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MULTILATERALISM, HUMAN RIGHTS AND THE 1970s:
INSIGHTS FROM IRELAND'S ROLE IN THE DEVELOPMENT
OF THE HUMAN RIGHTS FIELD

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The *Ireland v United Kingdom* case concerns the treatment of detainees by British security forces in Northern Ireland and the implementation of internment or detention without trial, introduced in Northern Ireland in 1971.¹ By reading human rights 'as a language'² and 'an endless semantic battlefield',³ we explore how the Irish Government in the *Ireland v United Kingdom* case sought to use the European Convention of Human Rights strategically to secure its own political assessment towards internment and the controversial interrogation methods as a legal outcome before a regional human rights institution. In this sense, the Irish legal team re-described and reframed the Irish Government's political position on the use of internment and of interrogation methods in the language of Convention and according to concepts developed within the European Commission of Human Rights jurisprudence. We focus on two strategic moves that the Irish legal team pursued at the admissibility and merits stages of the European Commission of Human Rights proceedings, namely, submitting a wider range of allegations, alongside article 3 allegations, as an administrative practice and advocating for the

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¹ *Ireland v the United Kingdom* (1978) 2 EHRR 25. The terms 'Ireland', 'United Kingdom' and 'Northern Ireland' are used in this paper as these terms have been used within the *Ireland v United Kingdom* case itself. However, we recognise 'how terminology raises complex questions about objectivity' with any writing on Northern Ireland. See B O'Leary and J McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (Athlone Press 1993) 5.

² M. Koskenniemi, 'The Politics of Law: Twenty Years Later', *European Journal of International Law* 20(1) (2009), 7-19: 9.

³ P. Slotte and M. Halme-Tuomisaari, *Revisiting the Origins of Human Rights* (Oxford, 2016), 22.

hearing of expert testimony on the use of the interrogation methods (the ‘five techniques’). We explore these strategic moves in order to illustrate the semantic battlefield in operation and the potential limits of the strategic use of human rights as a language.

THE 1970s AND LAW AS A ‘SEMANTIC BATTLEFIELD’

The *Ireland v United Kingdom* case began when the Irish Government submitted an inter-state petition under article 25 of the European Convention on Human Rights to the European Commission of Human Rights in December 1971. It concluded with the landmark judgment of the European Court of Human Rights in January 1978. The period, early to late 1970s, has an undoubted significance in the evolution of the human rights field because it involved what Moyn calls ‘the NGO mobilization’ in which the appeal to human rights ‘framed activism in the 70s and 80s’.⁴ He describes this 1970s human rights frame as ‘a highly coalitional language that motivated essentially democratic activism’.⁵ Although its significance is agreed, there are opposing approaches in human rights historiography that read the significance of the period in competing ways, which, in turn, reflects the debate over the “origins” or “breakthrough” of human rights.

The universalist approach (or the ‘textbook narrative’) searches for an “origins” of contemporary human rights project in a ‘deeper history’,⁶ such as in social movements of the nineteenth century⁷ or in 1940s Universal Declaration of Human Rights era. Using this approach, the 1970s is read as yet another “progressive” period in an inevitable (“universal”) linear progressive history towards human rights as a global phenomenon. The revisionist

⁴ S. Moyn *Human Rights in History: The Last Utopia* (Boston 2010), 312.

⁵ *ibid.*

⁶ Slotte and Halme-Tuomisaari, *Revisiting the Origins of Human Rights*, 5-9.

⁷ J. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford, 2012).

approach rejects a deeper history for the contemporary human rights field, considering earlier social movements as distinct from the contemporary project. Instead, revisionist writers search for the “breakthrough” moment of the contemporary project in the post-Universal Declaration of Human Rights era.⁸ Although Moyn identified the breakthrough in the NGO mobilisation of the 1970s,⁹ Jensen stressed racial discrimination and decolonisation of the 1960s¹⁰ and Hoffmann emphasised humanitarian intervention of the 1990s.¹¹ Therefore, the significance of the 1970s in the evolution of the field remains a contested debate among revisionist scholars.

As human rights scholars, we reflect this opposition between universalist and revisionist within the literature yet we are agreed that there is no single concept of human rights rather human rights are ‘open-ended and ambiguous’.¹² Therefore, we pull on Slotte and Halme-Tuomisaari’s work as they conceptualise human rights as ‘open-ended and ambiguous’ yet seemingly absolute and weighted. They see this conceptual vagueness or ‘open-endedness as key to the usefulness of human rights because it allows anyone to argue their preferences as belonging to the human rights category’.¹³ Therefore, they examine human rights as forming a language and this portrays ‘rights as forming an endless semantic battlefield upon which participants argue over the meaning of key concepts’.¹⁴

This concept of law as language and a ‘site of politics’ draws on the literature of critical legal scholars that identify the indeterminacy of law and the structural biases of institutions.¹⁵ Law

⁸ S. Hoffmann, ‘Human Rights and History’ *Past and Present* 232 (2016) 279-310: 280.

