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Politics and Poor Weather: How Ireland Sued the United Kingdom under the *European Convention on Human Rights*

by William A. Schabas* & Aisling O'Sullivan**

‘I wish to inform the House that an application concerning breaches in the Six counties by the British Government of the Convention for the Protection of Human Rights and Fundamental Freedoms is being lodged with the Secretary General of the Council of Europe this afternoon’, declared the late Paddy Hillery, Minister for Foreign Affairs, in the Dáil (lower house of Parliament) on 16 December 1971.¹ So began the *Ireland v. United Kingdom* case.² In light of recent releases of the Irish and British State papers, it is timely to examine the behind-the-scenes deliberations by both sides during the lengthy proceedings, which culminated in a celebrated judgment of the European Court of Human Rights in January 1978 that is still cited as authority for the interpretation of article 3 of the *European Convention on Human Rights*.³

This paper, which has been prepared as part of a larger research project, examines the deliberations of the Irish Government from the time internment in Northern Ireland was introduced, on 9 August 1971, to the submission of the application by the Irish

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¹ Dáil Debates, Volume 257, col. 2354-5 (16 December 1971).

² *Ireland v. the United Kingdom*, 18 January 1978, Series A, No. 25. See also *Ireland v. the United Kingdom*, (App. 5310/71) (1976) 19 Yearbook 512 (E.Comm.H.R.), p. 512 and *Ireland v. United Kingdom* (App. 5310/71 and 5151/72), (1972) 41 CD 3.

³ e.g., *Saadi v. Italy*, 28 February 2008, [Application no. 37201/06](#), para. 127.

government on 16 December of that year. It considers how the decision to submit an application to the European Commission of Human Rights became an increasing inevitability; and appears to have been recognised as such by British Prime Minister Edward Heath. With the decision of the British Government to establish the Compton Committee, in September 1971, the arena turned to bilateral consultations between Taoiseach (Prime Minister) Jack Lynch and British Prime Minister Edward Heath. When these broke down, the Irish Government let Heath know it was 'seriously considering' submitting an inter-State application. A final decision was taken by the Irish Cabinet on 30 November 1971 and the filed two weeks later.

Inter-State Petitions under the *European Convention on Human Rights*

Both Ireland and the United Kingdom were founding members of the Council of Europe, in 1949, and both countries were deeply engaged in the drafting of the *European Convention on Human Rights*.⁴ Ireland's foreign minister at the time, Seán MacBride, hoped to use the institution as a forum to advance the central theme in Irish foreign policy, the campaign against partition of the island, although he soon learned that there was little patience for the debate within a post-war Europe anxious to discourage manifestations of nationalism and to promote greater political and cultural cohesion.⁵ The two States ratified the *Convention* shortly after its adoption in November 1950.

In addition to setting out a catalogue of human rights norms, which was largely inspired by provisions in the *Universal Declaration of Human Rights*,⁶ the *Convention* also set out implementation mechanisms and provided for the creation of institutions where these could be invoked. Two bodies were to be established, the European Commission on Human Rights and the European Court on Human Rights.⁷ In a very general sense, the two had a hierarchical relationship, with applications going first to the

⁴ *European Convention on Human Rights*, (1955) 213 UNTS 221, ETS 5.

⁵ William Schabas, 'Ireland, the European Convention on Human Rights and the Personal Contribution of Seán MacBride', in John Morison, Kieran McEvoy & Gordon Anthony, eds., *Judges, Transition, and Human Rights*, Oxford: Oxford University Press, 2007, pp. 251-274.

⁶ GA Res. 217 A (III), UN Doc. A/810

⁷ *European Convention on Human Rights*, (1955) 213 UNTS 221, ETS 5, art. 19.

Commission and subsequently to the Court. The Commission was eventually abolished, in 1998, as part of a restructuring of the *Convention* organs.

Under the original *Convention*, the Commission and the Court were each authorised to consider individual petitions, although only if contracting States made a special declaration accepting jurisdiction in this regard. Ireland had the distinction of being the first State to accept the individual petition mechanism both to the Commission and the Court. Perhaps as a result, it was on the receiving end of the first case to come before the Court, in an application initiated by Seán MacBride himself, by then a private citizen.⁸

The *Convention* also allowed for inter-state applications. Under article 24, 'Any High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party.'⁹ Jurisdiction of the Commission to hear inter-State applications was an automatic consequence of ratification of the *Convention*, and in contrast with the situation of individual petitions, no supplementary declaration was required. Once the Commission had issued its report, the inter-State case could then be referred to the European Court of Human Rights by the Commission itself, or by one of the parties¹⁰ where both States had recognised the compulsory jurisdiction of the Court.¹¹ This was the situation for both Ireland and the United Kingdom.

The first inter-State applications were filed by Greece against the United Kingdom. They concerned repressive measures adopted by the British to suppress the independence struggle in Cyprus.¹² They were dropped as negotiations for Cypriot independence advanced. Austria filed an application against Italy concerning treatment of

⁸ *Lawless v. Ireland*, Series A, No. 3.

⁹ Following the entry into force of *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby*, ETS 155, in 1998, the provision has been renumbered as article 33.

¹⁰ *European Convention on Human Rights*, (1955) 213 UNTS 221, ETS 5, art. 48. The provision was repealed by *Protocol No. 11*.

¹¹ *Ibid.*, art. 46. The provision was repealed by *Protocol No. 11*.

¹² *Greece v. United Kingdom* (App. No. 176/56), (1955-1956-1957) 1 *Yearbook of the European Convention on Human Rights* 128; *Greece v. United Kingdom* (App. No. 176/56), (1958-59) 2 *Yearbook of the European Convention on Human Rights* 186. Also: *Greece v. United Kingdom* (App. No. 299/57), (1958-59) 2 *Yearbook of the European Convention on Human Rights* 178. On the Greek applications, see: A.W. Brian Simpson, *Human Rights and the End of Empire, Britain and the Genesis of the European Convention*, Oxford: Oxford University Press, 2001, pp. 924 ff.

the German-speaking minority in the Alto Adige.¹³ Applications were also filed against Greece by several European States following the military coup d'état in 1967,¹⁴ but they were struck from the list following the return of democracy to Greece in 1974.¹⁵ Until the Irish case, however, no application was considered by the Commission and then adjudged by the European Court of Human Rights. Indeed, until the *Cyprus v. Turkey* case, in 2001,¹⁶ the Irish case remained the only inter-State proceeding before the European Court of Human Rights since its establishment in 1959.

Irish Policy Before Internment Was Introduced

The Northern Ireland policy of the Fianna Fáil Government of Jack Lynch underwent significant alternation between 1968 and 1971. The traditional call for the end to partition and the reunification of the 'national territory', as espoused in articles 2 and 3 of the 1937 Constitution,¹⁷ was combined with co-operation on certain economic matters with Northern Ireland administrations prior to the outbreak of the Northern Ireland 'troubles' in the late 1960s. While more limited co-operation continued, the Irish Government modified its anti-partitionist policy somewhat to accommodate its declared support for the civil rights movement. In a January 1969 speech, Jack Lynch referred to the need for reform to end discrimination directed at the Catholic minority, while

¹³ *Austria v. Italy (Pfunders case)* (App 788/60), (1961) 4 *Yearbook* 116 (ECommHR). Following the hearing of witnesses and an oral hearing, the Commission prepared a report which it submitted to the Committee of Ministers in May 1963. It concluded that Italy had not violated the *Convention*, a finding that was upheld by the Committee of Ministers. The Commission had the authority to propose referring the case to the Court, but because Italy had not accepted the compulsory jurisdiction of the Court, this would ultimately be dependent upon its consent. The Commission decided not to propose referring the case to the Court. See: *Austria v. Italy (Pfunders case)* (App 788/60), (1963) 6 *Yearbook* 740 (ECommHR).

¹⁴ *Denmark, Norway Sweden and the Netherlands v. Greece (First Greek case)* (App. 3321/67, 3322/67, 3323/67 and 3344/67), (1968) 12 *Yearbook* 690 (EurCommHr).

¹⁵ (1977) 6 DR 6.

¹⁶ *Cyprus v. Turkey*, No. 25781/94, ECHR 2001-IV. A preceding inter-State application concluded with a friendly settlement. See *Denmark v. Turkey*, No. 34382/97, ECHR 2000-IV.

¹⁷ Article 2 of the 1937 Constitution stated that 'the national territory consists of the whole island of Ireland, its islands and the territorial seas'. Article 3 declared that 'pending the re-integration of the national territory....the laws enacted by that Parliament shall have the like area and extent of application as the laws of *Saorstát Éireann* and the like extra-territorial effect'. Both provisions were amended by the constitutional referendum in 1998, which confirmed commitments in the Belfast Agreement. Article 3 now explicitly recognises a united Ireland brought by peaceful means with the consent of the majority of the people, democratically expressed, in both jurisdictions on the island.

speaking very limitedly of co-operation. This signalled a distancing from the Stormont administration in Belfast, which increased as the 'Troubles' intensified. During the period of 1969-1970, Minister of External Affairs¹⁸ Frank Aiken increasingly adopted a policy of pressuring London to take more control over Northern Ireland.¹⁹

Initially, a significant problem in developing a clear policy response to the outbreak of the 'Troubles' was the lack of information. The Irish Government's on-the-ground sources were practically non-existent until Eamonn Gallagher began reporting on his discussions with members of the Northern Ireland Civil Rights Association.²⁰ Many of the Department of Foreign Affairs files, relating to the period 1969, are predominantly composed of 'newspaper clippings and transcripts of radio and television broadcasts'. There appears to have been an 'unhealthy dependence on the media for information'.²¹ The former Irish Ambassador to the United States, Seán Donlon, has wryly observed that at the time the Irish government was better informed on the situation in Nigeria, with weekly reports relayed to Dublin from the Irish embassy in Lagos, than it was on the situation in Belfast in 1968-70.²²

In 1970, a schism within Fianna Fáil concerning its Northern Ireland policy brought the Government close to disintegration. The hard line views of Minister for Agriculture Neil Blaney were in complete contrast with the moderate position of Frank Aiken. With Aiken's departure from Cabinet in 1969, Michael Kennedy has argued, the aggressive Northern Ireland policy advocated by Blaney had no opponent.²³ In response to the violence of August 1969 in the aftermath of the Apprentice Boys parade in Derry, the Irish Government ordered the Defence Forces to establish relief hospitals along the

¹⁸ The Department of External Affairs was renamed the Department of Foreign Affairs in 1971.

