the auspices of the Schengen Information System (SIS). Proposals are also currently being discussed to bring together all the national para-military police units to police protests and there is also an Action Plan, dating from July 13 2001 to place protestors under surveillance.

As Statewatch have commented, all of these proposals are "going ahead in an atmosphere where "policing" is contaminated by the ongoing "war on terrorism"."

The ICCL finds these developments invidious to the protection of the same core democratic values and civil liberties which real international terrorism threatens and undermines.

9. Conclusion

The ICCL urges the Irish Government and the Oireachtas as a whole to avoid the introduction of further special emergency/counter-terrorism legislation, in the absence of a clear and identifiable need for extra powers where the existing powers cannot address concrete and verifiable threats to the security of the State or international security. Only in the event where such a lacunae in the existing

legislation is established should the Oireachtas consider passing additional legislation, and then that legislation must be carefully tailored and drafted so that it meets the legitimate aim and cannot be used for a wider purpose in breach of the rule of law and human rights standards. Such legislation must be subject to periodic review and renewal to justify its necessity in line with the evidence of a threat to security.

The ICCL submits that the current Bill is neither necessary in light of existing powers to combat terrorism, nor does it contain the adequate safeguards required by international law.

Summary of Points

- Ireland already has extensive emergency/counter-terrorist legislation, which is sufficient if not excessive to deal with the threat of terrorism to the State.
- The effectiveness of specialised counter-terrorism legislation in combating the threat posed by terrorist organisations to national and international security is highly questionable.
- The Bill represents a wholly new approach to dealing with terrorism in an Irish context, namely in attempting to define terrorist offences, an approach that has been rejected here in the past. No valid reasons have been offered why.
- The Bill highlights the difficulties in relation to the undemocratic manner in which Justice and Home Affairs decisions, and in particular Framework Decisions are reached.
- The wide definition of what constitutes "terrorist offences" under the Bill, in conjunction with the wide category of offences that can be considered as terrorist offences are disproportionate to the objective of protecting national and international security from extremist international terrorist organisations.
- Due to the overly broad manner in which the Bill is drafted, its provisions constitute a serious threat to the right to political protest.
- The Bill contains no safeguards, as exist in the Declaration accompanying the European Framework Decision, protecting the civil rights of citizens to protest, to assembly and to political association.
- The Bill contains no safeguards with respect to periodic review of the need for retention of the legislation and its operation.

- The extra-territorial effect of the Bill may criminalise persons involved in legitimate liberation movements against oppressive regimes.
- The provisions relating to financing terrorism are drawn so broadly as to potentially cover persons making small donations to organisations with little direct link to the activities complained of.