⁹ Moyn *Human Rights in History*.

¹⁰ S. Jensen *The Making of International Human Rights: The 1960s, Decolonization and the Reconstruction of Global Values* (Cambridge 2016).

¹¹ Hoffmann, ‘Human Rights and History’, 295 et seq.

¹² Slotte and Halme-Tuomisaari, *Revisiting the Origins of Human Rights*, 1.

¹³ *ibid.*

¹⁴ *ibid.*, 22.

¹⁵ See D. Kennedy, *A Critique of Adjudication* (Cambridge 1998), J. Desantels-Stein, ‘Back in Style’ *Law and Critique* 25 (2014), 141-162, D. Kennedy, *International Legal Structures* (Baden-Baden 1987), M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge 2005), E. Jouannet, ‘A

as a semantic battlefield is a ‘site of politics’ in which participants to struggle for hegemony over their opponents.¹⁶ In this sense, all legal discourse ‘is a surface over which political opponents engage in hegemonic practices, [enlisting] its rules [...] and institutions on their side, making sure they do not support the adversary’.¹⁷ As any legal vocabulary is political open-ended, it means that ‘what gets read into it (or out of it) is a matter of subtle interpretative strategy’.¹⁸ In this sense, ‘political struggle is waged on what legal words such as “aggression”...mean, whose policy will they include, whose will they oppose’,

To think of this struggle as *hegemonic* is to understand that the objective of the contestants is to make their partial view of that meaning appear as the total view, their preference seem like the *universal preference*.¹⁹

In the case of international law specialisms, such as the human rights law regime, an issue can be framed in terms of the particular specialism, decided within that particular specialism’s institutional setting and in turn, secure the success of certain legal arguments that follows the general bias of the deciding institution.²⁰ For instance, in the *Ireland v United Kingdom* case, both Governments re-described their political positions regarding the British Government’s security policy in Northern Ireland using the rights language of the European Convention on Human Rights and sought to deploy the language and concepts of the Convention strategically within the Convention’s institutions. For the Irish Government, the aim was to secure as a legal outcome a reading of internment, introduced in August 1971, as an excessive security measure in circumstances of the emergency situation, and the treatment of detainees, including the use

Critical Introduction’, in M. Koskenniemi, *The Politics of International Law* (Hart 2011) and Koskenniemi, ‘Twenty Years Later’, 7-19.

¹⁶ Jouannet, ‘A Critical Introduction’, 7.

¹⁷ M. Koskenniemi, ‘International Law and Hegemony: A Reconfiguration’ *Cambridge Review of International Affairs* 17 (2004), 197-218: 200.

¹⁸ Koskenniemi, ‘Twenty Years Later’, 9.

¹⁹ Koskenniemi, ‘International Law and Hegemony’, 199.

²⁰ Koskenniemi, ‘Twenty Years Later’, 11.

of sensory deprivation techniques, as violations of article 3 of the Convention, prohibiting torture or inhuman or degrading treatment or punishment.

Similarly, Slotte and Halme-Tuomisaari's approach to the dilemma of history-writing is useful for situating 'events' within the wider historiography of human rights as a global phenomenon. They advise academic researchers 'to trace down meanings invested in [rights] claims as well as examining the processes accompanying their making as well as exploring why they were made in first place'.²¹ In Slotte and Halme-Tuomisaari's edited work, they read the Universal Declaration of Human Rights era as an 'important moment of beginning' because it is 'an imagined reference point of origin' that is 'in retrospect' invoked in endless documents; it becomes an origin because it is imagined and invoked as such.²² In this sense, myth and reality become enmeshed that shows the difficulty of writing human rights history with any certainty.²³ Applying their approach, we suggest that the 1970s period is an 'imagined reference point of "breakthrough"' of human rights with 'lines of continuity' to human rights activism of the 1990s.²⁴ Therefore, although we do not focus on the debate over origins/breakthrough *per se*, we take as our point of departure that the emergence of the contemporary human rights project was dependent on historio-political dynamics, using human rights as a language strategically, within institutional contexts.

THE *IRELAND v UNITED KINGDOM* CASE

We noted above that the *Ireland v United Kingdom* case concerns the treatment of detainees by British security forces in Northern Ireland and the implementation of internment or

²¹ Slotte and Halme-Tuomisaari, *Revisiting the Origins of Human Rights*, 22.

²² *ibid*, 26.