¹⁹ Michael Kennedy, *Division and Consensus: The Politics of Cross-border Relations in Ireland 1925-1969*, Dublin: Institute of Public Administration, 2000, pp. 319-320.

²⁰ Ronan Fanning, 'Playing it Cool: The Response of the British and Irish Governments to the Crisis in Northern Ireland 1968-1969', (2001) 12 *Irish Studies in International Affairs* 57, at p. 80. Eamonn Gallagher, whose roots were in Donegal, went privately to Belfast on the 15 August 1969 'to have a look'. He subsequently reported his impressions in a note to the Secretary of the Department, Hugh McCann, who responded by calling Gallagher to his office to state that 'nobody has ever done this before, why don't you keep it up?' *Ibid.*

²¹ *Ibid.*, at p. 60.

²² Interview of Seán Donlon by Aisling O'Sullivan, 8 February 2007.

²³ Michael Kennedy, *Division and Consensus: The Politics of Cross-border Relations in Ireland 1925-1969*, Dublin: Institute of Public Administration, 2000, p. 328.

border²⁴ and Lynch made a televised address calling for a United Nations peacekeeping force. Somewhat later, Aiken's replacement as foreign minister, Paddy Hillery, campaigned to put the situation in Northern Ireland on the agenda of the United Nations Security Council.²⁵ After a period of some ambiguity on the subject, Lynch eventually affirmed that the Irish government would seek unity by consent through peaceful means. He pledged that Dublin would act as the 'second guarantor' of the Catholic minority community in Northern Ireland, the United Kingdom being the first guarantor.²⁶

Operation Demetrius and the Introduction of Internment

Internment was introduced by a wide arrest operation entitled Operation Demetrius, which took place around 4.30 am on Monday 9 August 1971.²⁷ Arrests were conducted by the British Army, with the Royal Ulster Constabulary officers 'very occasionally' acting as guides.²⁸ Some 450 names were on lists prepared by the Royal Ulster Constabulary but only 342 people were actually arrested.²⁹ Taylor records that 3,000 British troops took part in the arrest operation.³⁰ The detainees were taken to either Crumlin Road jail in Belfast or the prison ship, the Maidstone, in Belfast harbour.³¹

²⁴ Kennedy records Lynch commenting later that the military measures were really a 'smokescreen' relieving pressure on him within the Cabinet. *Ibid.*, at p. 342.

²⁵ See generally Con Cremin, 'Northern Ireland at the United Nations: August-September 1969', (1980) 1 *Irish Studies in International Affairs* 2; Noel Dorr, '1969: A United Nations peacekeeping force for Northern Ireland?', in Michael Kennedy and Deirdre McMahon, eds., *Obligations and Responsibilities: Ireland and the United Nations, 1955-2005: Essays Marking Fifty Years of Ireland's United Nations Membership*, Dublin: Institute of Public Administration, 2005.

²⁶ Enda Staunton, *The Nationalists of Northern Ireland 1918-1973*, (Columbia Press, 1973), p274.

²⁷ For the British government's account of internment, see the 'Compton Report': Home Office, *Report of the Enquiry into Allegations Against the Security Forces of Physical brutality in Northern Ireland arising out of events on 9th August 1971*, London: Her Majesty's Stationery Office, 1971 Chapter IV, para. 32. See also: Amnesty International, *A Report on Allegations of Ill-treatment Made by Persons Arrested under the Special Powers Act after 8th August 1971*; John McGuffin, *Internment*, Dublin: Anvil Books Ltd., 1973.

²⁸ 'Compton Report', Chapter IV, para. 32.

²⁹ *Ibid.*, Chapter II, para. 6. This is generally acknowledged as the number of people arrested. However, some accounts differ between 337 and 346. See: John Huston, ed., *Brian Faulkner: Memoir of a Statesman*, London: Weidenfeld and Nicolson, 1978, p. 123, T. Ryle Dwyer, *Nice Fellow: A Biography of Jack Lynch*, Dublin: Mercier Press, 2001.

³⁰ P. Taylor, *Brits: The War Against the IRA*, London: Bloomsbury, 2001, p. 67. See also: John Huston, ed., *Brian Faulkner: Memoir of a Statesman*, London: Weidenfeld and Nicolson, 1978, p. 120.

³¹ 'Compton Report', Chapter IV, para. 38.

Military intelligence and the RUC Special Branch subjected eleven detainees to 'interrogation in depth'.³² This included the application of what became known as the 'five techniques'. These combined wall-standing, hooding, sleep deprivation, bread and water diet and subjection to continuous white noise³³ repeatedly (for a varying number of hours at a time) over a number of days.³⁴

The response to internment was a 'terrible' violence.³⁵ By the end of the day on 9 August, two soldiers and eight civilians had died in rioting in Derry, Strabane, Armagh and Newry.³⁶ In Belfast, Protestant and Catholic families alike abandoned their homes; some setting fire to them as they left.³⁷ It was estimated that 7,000 Catholics fled across the border to five camps set up by Irish Defence Forces on 9 August.³⁸ On the same day, the Social Democratic Labour Party, Nationalist and Republican Labour parties called for the withholding of rates and rent. This became known as the civil disobedience campaign.³⁹

The decision to introduce preventive detention or detention without trial obviously impacted critically on the political situation. In light of Northern Ireland Prime Minister Brian Faulkner's impending announcement of the introduction of internment,⁴⁰ Heath had sent a secret telegramme to Lynch.⁴¹ Heath referred to a meeting with Faulkner the previous week.⁴² Faulkner had told Heath and his advisers that internment was 'now the right, and indeed inevitable, course'.⁴³ Heath cited the latest Irish Republican Army atrocities coupled with the organisation's declared intention to escalate the violence as an indication that internment, 'however abhorrent', was essential in order to ensure

³² *Ibid.*, Chapter VI, para. 44.

³³ *Ibid.*, para. 47.

³⁴ *Ibid.*

³⁵ Jonathan Bardon, *A History of Ulster*, Belfast: Blackstaff Press, 1992), p. 682.

³⁶ *Ibid.* See also Richard Deutsch and Viven Magowan, *Northern Ireland (1968-1971): A Chronology of Events*, Vol. 1 (1968-71), Belfast: Blackstaff Press, 1973, p. 119.

³⁷ *Ibid.*

³⁸ *Ibid.* Deutsch and Magowan recorded that some returned to Belfast as the camps were ill-equipped to deal with the numbers.

³⁹ Richard Deutsch and Viven Magowan, *Northern Ireland (1968-1971): a chronology of events*, Vol. 1 (1968-71) (Blackstaff Press, Belfast, 1973), p119.

⁴⁰ John Huston, ed., *Brian Faulkner: Memoir of a Statesman*, London: Weidenfeld and Nicolson, 1978, p. 121.

⁴¹ DFA 2003/17/304.

⁴² John Huston, ed., *Brian Faulkner: Memoir of a Statesman*, London: Weidenfeld and Nicolson, 1978, p. 119.

⁴³ DFA 2003/17/304

economic and social stability in Northern Ireland. The British Government considered the internment measure to be a speedier solution to the escalating violence than existing security measures, which would only result in a long haul and would be worse for the community in the long term.⁴⁴ The subsequent surge of violence in the aftermath of the introduction of internment proved this to be a total miscalculation.

Heath then turned to tempering Irish reaction. He stated that the British Government had insisted that it would only accept internment and instruct British forces to implement it if parades and marches were completely banned for at least six months. Equally 'we have however made clear our view that the measures taken should not discriminate as between the different sections of the community'.⁴⁵ He acknowledged that the decision carried dangers as well as advantages (for both Westminster and Stormont) and had implications and dangers for the Irish government, but, he argued, if Ireland had taken the decision to intern in the Republic, he could have used this as 'an inducement to Faulkner to hold his hand'.⁴⁶ This was an implicit reference to the British Government consideration that the security situation in Northern Ireland stemmed from the unsecure 'border' and consequently, IRA enclaves in the Republic.

It seems that Ireland had indeed, several months earlier, considered a policy of internment in response to an 'allegation' of impending IRA violence. On 4 December 1970, the Irish Government announced had that, according to reliable information obtained by An Garda Síochána, 'secret armed conspiracy exists [...] to kidnap one or more prominent persons', including 'plans to carry out armed bank robberies which the police believe may well involve murders or attempted murders'.⁴⁷ In response the Government proclaimed the bringing into operation until further notice of Part II of the *Offences against the State (Amendment) Act 1940*,⁴⁸ which provides for preventive detention or 'internment'.⁴⁹ As a result, places of detention were to be prepared immediately. The Secretary-General of the Council of Europe was to be informed that the

⁴⁴ *Ibid.*, p. 2.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, p. 3.

⁴⁷ DFA 2001/42/2. Statement from Government Information Bureau, 4 December 1970. See generally Dermot Keogh, *Twentieth Century Ireland: Nation and State*, New York: St. Martin's Press, New York, p. 314.

⁴⁸ *Ibid.*

⁴⁹ Section 4, Part II of the *Offences against the State (Amendment) Act 1940*, Act No 2 of 1940.

measures could involve derogation from the *European Convention on Human Rights*.⁵⁰ Article 15(1) of the *European Convention on Human Rights* authorises States to derogate from their obligations in the case of war or an emergency threatening the life of nation. The issue was to be kept 'low key', according to the memorandum of a meeting involving the Legal Adviser to the Department of Foreign Affairs Mahon Hayes, Seán Morrissey and Taoiseach Jack Lynch. The letter to the Secretary-General would be signed by the Permanent Representative to the Council of Europe, Mary Tinney, who was to indicate orally to the Secretary-General that the letter was not a formal notice of derogation but that this would follow if derogation became necessary.⁵¹

The archives record the following:

In reply to a general comment by the Taoiseach [Jack Lynch] wondering whether we are perhaps not over-zealous in adhering to the letter of our international obligations, I [Mahon Hayes] said that, in the present case, our Department felt that it had to make known its view that it was doubtful whether a derogation from the Convention for the reasons indicated would stand up in the eyes of the international community. Furthermore, any intention to move away from our obligations under the Convention would inevitably have a reaction in the North and also in domestic political opinion. This was however, only one facet of the overall problem. The Government have also to take other considerations into account in the exercise of their right and duty to govern.⁵²

In this context, the State papers also indicate that at about the same time the Irish Government had also considered withdrawing from the *European Convention on Human Rights* altogether, something authorised by article 65.⁵³ In a letter written in November 1971, Mahon Hayes, who was Legal Adviser to the Department of Foreign Affairs, noted he was 'summoned home hurriedly' in the second half of November 1970 to participate in discussions on a proposal that Ireland should denounce the *European Convention on Human Rights*.⁵⁴ No document narrating these discussions could be found in the papers of the Taoiseach, Justice or Foreign Affairs departments. However, it seems probable that

⁵⁰ DFA 2001/42/2. Statement from Government Information Bureau, 4 December 1970.

⁵¹ DFA 2001/42/2. Secret Note from Hugh McCann, 7 December 1970.

⁵² *Ibid.*

⁵³ There has been only one denunciation of the Convention, by Greece, in 1969. See: *Denmark, Norway and Sweden v. Greece*, (1970) 13 *Yearbook of the European Convention on Human Rights* 108, at p. 120. There have occasionally been suggestions of denunciation by States concerned about evolving interpretations of the *Convention*. The idea has been suggested that they could denounce the *Convention* and then accede to it again, but with a reservation aimed at neutralising the troublesome precedent.

⁵⁴ DFA 2004/7/1936. Handwritten letter from Mahon Hayes to Declan Quigley, undated.

they were conducted deep in the background of the consideration of derogation. Ultimately, internment was never used in the Republic of Ireland; probably as the kidnapping operation did not materialise.⁵⁵ Ironically, as observed by Mahon Hayes in his letter to Declan Quigley, rather than turn on the *European Convention*, through derogation or even denunciation, Ireland instead would soon invoke its provisions in the famous application filed against the United Kingdom.

Public Initiatives to Prompt Government Action

Among the State papers released by the Department of Foreign Affairs are letters documenting correspondence between Seán MacBride,⁵⁶ who was then chair of the executive of Amnesty International, and Jack Lynch, commencing on the 9 August 1971. MacBride had written to inform Lynch of an option open to the Government, ‘in case this option had not already been drawn to your attention by your advisers’, whereby Ireland could refer to the European Commission of Human Rights ‘any alleged breach of the provisions of the Convention’ by another party to the Convention under article 24.⁵⁷ MacBride referred to the unlawful killing of [X] and ill-treatment of [Y]⁵⁸ by British forces on 7 August 1971 as acts that were not subject to derogation.⁵⁹ The contents of this letter were disclosed by MacBride on the RTE 1.30 pm news the same day,⁶⁰ which Seán Ronan of the Department of Foreign Affairs described as putting the Taoiseach somewhat

⁵⁵ Dermot Keogh, *Twentieth Century Ireland: Nation and State*, New York St. Martin's Press, 1995, p. 314. Keogh refers to an interview on 4 January 1971 with the Tanáiste (Deputy Prime Minister, Erskine Childers, who stated that 80% of the population would support the introduction of internment.

⁵⁶ See: Catriona Lawlor, ed., *Seán MacBride: That Day's Struggle A Memoir 1904-1951*, Dublin: Curragh Press, 2005 and Elisabeth Kane, *An Irish Statesman and Revolutionary: The Nationalist and Internationalist Politics of Seán MacBride*, London Tauris Academic Studies, 2006.

⁵⁷ DT 2002/8/493. Letter from Seán MacBride to the Taoiseach Jack Lynch, 9 August 1971.

⁵⁸ The names of the two individuals in question have been redacted pursuant to section 8(4) of the *National Archives Act* (1986).

⁵⁹ DT 2002/8/493. Notice of derogation, required by article 15(3) of the *Convention*, was transmitted by the United Kingdom to the Secretary-General of the Council of Europe on 27 June 1957 and again on 25 September 1969. On 25 August 1971, further notice was given of the decision to introduce internment. It was described as within the strict exigencies of the situation, the legal conditions for measures taken pursuant to a derogation in the time of war or emergency threatening the life of the nation.

⁶⁰ Compare: ‘MacBride’s call to Lynch: a case for the Human Rights Court’, *Evening Press*, 10 August 1971.

'out of court'.⁶¹ MacBride's letter provoked a wave of correspondence from private citizens, non-governmental organisations and relatives of victims of ill-treatment to the Department of the Taoiseach calling for the government to bring proceedings before the European Commission of Human Rights in Strasbourg.⁶²

Among the initial correspondence, the Northern Ireland Civil Rights Association wrote: '....having been confronted with daily evidence of gross violations of human rights committed by the British Army in Belfast and in other parts of the North of Ireland, request your Government, as a matter of grave urgency, to institute proceedings on behalf of the victims concerned against the Government of the UK under the provisions of Article 24 of the European Convention of Human Rights'.⁶³ Correspondence throughout the month of August included a telegramme received from Bernadette Devlin, MP for Mid-Ulster and a member of the Northern Ireland Civil Rights Association, demanding the 'immediate initiation of case against British Government at Strasbourg [...] failing action by you we will contact the next closest Government posing as friendly'.⁶⁴ A letter from Brian Brady of the Association of Legal Justice, co-signed by 22 persons and accompanied by numerous witness statements, 'earnestly' requested that the Taoiseach and the Government refer the matter 'urgently' under article 24 of the Convention.⁶⁵

Assisting the Department of the Taoiseach in delivering a response to MacBride, the Department of Foreign Affairs Legal Section drafted a memorandum analysing the jurisprudence of the European Commission of Human Rights.⁶⁶ The main focus was the application of the issue of exhaustion of domestic remedies, a requirement set out in article 26 of the *Convention*,⁶⁷ with respect to inter-State complaints submitted pursuant

⁶¹ DT 2002/8/493. Letter from Seán Ronan, Department of Foreign Affairs to Hugh O'Dowd, Department of the Taoiseach, 10 August 1971. This letter enclosed the legal opinion of the Legal Adviser to the Department of Foreign Affairs, Mahon Hayes, and a copy of the Convention and Protocol No. 1 thereto.

⁶² DT 2002/8/494.

⁶³ DT 2002/8/493. Letter from the NICRA to the Taoiseach, 15 August 1971.

⁶⁴ *Ibid.* Telegramme from Bernadette Devlin, 18 August 1971.

⁶⁵ *Ibid.* Letter from 20 persons (Belfast) to the Taoiseach, 20 August 1971.

⁶⁶ DT 2002/8/493. Letter from the DFA's Legal Section to Assistant Secretary, Seán Ronan, 10 August 1971.

⁶⁷ Article 26 of the original text of the *Convention* states that 'the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken'. It has been replaced by article 35 following entry into force of *Protocol No. 11*.

to article 24. The requirement that domestic remedies be exhausted as a condition for admissibility of an application is based upon the principle that a State must first be given the opportunity to resolve the problem before international litigation begins.⁶⁸ The Legal Section acknowledged that although there had been 'some doubt' regarding its application in the past, the European Commission of Human Rights had ruled⁶⁹ that article 26 applied to inter-state applications.⁷⁰ This would require the dependents of the two victims whose names MacBride had proposed, [X] and [Y], to exhaust local remedies under United Kingdom law. Early acknowledgement was made to the 'weightiest factor' being political considerations, which was not a matter for the Legal Section.⁷¹

The final draft of the Taoiseach's reply contended that the government was 'of course, aware of the provisions of the Convention', but said there were 'some not inconsiderable legal difficulties arising from other provisions of the Convention, including Article 26'.⁷² Accordingly, coupled with the probability, even if successful, of lengthy proceedings, the Government 'do not consider that it would be advisable, at least at the present, to pursue the course of action you have suggested'.⁷³ In response, MacBride said the Taoiseach had not been 'correctly advised' regarding article 26, which only applied to individual petitions under article 25, invoking case law of the European Commission in support.⁷⁴ But contrary to MacBride's contention, these cases indeed required the exhaustion of local remedies as a precondition for admissibility of an inter-State application to the European Commission. MacBride further argued that, while there might be a delay before the final judgment, he thought that the submission of a complaint against the United Kingdom, in relation to breaches of articles 2 (right to life) and 3

⁶⁸ Francis Jacobs, *The European Convention on Human Rights*, Oxford: Oxford University Press, 1975, pp. 235 ff.; Jonathan Charney, 'Is International Law Threatened by Multiple International Tribunals?', (1998) *Receuil des cours* 101, pp. 285-303.

⁶⁹ *Austria v. Italy (Pfunders case)* (App 788/60), (1961) 4 *Yearbook* 116 (ECommHR).

⁷⁰ It was Declan Quigley of the Attorney General's Office who suggested this tactic in replying to MacBride's letter. See DFA 2004/7/1936.

⁷¹ DT 2002/8/493.

⁷² *Ibid.*

⁷³ DT 2002/8/493. Letter from the Taoiseach to Seán MacBride, 12 August 1971.

⁷⁴ DT 2002/8/493. Letter from Seán MacBride to the Taoiseach Jack Lynch, 13 August 1971, citing *Austria v. Italy (Pfunders case)* (App 788/60), (1961) 4 *Yearbook* 116 (ECommHR); *Denmark, Norway Sweden and the Netherlands v. Greece (First Greek case)* (App. 3321/67, 3322/67, 3323/67 and 3344/67), (1968) 12 *Yearbook* (ECommHr).

(prohibition of torture and inhuman and degrading treatment or punishment), would have ‘immediate effect on the behaviour of its forces in the Six counties’, particularly given the likelihood of a fact-finding mission by a sub-Commission to compile evidence, which would in itself have an ‘important and immediate effect’.⁷⁵ MacBride urged Lynch to take steps ‘in any event...as a matter of top priority’ to compile the evidence required to mount such proceedings in case a positive decision would be taken by the government in the near future.⁷⁶ In a jibe at the government departments, he contended that the most difficult aspect of collecting such evidence would be establishing a team for the task, given the potential for ‘our rather inefficient and lethargic Departments’ not to do the task as completely as necessary.⁷⁷ Lynch replied to the letter, reiterating the Government’s interpretation of the European Commission jurisprudence but adding that the whole question was ‘under the closest surveillance’.⁷⁸

The draft response to the Northern Ireland Civil Rights Association was slightly more positive.⁷⁹ It reiterated the line adopted in the correspondence to Seán MacBride, but added that the Government had organised for the examination and assessment of the ‘evidence available to them to date’, and that the Northern Ireland Civil Rights Association might wish to forward evidence in its possession.⁸⁰ Explaining the approach in the draft response for the Taoiseach’s office, Foreign Affairs acknowledged that this presented an ‘official indication’ of giving the question of submitting an application serious consideration but that the Minister for Foreign Affairs considered that ‘we should not back away from this question while at the same time not committing ourselves to proceed’.⁸¹

While the Department of Foreign Affairs remained publicly both non-committal and non-dismissive on the question of mounting an inter-State case, the concept gradually

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* Letter from the Taoiseach to Seán MacBride, 24 August 1971. The letter was drafted by Declan Quigley, Attorney General’s Office.

⁷⁹ The files do not contain a copy of the final letter that would have been sent, only the draft prepared by the Department of Foreign Affairs. It is possible that the final version differs from the letter available in the archives.

⁸⁰ *Ibid.* Letter from the Private Secretary to Department of Foreign Affairs to the Private Secretary to the Taoiseach, 30 August 1971.

⁸¹ *Ibid.*

insinuated itself into discussions between Irish and British officials. The first meeting between the two governments was on 11 August 1971. The Minister of Foreign Affairs, Patrick Hillery, met the British Home Secretary and Acting Prime Minister in Edward Heath's absence, Reginald Maudling, in London. Hillery charged the British Government with adopting a strategy which could lead to civil war. He urged political initiatives resulting in minority participation in governing Northern Ireland, leading to eventual reunification, both of which required the end of internment as the necessary and urgent precursor. Maudling argued that Stormont was the 'democratically elected' assembly, that the internment strategy sought to remove the 'gunmen' and that progress on the political level could ensue after the violence had been contained.⁸²

The following day, 12 August 1971, Jack Lynch launched a lengthy public attack on the Stormont Government.⁸³ He argued that the violent reaction to internment was not surprising and that the Irish Government supported the nationalist minority community in bringing the 'misgovernment' in Northern Ireland to an end. He called for recognition that the Stormont Government in Northern Ireland was directed at the suppression of the civil and human rights of the minority and it was clear that its Government's main concern was to meet the demands of the most extreme members of its administration. He argued that the reform programme had been delayed and distorted and called for the replacement of the Stormont administration with a power-sharing administration, distributing power equally between nationalist and unionist constituencies.⁸⁴ The Northern Ireland Prime Minister Brian Faulkner was outraged. He described Lynch's statement as 'extraordinary' in its general tone and language and considered it debatable whether it was compatible with 'a decent relationship between neighbouring States'. He took the statement as evidence that constructive dialogue with the Irish Government was now impossible.⁸⁵

On 19 August, while Heath and Faulkner met in London, Lynch sent another telegramme to Heath, which he also made public. He argued that the events subsequent to

⁸² DFA 2002/19/427. Report of Meeting at Home Office on 11 August 1971 between the Minister for Foreign Affairs and Mr. Maudling, Acting Prime Minister, signed Donal O'Sullivan, Irish Ambassador to Britain, 13 August 1971.

⁸³ DT 2002/8/487. Telegramme from Jack Lynch to Edward Heath, 12 August 1971.

⁸⁴ DFA 2003/16/463.

⁸⁵ DFA 2001/43/1436. Statement issued by the Northern Ireland Prime Minister Brian Faulkner, 13 August 1971.

the introduction of internment demonstrated the failure of internment as a solution to the crisis, which now required political initiatives. He stated that if internment continued, he would support the policy of passive resistance adopted by the nationalist minority. In the alternative, he was open to a meeting of all interested parties aimed at designing the necessary political framework, 'without prejudice to the aspiration of the great majority of the Irish people to the re-unification of Ireland'.⁸⁶

Heath sent a thundering reply, which he also published. He charged that Lynch's telegramme was 'unjustifiable in its contents, unacceptable in its attempt to interfere in the affairs of the United Kingdom and can in no way contribute to the solution of the problems of Northern Ireland'. He argued that equality and non-discrimination were the avowed policy of his Government and that the military operations were a defensive response to 'armed terrorists many of whose activities originate in the Republic'.⁸⁷ While he welcomed Lynch's views given that he was the head of a friendly government, Lynch could not participate in meetings relative to the political development of the United Kingdom. Heath criticised Lynch's decision to support the civil disobedience campaign as 'calculated to do maximum damage to the co-operation between the communities in Northern Ireland'.⁸⁸

Dublin's 'Secret Report' – the Investigation

Meanwhile, the Irish Government had begun to take practical steps with the perspective of preparing an inter-State application against Britain at the European Commission of Human Rights. On 12 August, only a few days after internment was introduced, Seán Donlon, Ireland's Consul General in Boston, received a phone call from Hugh McCann, who was Secretary of the Department of Foreign Affairs.⁸⁹ McCann asked a series of pointed question clearly gauged to establish Donlon's previous relationship with Northern Ireland. The responses established that he had neither family

⁸⁶ DT 2002/8/487.

⁸⁷ DFA 2003/16/463. Telegramme from Edward Heath to Jack Lynch, 20 August 1971.

⁸⁸ *Ibid.*

⁸⁹ He was apparently nicknamed 'Canny McHugh' by his colleagues. See: Ronan Fanning, 'Playing it Cool: The Response of the British and Irish Governments to the Crisis in Northern Ireland 1968-1969', (2001) 12 *Irish Studies in International Affairs* 57, at p. 79.

nor friends in Northern Ireland nor could recall ever having visited, to which McCann replied; 'you are just the man we want'.⁹⁰ Donlon was instructed to return immediately to Dublin for an assignment expected to last no more than six to eight weeks. On arrival at Dublin Airport, he was met by a Department colleague who handed him the keys to a hired car. He was told that the Department of Foreign Affairs had received considerable information over the past two days on how internment had been introduced and wanted to establish a clear and more precise picture. Consequently, Donlon was to travel immediately to Belfast and begin what amounted to a clandestine investigation by an Irish diplomat on the territory of a foreign State. Donlon was given strict instructions by the Department of Foreign Affairs not to make any contact with subversive organisations on either the nationalist or loyalist side. Eventually, the British government became aware of Donlon's movements and formally complained to the Department of Foreign Affairs. The British noted that Donlon was not officially accredited and that as a result the British government could not guarantee his safety in Northern Ireland.⁹¹

Donlon was instructed to begin by meeting Paddy Devlin, who was one of the Social Democratic Labour Party leaders in Belfast. Devlin had been one of the main sources of information for the Department of Foreign Affairs and would elaborate on narratives coming out of the detention centres. Devlin provided Donlon with an outline of the arrest operation and its aftermath and some of the detail on the narratives coming from detention centres.⁹² Devlin referred him to Brian Brady, at the time a teacher in St. Joseph's College of Education. Immediately after the introduction of internment, Brady had begun to accumulate what Donlon described as 'half sheets of paper' on internees.⁹³ These accounts had been collected from the relatives of detainees, after their visits to detention centres, and from those released within the first 48 hours of the 9 August arrest operation. Donlon later described Brady's assistance as 'extremely helpful' for the Department's investigation⁹⁴ and he estimated that he was responsible for identifying 'about two-thirds of the material' for the case before the European Commission.⁹⁵

⁹⁰ Interview of Seán Donlon by Aisling O'Sullivan, 8 February 2007.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ DFA 2002/19/398. Memo to Eamonn Gallagher from Seán Donlon, 21 December 1971.

⁹⁵ Interview of Seán Donlon by Aisling O'Sullivan, 8 February 2007.

Furthermore, Brady had assisted greatly in obtaining 'very urgent last minute jobs' in the immediate advance of submitting the application.⁹⁶

Brady introduced Donlon to the Association for Legal Justice.⁹⁷ It had established a clinic, operating virtually around the clock, to enable people to lodge complaints.⁹⁸ The documented complaints were made available to Donlon only after it had been established exactly who he was working for. There was a moratorium for two or three days while certain people were consulted as to whether he should be given the material. At the time, Donlon suspected that the Association of Legal Justice leaned in the direction of the Irish Republican Army. In the context of his instructions, he recalled being 'exceptionally careful' in accessing the information he received from it.⁹⁹

Gradually, Donlon widened his network of sources. He was referred to Tom Conaty, of the Central Citizens Defence Committee, an amalgamation of street, parish and community defence groups established to defend against physical attacks on members of the community or destruction of property.¹⁰⁰ As a co-ordination network of community groups, Donlon considered the Committee to be a 'good route' into establishing what was happening in various areas of Belfast. Donlon found it necessary to elicit the services of solicitors to assess the accuracy of the documents he had accumulated from Brady and others. Some of the accounts appeared 'so outlandish that I was not inclined to accept it', especially information on the men subjected to the 'five techniques'. Donlon dealt principally with Christopher Napier, brother of the Alliance party leader Oliver Napier, and Pascal O'Hare. For material and expertise on the Northern Ireland legal system, he sought the advice of a young barrister, Charlie Hill.¹⁰¹ Hill was later appointed legal adviser in the proceedings at Strasbourg. Donlon was also referred to physicians to whom internees had turned to on their release. By and large, he

⁹⁶ *Ibid.*

⁹⁷ It was established in April 1971 to 'secure legal justice for the minority in Northern Ireland'. Donlon explained that the Association of Legal Justice was particularly active after internment in bringing attention to the treatment of detainees and in challenging internment through the courts. He referred to the fact that the Amnesty International and Compton inquiries relied heavily on the material collected by the Association of Legal Justice. See DFA 2002/19/398. Memo to Eamonn Gallagher from Seán Donlon, 21 December 1971.

⁹⁸ Interview of Seán Donlon by Aisling O'Sullivan, 8 February 2007.

⁹⁹ *Ibid.*

¹⁰⁰ On the work of the organisation, see: W.D. Flackes, *Northern Ireland: A Political Directory 1968-1979*, New York: Gill and Macmillian, 1980, p. 38.

¹⁰¹ *Ibid.*

had found the doctors to be 'very helpful'. In essence, this network of local community leaders and professionals acted for him in his investigation as both the sources of the evidence and a means for assessing its credibility. As the evidence accumulated, he considered that it signalled the existence of numerous detention centres with selective interrogation techniques being applied, all of which appeared to be scientifically constructed.¹⁰²

After about two weeks, Donlon travelled to other places in Northern Ireland indicated by his Belfast sources, such as Tyrone, Fermanagh and finally Derry. In the majority of cases, he would first see the local Social Democratic Labour Party member, such as Austin Currie in Dungannon, Ivan Cooper in Strabane and John Hume in Derry. Subsequently, he would meet and interview people who had been arrested.¹⁰³ Donlon had once been a clerical student in Maynooth, which was then the National Seminary for the entire island; including the parishes in Northern Ireland. Maynooth at that time was an 'enclosed semi-monastic situation', which of course meant that members of a class of 105 seminarians all knew each other well. Donlon had subsequently changed careers, joining Ireland's diplomatic service, but some of his classmates were working as curates in parishes all over the island. During his 1971 mission, Donlon would introduce himself at the parochial house, where he might well know the curate personally. Otherwise, he would cite his time as a clerical student in Maynooth, in order to, in most cases, foster trust and network further.¹⁰⁴

Discussions with local priests were always covert. Many were anxious not to be seen to be involved in political activity. Nevertheless, this network assisted Donlon in establishing whom to contact. It was also as a source of information on the locality and the family connections and background of the detainees. Particularly outside Belfast and the main centres, this network was an indispensable asset in amassing information to supplement the witnesses' narratives. Although he understood the expertise of local journalists, who possessed a wealth of valuable information on the locality, Donlon was unable to tap into this source of information for risk of exposing his identity and the reason for his presence in Northern Ireland. There was one exception. He approached the

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

legendary 'Insight Team' from the *Sunday Times*, investigative reporters who were travelling throughout Northern Ireland talking to political figures, community leaders, doctors, solicitors and other journalists. Of the unofficial contemporaneous inquiries, Donlon considered their investigative journalism to be the only competitor in terms of the depth of material collected. He would swap information with the *Sunday Times* reporters, although their mandate, to address the entire political crisis in Northern Ireland, was much broader than his own.¹⁰⁵

Advice on Strasbourg, and on Allowing 'further little time'

In preparation for the 24 August Cabinet meeting, a relatively positive legal opinion on applying to the European Commission was drafted by the Legal Adviser to the Department of Foreign Affairs, Mahon Hayes, most probably in consultation with Declan Quigley of the Attorney General's Office, and his legal assistant in the Department, Charles Lysaght.¹⁰⁶ It was dominated by the issue of exhaustion of domestic remedies. Reference was made to the first Cyprus case, in the 1950s, in which the European Commission referred to the inapplicability of the rule in the case of an application regarding the compatibility of legislative or administrative practices with the rights under the *Convention*.¹⁰⁷ However, it appears that a focus on the issue of 'administrative practice', which is required within the context of a 'compatibility' application, did not arise until a later stage in the legal analysis. The doctrine of an 'administrative practice' has two conditions; a repetition of acts and an official tolerance of this pattern or practice.¹⁰⁸ Another relevant exception to the rule was the requirement that only effective remedies need be exhausted. This follows the general international legal rule regarding insufficient, inadequate or illusory remedies, but Hayes cautioned that it would be 'fairly narrowly construed'.¹⁰⁹ The other relevant exception was the existence of 'special

¹⁰⁵ See Sunday Times Insight Team, *Ulster*, London: Penguin, 1972.

¹⁰⁶ DFA 2002/20/7. Minute of Hugh McCann to the Minister, Dr. Hillery, 23 August 1971, Annexed memorandum.

¹⁰⁷ *Ibid.*, p. 2.

¹⁰⁸ *Greece v. United Kingdom* (first Cyprus case) (App.176/56), (1956-57) 2 *Yearbook* 182 (ECommHR).

¹⁰⁹ DFA 2002/20/7. Minute of Hugh McCann to the Minister, Dr. Hillery, 23 August 1971, Annexed memorandum.

circumstance's preventing the exhaustion of effective remedies. It applies where remedies are not exhausted for fear of repercussions.

Hayes said that an allegation of breaches of the Convention would be successful *only* if it related to article 3 of the *Convention* and was based on individuals who were internees, for whom convincing evidence of torture or inhuman or degrading treatment was available and for whom no domestic remedy exists, and who had availed themselves unsuccessfully of the review of detention by the Advisory Committee.¹¹⁰ His forecast proved to be clairvoyant. The central tenet of the August 1971 assessment, namely the success solely with respect to breaches of article 3 of the *European Convention on Human Rights*, prohibiting torture, and inhuman or degrading treatment or punishment, mirrors the findings in the 1976 report of the European Commission of Human Rights and the 1978 judgment of the European Court of Human Rights. But Hayes also said his views should not preclude submissions on other breaches of the *Convention*. Although such allegations were likely to be dismissed 'probably at an early stage', they would be of value in describing the general atmosphere of contempt for human rights, increasing the probability of success in the 'main cases' and putting pressure on the British 'to live up to their responsibilities'.¹¹¹

The discussions on the question were already being fuelled by witness statements that Sean Donlon was sending back from Northern Ireland. Hugh McCann advised Hillery that the government decision on going to Strasbourg and its timing should be governed by the 'probable' consequence on British policy, given the requirement to persuade the British, rather than the Stormont parliament, on a course of action in the North. McCann contended that Heath was already questioning his recent policy decisions, an implicit reference to internment, as well as his 'intemperate message' to the Taoiseach. He considered that an agreement to establish an inquiry into allegations of brutality was evidence of Heath's 'second thoughts'.¹¹² McCann wrote: 'I would favour affording some *further little time* to show evidence of a change of heart before taking any overt steps which would drive him [Heath] into obduracy – given his reputed

¹¹⁰ *Ibid.*, p. 2.

¹¹¹ *Ibid.*, p. 3.

¹¹² DFA 2002/20/7. Minute of Hugh McCann to the Minister, Dr. Hillery, 23 August 1971.

stubbornness'¹¹³. McCann stressed that this affording of 'further little time' did not preclude the collection of evidence, which he described as 'desirable', nor the attempts by victims to seek legal remedies available in local courts.¹¹⁴

In the meantime, Irish officials were under growing pressure from representatives of civil society. In a private meeting on 23 August involving Mahon Hayes and other foreign ministry officials, the Chairman of the Northern Ireland Civil Rights Association, Frank Gogarty, expressed frustration when the lawyers insisted upon the importance of the exhaustion of domestic remedies rule.¹¹⁵ Hayes explained that nothing would be gained if an application was dismissed on a matter of procedure. Gogarty responded: 'Action must be urgent; Britain must be brought to account; must prevent reoccurrence.' He argued that if there is an injustice done, there is a moral obligation owed, which is above politics and it is the duty of a government to act. Sean Ronan, who was Assistant Secretary to the Department, countered: '[T]he government will have to have a reasonable chance of success.'¹¹⁶ On the same day, the Taoiseach met a delegation of Northern Ireland MP's and Senators. When the issue of internment was discussed, Lynch's response was to ask the delegation to assist in having evidence of brutality supplied to the government, where possible by way of affidavit.¹¹⁷ He also reminded them of the difficulties in bringing cases to the European Commission unless all local legal remedies were first exhausted.¹¹⁸

When the Cabinet met on 24 August, it was agreed that the Minister for Foreign Affairs should make representations to British authorities for an immediate impartial inquiry into treatment of internees. However, the British authorities were also to be informed that failing the establishment of an independent inquiry, the government would feel obliged to consider bringing the matter of treatment of internees before the European Commission of Human Rights.¹¹⁹ The Irish ambassador to Britain, Donal O'Sullivan, was

¹¹³ *Ibid.* (emphasis added).

¹¹⁴ *Ibid.*

¹¹⁵ DFA 2004/7/1936. Handwritten notation of meeting, noting only the principal statements of each of the meeting's delegates.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ DT 2002/8/487. Confidential Memo on meeting, held on 23 August 1971, between the Taoiseach, Ministers for Foreign Affairs, Labour, Finance Education and the delegation of Northern Ireland MP's and Senators. Memo, p. 2.

¹¹⁹ DT 2002/8/487. Cabinet Minute 'Situation in Six counties', 24 August 1971.

despatched to make representations to the British authorities. He met with Sir Thomas Brimelow, Deputy Under-Secretary of State at the Foreign and Commonwealth Office, on 25 August. He informed Brimelow that the Irish government wanted an independent inquiry whose composition should be non-British and whose terms of reference should be sufficiently wide to include not only the allegations of 'brutality' by the security forces but also the accusations of civilian killings by British forces.¹²⁰

The British were 'taken aback' when O'Sullivan stated that the Irish Government was considering whether to submit a case to the European Commission of Human Rights. Ambassador O'Sullivan stated that his government was under great pressure to do so. As he understood the law, derogations to articles 2 and 3 of the *European Convention* were not possible, even in the case of State emergencies. The British officials conveyed the 'strong hope' that the Irish government would 'wait on events' before deciding to go to Strasbourg. O'Sullivan thought the British were 'reasonably certain' that the allegations were 'grossly exaggerated'. In fact, the British were practically convinced that the Irish government was 'backing a loser' if it thought the charges of brutality were well-founded. Ambassador O'Sullivan described the tone of the meeting as 'completely friendly throughout' and he had the impression that the Foreign Office wanted to be 'as reasonable and conciliatory as possible'. He was told that Heath had ordered urgent action, and that General Tuzo, Head of the British forces in Northern Ireland, was anxious that an inquiry should proceed as urgently as possible. According to Ambassador O'Sullivan, the Irish government was 'pushing an open door'.¹²¹

On 31 August 1971, the British Home Secretary Reginald Maudling informed the House of Commons of the establishment of a Committee of Inquiry headed by Sir Edmond Compton, Ombudsman for Northern Ireland. It did not have an international chairman, and its sessions were held in camera to protect the personal safety of the security personnel. Its legitimacy was challenged by the Northern Ireland Civil Rights Association, and nearly all of the detainees decided against co-operation with it. When Heath and Lynch met at Chequers on 6 September, Lynch told the British Prime Minister

¹²⁰ NAI DFA 2004/7/1936. Letter from D. O'Sullivan to Assistant Secretary Seán Ronan. See also NAI DT 2002/8/493. Letter from Hugh McCann to D. O'Sullivan, 18 October 1971; DFA 2003/17/30. Minute entitled 'British Committee of Inquiry into allegations of brutality' (undated).

¹²¹ *Ibid.*

that the Compton Inquiry had been 'badly received'.¹²² Clearly, there should have been an international Chairman and detainees should be legally represented. But Heath countered that he had been most careful in determining the composition of the commission of inquiry, and that Compton was 'above reproach or suspicion'. Heath said that private hearings were necessary to avoid a 'public jamboree'.¹²³

Lynch dropped the threat of internationalising the allegations of ill-treatment. He stated that his government was under 'strong pressure from the Opposition and minority representatives' to initiate proceedings before the European Commission of Human Rights. He told Heath that a complaint could be made on a number of grounds, notably articles 2 and 3 of the *European Convention*. He doubted derogation from the *European Convention of Human Rights* could be justified, because the life of the nation could not be threatened by the situation in Northern Ireland, as a corner of the United Kingdom. It is intriguing that issues of international human rights law of some technical complexity were being debated by senior political figures. The stronger argument, for Lynch, was the prohibition of derogation set out in article 15(2) with respect to articles 2 and 3, even in the case of a 'public emergency threatening the life of the nation'. If Heath had been on his toes, he might have reminded Lynch that the Irish Government had itself successfully invoked derogation barely a decade earlier with respect to the situation in Northern Ireland in the first case to come before the European Court of Human Rights.¹²⁴

Three weeks later, Heath and Lynch held another meeting at Chequers. Lynch again attacked the interment policy, noting that the Compton Committee was unacceptable to the minority in Northern Ireland. He said he was 'satisfied that there is a case for going to the Court of Human Rights under article 2 and 3 of the Human Rights Convention and he added that he is under very strong pressure to take action in this regard'. Heath responded that the Compton Committee was working 'speedily and effectively'.¹²⁵ He personally believed that 'much of the talk about ill-treatment was no more than understandable propaganda by the internees'.¹²⁶

¹²² *Ibid.*

¹²³ DFA 2003/13/6. Report of the Irish Ambassador to Britain, Donal O'Sullivan, 9 September 1971.

¹²⁴ *Lawless v. Ireland*, Series A, No. 3.

¹²⁵ DFA 2003/13/7. Taoiseach's meeting with British Prime Minister Heath-Chequers II, 27 and 28 September 1971. Report of Discussion.

¹²⁶ *Ibid.*, p. 33.

Turning to the Lawyers

Sean Donlon returned to Dublin in mid-September 1971 with 'literally sack loads of material' which he delivered to Declan Quigley in the Office of the Attorney General.¹²⁷ While Quigley was analysing the material, Attorney General Colm Condon sent junior barrister Aidan Browne to assist Donlon in assessing whether there was a 'sustainable case'. He was to gauge if the witnesses could stand up to what, in all probability, might be strenuous cross examination in Strasbourg. Browne travelled with Donlon to Belfast to interview proposed witnesses.¹²⁸ In order to gain entry to Crumlin Road Jail and conduct the interviews, Donlon accompanied solicitor Pascal O'Hare, claiming to be his apprentice, while Browne went in with solicitor Charlie Hill, claiming he was a student at the Northern Ireland bar.¹²⁹

These prison visits were subsequent exposed in the Irish media. Under the headline 'Dublin gets secret report on torture', the *Irish Press* explained that the allegations against the British Army were being examined by the Irish government through the offices of Aidan Browne. The article recounted that a 'comprehensive dossier' of individual cases alleging 'brutality, torture and brain-washing' of people detained in the North by British troops and members of the Royal Ulster Constabulary was being compiled by the Irish government following 'a secret week-long visit to the North by Mr. Aidan Browne'. It referred to Browne's visit to Crumlin Road Jail to interview internees and emphasised the fact that the investigations were being conducted 'without any consultation with the Stormont authorities and [...] without their knowledge'.¹³⁰

Browne reported his general findings to the Attorney General who, in turn, as far as Eamonn Gallagher was aware, advised the Taoiseach that the investigations demonstrated a 'sustainable case'.¹³¹ There is no record in the State Archives of a memorandum to Jack Lynch from the Attorney General; it must be among the Attorney

¹²⁷ Interview of Seán Donlon by Aisling O'Sullivan, 8 February 2007.

¹²⁸ DFA 2002/19/427. Minute by Eamonn Gallagher, 23 November 1971.

¹²⁹ *Ibid.*

¹³⁰ 'Dublin Gets Secret Report', *Irish Press*, 30 October 1971.

¹³¹ DFA 2002/19/427. Minute by Eamonn Gallagher, 23 November 1971.

General's Office papers, which have yet to be released. However, a minute from Charles Lysaght, Assistant Legal Adviser to the Department of Foreign Affairs, refers to the Attorney General's advice to the Taoiseach, adding that it was given 'without any consultation with our Legal Section'.¹³² As a response, the government decided that there was enough evidence to justify constituting a legal team.¹³³ In addition to Declan Quigley of the Attorney General's Office, and Mahon Hayes and Charles Lysaght of the Section in Foreign Affairs, Attorney General Colm Condon retained a number of barristers including Anthony Hederman, who was later a Justice of the Supreme Court, and John L. Murray, the current Chief Justice of the Supreme Court.

The Department of Foreign Affairs also drew upon the expertise of Professor Robert Daly, who had recently returned from the United States to take up appointment as Professor of Psychiatry at University College Cork. Daly accompanied Donlon to Northern Ireland to meet some of the released internees but also fellow professionals.¹³⁴ An English psychiatrist, who was an expert on interrogation techniques, was also consulted.¹³⁵ Donlon recalls that this combined expertise led the government's investigation to establish, 'probably' by October, that the interrogations were not a question of physical assaults on internees but the exercise of 'very highly organised, well-tested techniques, which had probably been used elsewhere in the world in places like Oman probably going back to WWII but considerably more advanced since then'.¹³⁶

On 17 October 1971, the *Sunday Times* Insight team published its in-depth report on allegations of ill-treatment. The report probably prompted the Taoiseach to instruct the Department of Foreign Affairs, the following day, to draft a letter for the British Ambassador informing him of the Taoiseach's intention to announce in the Dáil the following week the government's decision to submit a complaint to Strasbourg.¹³⁷ But Lynch was counselled not to use the threat of proceedings before the European Commission. In advice to the Taoiseach on the initial draft from the Department of

¹³² DFA 2004/7/1936. Minute from Charles Lysaght to Secretary of the Department of Foreign Affairs, Hugh McCann, 16 November 1971.

¹³³ *Ibid.*

¹³⁴ Interview of Seán Donlon by Aisling O'Sullivan, 8 February 2007.

¹³⁵ Probably Dr. John Wing or Professor Sheppard of Maudsley Hospital, Denmark Hill, London. See DFA 2002/19/427. Letter from Peadar de Paor (Patrick Power) to Mr. Small, 7 January 1972.

¹³⁶ Interview of Seán Donlon by Aisling O'Sullivan, 8 February 2007.

¹³⁷ DFA 2003/17/304. Note on procedure, 18 October 1971.

Foreign Affairs, the Secretary to the Department of the Taoiseach said reference to the warnings to Heath about proceedings at Strasbourg as not having their 'desired effect' was essentially recording a 'lack of success'. Second, it could imply that the institution of the Strasbourg proceedings was 'a bargaining counter'. According to the Department, 'the institution of proceedings had to be preceded by careful consideration and investigation and by the exhausting of domestic remedies by the aggrieved'.¹³⁸ In the final draft, the British Ambassador, Sir John Peckm was informed that after 'careful examinations' and material at his disposal from 'reliable sources', the Taoiseach was satisfied that breaches of the *European Convention on Human Rights* 'appear to have taken place in a substantial number of cases'. Hence, the Irish government were 'now' seriously considering taking the decision to institute proceedings.¹³⁹

The British Ambassador replied the following day, outlining his government's position.¹⁴⁰ He charged that allegations of brutality were 'part of the stock-in-trade of the IRA' and that his Government had publicly stated such allegations were being investigated by the Compton Committee.¹⁴¹ He emphasised that complaints before the European Commission must be examined with supporting evidence whereas previous petitions brought by individuals from the Northern Ireland were in the form of general allegations, without supporting evidence.¹⁴²

In these circumstances, my Government hope that the Irish Government would prefer to wait and study very carefully the findings of the Compton Committee in each case before they take up a position which

¹³⁸ DT 2002/8/493. Memorandum entitled Draft communication to the British Ambassador by David O'Sullivan, 19 October 1971

¹³⁹ DT 2002/8/494. Letter to British Ambassador to Ireland Sir John Howard Peck from Hugh McCann, 19 October 1971.

¹⁴⁰ DT 2002/8/494. Confidential Letter from John Peck to H.J. McCann, 20 October 1971.

¹⁴¹ *Ibid.*

¹⁴² *Decision of the Commission on thirteen applications by S McG and others against United Kingdom* (17 December 1970). The thirteen applications were joined into Groups I and II, which collectively alleged (i) breaches of article 3, 5 to 11, 13 and 14 of the Convention by the existence of the Special Powers Act 1922, (ii) breach of article 3 of Protocol 1 regarding the conduct of elections in Northern Ireland and (iii) discrimination in public housing and employment. . In its decision to strike off the case from its list, the Commission cited the whole history of the application, the lack of correspondence in the immediate past from the applicants as indicating failure to show an interest and requirement for more precise information in its submissions, citing inadequacies in presentation and formulation of substance of complaints. This requirement precluded the Commission from determining that 'a general character affecting the observance of the Convention' necessitates continued examination of the application.

could bring them into open dispute with the British Government, particularly if it was on the basis of allegations which might later prove to be unfounded.¹⁴³

The same day, Lynch delivered a lengthy speech in the Dáil in which he said Britain should be held accountable for its international obligations, including those under the *European Convention on Human Rights*.¹⁴⁴

At the end of October, Eamonn Gallagher, Seán Donlon, Mary Tinney, Charles Lysaght and Declan Quigley met to review their responsibilities in preparing the application.¹⁴⁵ Donlon was to continue to amass statements and supplementary material from solicitors, doctors and community leaders. This would be assessed by Declan Quigley.¹⁴⁶ The Attorney General's Office had assumed primary responsibility for the case at an early stage. This, as Charles Lysaght explained, was because the Taoiseach had handed over 'some papers in connection with the case when it was first mooted', and also because of understaffing in the Legal Section in the Department of Foreign Affairs.¹⁴⁷ However, Lysaght explained that it was the view of the Legal Adviser, Mahon Hayes, that the Legal Section of the Department of Foreign Affairs 'is the body primarily responsible for proceedings under the European Convention and nothing should be done which implies acceptance of any other view' and consequently 'we should insist that the evidence be submitted to us before a final decision is made to proceed'.¹⁴⁸ He said 'we should be more expert in weighing the weight of evidence before the European Commission'.¹⁴⁹

Donlon returned to Belfast on 11 November where he spent a week gathering more information.¹⁵⁰ At the same time, Eamonn Gallagher travelled to Dungannon, Derry and Strabane, collecting statements and other information as evidence before joining Donlon in Belfast on the evening of 15 November.¹⁵¹ Later in the month, Donlon told Gallagher that 'Kevin Street', meaning the wing of Sinn Féin that was associated with the

¹⁴³ DT 2002/8/493. Confidential Letter, 20 October 1971.

¹⁴⁴ Dáil debates, Volume 256, col 18

¹⁴⁵ DFA 2002/19/427. Minute by Eamonn Gallagher, 23 November 1971.

¹⁴⁶ *Ibid.*

¹⁴⁷ DFA 2004/7/1936. Letter from Charles Lysaght to Secretary of the Department of Foreign Affairs, Hugh McCann, 16 November 1971.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ DFA 2002/19/427. Minute from Hugh McCann to Minister, 23 November 1971.

¹⁵¹ *Ibid.*

Provisional Irish Republic Army, had instructed its followers not to co-operate with the Irish Government's investigations. Hence, some of the promised material from the 11 November expedition would not be handed over as evidence for the Government's application.¹⁵²

Donlon was not overly troubled, as he had also established a 'working arrangement for swapping information with Amnesty International', and the final investigation should cover 'something like 75 cases'.¹⁵³ In the end, some 228 cases of alleged ill-treatment were referred to in Ireland's application to the Commission.¹⁵⁴ The development of this working relationship with Amnesty International is described in a minute of the Department of the Taoiseach, drafted following a visit to the Department by Seán MacBride. Amnesty International was preparing to conduct an investigation. The Amnesty inquiry would be conducted by Dr. Hermann van Guns, a Dutch medical doctor who worked for the World Health Organisation, and Thomas Hammerberg, a Swedish journalist and chairman of the Swedish section of Amnesty International, currently the Commissioner for Human Rights of the Council of Europe. Torkel Opsahl of the Law Faculty of the University of Oslo was yet to be confirmed. Opsahl had been elected a member of the European Commission on Human Rights in 1970, and he sat on the sub-Commission that heard witnesses in the *Ireland v. United Kingdom* case in 1975. MacBride suggested that Amnesty International's investigator and the Department of the Taoiseach co-operate confidentially in exchanging statements concerning torture and brutality. This was agreed to, and Seán Donlon was instructed to liaise with the Amnesty International investigator, who would also be operating in Belfast.¹⁵⁵

'Further little time' Runs Out....

The Compton Report was published by the British Government on 16 November. Mahon Hayes, the Legal Adviser to the Irish Department of Foreign Affairs, believed that it 'clearly established an administrative practice of ill-treatment, which the [European]

¹⁵² DFA 2002/19/427.

¹⁵³ Ibid.

¹⁵⁴ *Ireland v. United Kingdom*, (App. 5310/71) (1976) 19 Yearbook 512 (E.Com.H.R.), p734.

¹⁵⁵ DT 2002/8/494. Minute for Taoiseach, 9 November 1971.

Commission would very likely hold amounted to torture or inhuman or degrading treatment or punishment'.¹⁵⁶ Indeed, in its admissibility decision of 1 October 1972 in the inter-State case, the European Commission of Human Rights distinguished the use of the 'five techniques' from other allegations of ill-treatment and concluded that the Compton Report, as well as the subsequent Parker Report, which acknowledged official sanction for the use of the techniques, provided the substantial evidence required to establish an administrative practice.¹⁵⁷ So the Compton Report was rightly believed to provide the means to overcome the difficult issue of the exhaustion of domestic remedies. In effect, the British Government had snookered itself. Its own inquiry handed the Irish legal team success at the admissibility stage.

Lynch concluded that the Compton Report coupled with the Irish government's investigation demonstrated 'very substantial evidence of a very grave state of affairs in the administration of justice in the North'. The government would examine both carefully to decide whether to refer the allegations to the European Commission of Human Rights, he said.¹⁵⁸ This reference to 'careful' examination obviously sought to bide more time for the government's investigation. Donlon was due to travel north again on 22 November to obtain more statements and supplementary evidence. However, given the interest of deputies in recent Dáil debates, it is unsurprising that the publication and dissection of the Compton Report intensified parliamentary and media focus on whether the government would decide to initiate proceedings before the European Commission of Human Rights. Lynch's attempts to bide time on the question of submitting an application were becoming more difficult to sustain.

At the 23 November sitting of the Dáil, the leader of the Opposition, Liam Cosgrave, asked whether the Taoiseach was now in position to state whether a definite decision on submitting an application to Strasbourg had been taken.¹⁵⁹ Tánaiste (Deputy Prime Minister) Erskine Childers reiterated the common line on collecting and evaluating evidence but added to a likely government decision within days. On being pressed

¹⁵⁶ DFA 2004/7/1936. Handwritten letter from Mahon Hayes to Declan Quigley, undated.

¹⁵⁷ *Ireland v. United Kingdom* (App. 5310/71 and 5151/72), 1 October 1972 (1972) 41 CD 3.

¹⁵⁸ Dáil Debates, 16 November 1971, Volume 256, col 2158.

¹⁵⁹ Dáil Debates, 23 November 1971, Volume 257, col 1.

regarding formal protests against the methods of interrogation,¹⁶⁰ Childers said such proceedings would be lengthy – he thought they might take one to two years - and that they would be unlikely to have any immediate practical effects on the interrogation policies of British forces.¹⁶¹

The *Financial Times* suspected that Irish Government wanted to await the view of British MP's in their Northern Ireland debate. It interpreted the mood in Ireland:

The Government here is now under strong pressure both from its own back benches and from the Opposition to press a case against Britain through the European Commission and this pressure has increased since the public condemnation by Cardinal Conway and five Roman Catholic bishops in the North of the interrogation methods used on detainees.¹⁶²

With parliamentary and media anticipation of an imminent government decision, the Cabinet prepared to debate the question of submitting an application to the European Commission at its meeting scheduled for 30 November 1971.¹⁶³ Prior to the meeting, Hugh McCann prepared a memorandum for the Minister of Foreign Affairs, who was reportedly now more favourable to the whole idea. McCann assessed the probable effects on political relationships if the Irish Government were to initiate proceedings. He anticipated sympathy from some European States, who are 'very sensitive on this issue of torture of prisoners', specifically The Netherlands and Italy. But he cautioned that it is likely that future partners in the European Economic Community would not be 'enthusiastic about two new members entering into this kind of conflict in public on the eve of their membership'. Nevertheless, a European forum for such a dispute would be preferable to the United Nations, where the Soviet Union and other socialist States might 'seek to exploit the situation'. On Anglo-Irish relations, McCann stated the obvious. The move would be 'strongly resented by the British Government and lead to a considerable deterioration in Anglo-Irish relations'. McCann concluded: 'If Mr. Heath's previous outbursts are any guide he would probably be furious at least in the short run. One might expect that Britain would get "really dirty" in handling our affairs.' He also calculated that an application to the Commission would compel the British to be 'more careful' in

¹⁶⁰ *Ibid.*, col 2.

¹⁶¹ *Ibid.*, col 3.

¹⁶² *Financial Times*, 24 November 1971.

¹⁶³ DT 2001/5/1.

dealing with detainees. This would slow down their gathering of intelligence information, making a military solution more difficult, and that would force the British to deal with the crisis at the political level. McCann noted the personal view of the Irish Ambassador to Britain, who was opposed to going to Strasbourg. According to McCann, while purely from the international relations standpoint it would not be wise to proceed, views of the minority in Northern Ireland as well as public opinion in the Republic had to be considered. '[T]he pressures appear to be greater' and it would probably be difficult for the government not to prioritise those pressures.¹⁶⁴

On 29 November, Lynch received a message from Edward Heath attempting to dissuade Lynch and the Cabinet from taking a positive decision on submission. After outlining the steps taken by the British Government in response to the allegations, he stated:

My reason for hoping that these problems will not be brought before the European Commission relates rather to the danger that my Government and yours would there be ranged on opposite sides in a public forum on issues which, starting from particular allegations and explanations would be liable to broaden out into charges and counter-charges concerning the operations of the IRA, the role they have in Northern Ireland and the support they receive in the Republic. Such a position could hardly fall to result in acrimonious exchanges between our two Governments. This would to my mind be unfortunate given the complexity of the Northern Ireland problem and the need for our two Governments to remain in the closest and friendliest touch about it. This will be particularly necessary if the security situation in the North develops sufficiently favourably for an early impetus to be given to political moves.

As you know, our aim is still to discuss the way forward with representatives of all the communities. We are committed to finding a way to give the minority there an active, permanent and guaranteed role in the life and public affairs of Northern Ireland. As we are making clear in the debate in the House of Commons, the best method and timing for doing this is very much in the forefront of our minds. It is because of these considerations that I hope that you will not feel constrained to give way to pressures to take a public stance against us at Strasbourg. If you do, it will no doubt rejoice the hearts of many people in the Republic and some of those among the minority in the North. It will however, also please those Protestant extremists who are always most opposed to the maintenance of a reasoned dialogue both public and private between our two Governments.¹⁶⁵

But Heath's letter did not deter the Cabinet, which decided that the Minister for Foreign Affairs, on behalf of the Irish Government, should refer to the European Commission of Human Rights recent breaches 'in the six counties' of the *European*

¹⁶⁴ DT 2002/8/495. Minute of Hugh McCann to Dr. Nolan (Secretary to the Government), 26 November 1971.

¹⁶⁵ DFA 2003/17/304. Message from Edward Heath to Jack Lynch, 29 November 1971.

Convention on Human Rights by the British government.¹⁶⁶ The minutes show that the Minister for Foreign Affairs, Dr. Hillery, was absent when the decision was taken.¹⁶⁷ The announcement of the government decision¹⁶⁸ led to debate in the Dáil. It focussed mainly on the formal diplomatic protests. Here, Lynch described the history of the diplomatic efforts of the Irish Government and framed this history in the context of finding redress through ‘private diplomacy’, which was considered the best approach between ‘neighbouring Governments’.¹⁶⁹ However, the Government failed to ‘persuade’ the British Government to fairly and adequately respond. Later in the debate, on being incessantly quizzed on whether formal protests were made at the highest level, Lynch declared in reference to the application to the European Commission of Human Rights, in apparent exasperation, ‘we have taken the extreme step now. Are the deputies not satisfied with what we have done?’¹⁷⁰ The British Government expressed regret that the Irish government had ‘chosen to make a governmental dispute of this issue’. It claimed the allegations could have ‘usefully’ been put at the disposal of British authorities for investigation.¹⁷¹

Filing the Application: Fog in Paris

With the government’s announcement came the impetus on the legal team to conclude preparations for the submission as early as possible. It was hoped to file the application at ‘a very early date’, preferably by 10 December. A political decision would still be required concerning allegations of breaches of article 2 of the *Convention* by British armed forces. The Legal Adviser, Mahon Hayes, was requested to submit his views on the nature of the case to the Attorney General’s Office. Further information was received from Ireland’s Permanent Mission to the Council of Europe in Strasbourg. Ireland was urged to prepare fifty copies of its application, which could then be

¹⁶⁶ DT 2001/5/1.

¹⁶⁷ *Ibid.*

¹⁶⁸ DFA 2002/19/427. Issued by Government Information Bureau, 30 November 1971

¹⁶⁹ Dáil Debates, 1 December 1971, Volume 257 col 907.

¹⁷⁰ *Ibid.*, col 909.

¹⁷¹ ‘Ireland Takes Torture Case to Europe Court’, *Irish News*, 1 December 1971.

considered on a preliminary basis as early as mid-December. Then, the British government would be formally notified and requested to make observations.¹⁷²

On 6 December 1971, the Taoiseach, accompanied by the Irish Ambassador, Donal O'Sullivan, met with Heath in his office in the House of Commons for a discussion about the security and political situation in Northern Ireland. The encounter proceeded along predictable lines. On security, Lynch referred to border incidents, such as incursions into the Republic by British forces and the cratering of roads along the border, and the thorny question of extradition, which, he argued, was a matter for the Courts. Heath referred to the need to maintain effective security along the border and to resolve the question of the South as a safe haven, possibly through extradition.¹⁷³ Lynch mentioned the immense pressure he had been subjected to, in the wake of the Compton findings, to submit an application to the European Commission of Human Rights. Heath's only response was to tell Lynch 'you resisted as long as you could'.¹⁷⁴

On 7 December, the Irish Cabinet informally agreed on the nature of the application. It would refer to breaches of article 1 (general duty to secure), article 2 (right to life), article 3 (prohibiting torture, inhuman or degrading treatment or punishment) and article 14 (prohibiting discrimination on specified grounds). The Attorney-General's memorandum to Cabinet explained that by invoking article 1, the entire scope of the *Special Powers Act* and its *Regulations* could be considered by the European Commission of Human Rights. The disadvantage was that this argument was too 'legalistic'. Furthermore, it was uncertain, given the lack of precedent of the substance of article 1.¹⁷⁵ Complaints based on article 2 were 'very much sought by the Northern Nationalists, would appeal to the public and, even if doomed to failure, would have the advantage of highlighting the general atmosphere'. The disadvantage, said the Attorney-General, was its 'doom' to failure for failure to exhaust domestic remedies. The strongest claim relied upon article 3, with the Compton Report providing 'great assistance' in demonstrating an administrative practice. Moreover, this accusation had the most

¹⁷² DFA 2002/19/427. Minute by Sean Donlon copied to Mr. Gallagher, Mr. Lysaght and Declan Quigley, 6 December 1971.

¹⁷³ DFA 2003/13/10. Report of Discussion between the Taoiseach and Mr. Heath on 6 December 1971, 7 December 1971, signed Donal O'Sullivan, Irish Ambassador to Britain.

¹⁷⁴ *Ibid.*

¹⁷⁵ DT 2002/8/495. Memorandum of Attorney General. A handwritten notation records that it was considered in the Cabinet meeting of 7 December 1971.

'popular appeal'. The only disadvantage was possible difficulty for some of the cases of ill-treatment regarding the domestic remedies rule, but it was felt this could be overcome. Finally, on article 14, the application sought to refer to the British Army searching of homes and the 'general behaviour' of the security forces, as forms of discrimination on the basis of political opinion and association with a national minority. The disadvantage was that while evidence was 'no doubt in existence', it had not been assessed.¹⁷⁶

With the submission imminent, the question of appointing an agent arose. In the *Lawless v. Ireland* case, this task was fulfilled by Ireland's Permanent Representative to the Council of Europe.¹⁷⁷ But the Anglo-Irish section cited the British practice of appointing the legal adviser to the Foreign and Commonwealth Office.¹⁷⁸ Ultimately, Mahon Hayes, Legal Adviser to the Department of Foreign Affairs, was appointed.

There were many meetings over the course of a few days in mid-December as the government struggled to finalise its application.¹⁷⁹ The team agreed to plead the case on the following grounds. First, certain killings in Northern Ireland constituted breaches of article 2. Second, the treatment of internees under interrogation and otherwise constituted torture, inhuman or degrading punishment or treatment within the terms of article 3. Thirdly, the scope of internment was 'wider than necessary' having regard to the strict exigencies of the situation and hence, was beyond the permissible right of derogation under article 15. Finally, internment and the search of houses had been conducted in a discriminatory manner, breaching article 14 of the *Convention*.¹⁸⁰

Fittingly, Seán Donlon, who had surreptitiously collected most of the proof upon which the application was based, was given the task of travelling with the 'three or four sacks' of evidence and the formal application to Paris and from there by train to Strasbourg to lodge the application. Hillery had promised the Dáil that this would be done by 16 December, and Donlon was under strict instructions to respect this

¹⁷⁶ *Ibid.*

¹⁷⁷ At the time of the *Lawless case*, the Permanent Representative of Ireland to the Council of Europe was Thomas Woods, who died tragically of an illness before the hearings of the European Court of Human Rights in April 1960 and was succeeded by Attorney General Andrias O'Caoimh. O'Caoimh was assisted by Anthony Hederman, who was then a junior counsel. Hederman later acted as senior counsel on the Irish legal team in *Ireland v. United Kingdom*.

¹⁷⁸ DFA 2002/19/427. Minute to Gallagher (unsigned), 13 December 1971.

¹⁷⁹ DFA 2002/19/427. Minute to Gallagher from Lysaght, 14 December 1971

¹⁸⁰ *Ibid.*

commitment. But his early-afternoon flight to Paris was diverted to Brussels due to fog. Donlon took a taxi to Paris, where he was greeted by Kestor Heaslip, First Secretary at the Paris Embassy. Donlon and Heaslip met the Secretary-General of the Council of Europe for the purposes of filing the application at his Paris hotel at 1.00 am on the morning of 17 December 1971. But the Secretary-General had agreed to stop the clock. For official purposes, it was recorded that the application was submitted at 11.45 pm in the evening on 16 December. Donlon has described the 'ceremony' as 'informal and brief'. The Secretary General had pulled trousers over his pyjamas and accepted the application through the 'dimly lit doorway' of his hotel bedroom.¹⁸¹

Conclusion

The application went on to make legal history. Ireland was successful before both the European Commission on Human Rights and, subsequently, the European Court of Human Rights. To this day, the case stands as an exceedingly rare example of inter-State litigation concerning human rights violations. It is particularly unusual given that it concerns two modern democracies with extremely close commercial and political links. Since *Ireland v. United Kingdom* there have been only a few more inter-state applications, in any forum.¹⁸² The inter-State application mechanisms of the United Nations human rights treaties¹⁸³ have never been invoked. For example, the United States has accepted the jurisdiction of the Human Rights Committee to consider inter-State communications based on alleged violations of the *International Covenant on Civil and Political Rights*, but no State party to the *Covenant* appears to have contemplated filing a complaint based upon the contemporary equivalent of British detention facilities in Northern Ireland, namely the prison camps in Iraq, Afghanistan and Cuba, and the secret

¹⁸¹ Interview of Seán Donlon by Aisling O'Sullivan, 8 February 2007.

¹⁸² See, generally, Menno Kamminga, *Inter-State Accountability for Violations of Human Rights*, Philadelphia: University of Pennsylvania Press, 1992.

¹⁸³ *International Convention on the Elimination of All Forms of Racial Discrimination*, (1969) 660 UNTS 195, art. 11; *International Covenant on Civil and Political Rights*, (1976) 999 UNTS 171, art. 41; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (1987) 1465 UNTS 85, art. 21; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, GA Res. 45/158, annex, art. 76; *International Convention for the Protection of All Persons from Enforced Disappearance*, GA Res. 61/77, art. 32;

jails in Poland and Romania.¹⁸⁴ Nor has the inter-state complaint procedure of the International Criminal Court been used to initiate proceedings, with the exception of three so-called 'self-referrals'.¹⁸⁵ Indeed, when the *Rome Statute of the International Criminal Court* was being adopted, it was frequently argued that State party referral could not be an effective mechanism to launch prosecutions precisely because of the sterility of inter-state complaint mechanisms within the human rights sphere.¹⁸⁶ It is also possible for one State to sue another before the International Court of Justice for breach of a human rights obligation, but there is only one example of such a phenomenon.¹⁸⁷

Seán MacBride launched the process in response to internment. His personal role is intriguing, given that he had himself been foreign minister of Ireland when the *European Convention on Human Rights* was being drafted and adopted. MacBride's public call for an application to Strasbourg gained unrelenting momentum as the months wore on. Allegations of ill-treatment that were published in both British and Irish newspapers kept the idea of an inter-State application alive among a watchful media, an active civil society and a tense parliament. The tragic increase in violence in the post-internment autumn of 1971 intensified calls for the Irish government to respond adequately. In this respect, the publication of the Compton Report, which had been commissioned by the British Government to investigate reports of abuse, was the point of no return. Subsequent parliamentary debates in Dáil Éireann signalled the deputies' expectation of a quick and decisive response by the Irish Government. In such an environment, Jack Lynch's Cabinet would have had immense difficulty convincing the parliamentary Opposition, the expectant media and the vocal public that any other course would be appropriate under the circumstances.

While these external factors were key, there were naturally very important parallel internal factors. As Seán Ronan's position at the 2 August 1971 meeting between

¹⁸⁴ Parliamentary Assembly, Council of Europe, *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States*, PACE Doc. 10957 (12 June 2006); Parliamentary Assembly, Council of Europe, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, PACE Doc. 11302 (7 June 2007).

¹⁸⁵ *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, art. 14.

¹⁸⁶ See: William Schabas, *Introduction to the International Criminal Court*, 3rd ed., Cambridge: Cambridge University Press, 2007.

¹⁸⁷ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, International Court of Justice, 19 December 2005.

Department of Foreign Affairs officials and Frank Gogarty of the Northern Ireland Civil Rights Association indicates, the Irish Government required a high probability of success for a positive decision to be forthcoming. Hence, Attorney General Colm Condon's positive determination, that on the weight of the evidence a sustainable case could be made, was crucial. Without this determination, a positive decision to submit the application might well have been outweighed by foreign relations considerations, particularly relations with Britain and Ireland's prospective partners in the European Economic Community. Instead, it resulted in a seminal ruling of the European Court of Human Rights. Arguably, the pressure that the application brought on the British had beneficial effects in terms of reducing the mistreatment and abuse of prisoners.