²³ *ibid*,

²⁴ Moyn, 'The End of Human Rights History', 309.

detention without trial, introduced in Northern Ireland in 1971.²⁵ It was conducted under the original text of the 1950 Convention that had established two enforcement institutions, the European Commission of Human Rights and the European Court of Human Rights.²⁶ Within this original framework, the Commission was authorised to consider petitions alleging breaches of the Convention brought either by an individual or by a state party.²⁷ On the latter, the Commission automatically had jurisdiction over inter-state petitions once the state party ratified the Convention.²⁸ If an application was declared admissible, the Commission would examine the merits of petition confidentially and if necessary, conduct an investigation.²⁹

During the merits stage, the Commission had to place itself at the disposal of the parties for the purposes of ‘securing a friendly settlement...on the basis of respect for human rights’.³⁰ If a settlement was reached, the Commission issued a report that stated the facts and the terms of the settlement that was then forwarded to the Committee of Ministers.³¹ If a settlement was not reached, the Commission was required to draw up its Report on the facts and render its opinion on whether breaches of the Convention had occurred.³² As the Commission’s procedures were confidential, its Report could not be published rather it was sent confidentially to all the state parties to the Convention via the Committee of Ministers. Thereafter, the case could be referred to the European Court of Human Rights by either the Commission itself or by one of the state

²⁵ *Ireland v the United Kingdom* (1978) 2 EHRR 25. The terms ‘Ireland’, ‘United Kingdom’ and ‘Northern Ireland’ are used in this paper as these terms have been used within the European Convention’s jurisprudence. However, we recognise ‘how terminology raises complex questions about objectivity’ with any writing on Northern Ireland. See B O’Leary and J McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (Athlone Press 1993) 5.

²⁶ Section II of the Convention (1950) (original text): URL: http://www.echr.coe.int/Documents/Collection_Convention_1950_ENG.pdf.

²⁷ Article 24 and 25 of the Convention (1950).

²⁸ Articles 24. For individual petitions, state parties had to declare acceptance of the Commission’s jurisdiction (article 25).

²⁹ Article 28(a).

³⁰ Article 28(b).

³¹ Article 30. See article 14 of the Statute of the Council of Europe (representatives on the Committee [of Ministers] shall be Ministers for Foreign Affairs).

³² Article 31(1).

parties to the case within three months of the transmission of the Report to the Committee of Ministers, if the state parties to the case had accepted the compulsory jurisdiction of the European Court of Human Rights.³³ If the case was not referred to the Court within three months, the Committee of Ministers had to decide by two-thirds majority whether violations of the Convention had occurred and to make ‘such proposals as it thinks fit’.³⁴ In this sense, the original text of the Convention contemplated a report issued by the Commission and if a Court referral, a judgment.³⁵

In its February 1976 Report, the European Commission of Human Rights found that the treatment of detainees had met the ‘minimum level of severity’ threshold to violate article 3 of the Convention.³⁶ However, it also rejected Ireland’s other allegations that the United Kingdom had breached its obligations under articles 5 (right to liberty), 6 (right to fair hearing) and 14 (prohibition against discrimination) in conjunction with article 15 in regards to its security measures during the conflict.³⁷ After the Commission’s confidential report was received in Dublin, the Irish Attorney General Declan Costello submitted a memorandum to the Irish Cabinet. He explained how the Committee of Ministers ‘can be unduly influenced by political considerations’ whereas the Court is a judicial tribunal ‘composed of eminent jurists who are

³³ Article 46 and 48. Both the Commission and the old Court were abolished in 1998 and a single institution was created, retaining the title of the European Court of Human Rights. The new Court had compulsory jurisdiction to hear both individual and inter-state petitions and the adjudicative role of the Committee of Ministers was abolished. Under article 39 of the current text, the new Court has the competence to place itself at the disposal of the parties with a view to friendly settle the case. See Protocol No 11 to the Convention (1998) ETS 155 and Articles 32, 33, 34 and 39 of the Convention.

³⁴ Article 31(1)(c) and 32(1) respectively.

³⁵ National Archives of Ireland, Department of Foreign Affairs (hereinafter cited as NAI DFA) 2006/133/677. AG Costello’s memorandum for the Taoiseach entitled ‘Future Procedures’, dated 18th February 1976, para 2. See also D Bonner ‘Of Outrage and Misunderstanding: Ireland v United Kingdom – governmental perspectives on an inter-state application under the European Convention on Human Rights’ (2014) 34(1) Legal Studies 47-75.

³⁶ *Ireland v The United Kingdom*, Application No, 5310/71 Report of the Commission (25th January 1976), 402.

³⁷ *ibid*, 103, 220, 475 and 485. For a recent discussion of Operation Demetrius, see M J McCleary *Operation Demetrius and its aftermath: A new history of the use of internment without trial in Northern Ireland 1971-1975* (Manchester, 2015).

required to act judicially and independently of the Governments who appointed them'.³⁸ He also noted the differences between the confidential nature of the Committee of Ministers' route and the public character of the Court's proceedings, including the publishing of the Commission's Report as part of the latter. Although he noted how this may be less significant given the British Government's statements of having 'no objection' to the Commission's Report being published, 'the possibility of a change in its attitude is not to be ruled out'.³⁹ Other considerations included the delays with the Committee of Ministers' decisions and the preference for the lengthy and comprehensive analysis of a Court judgment.⁴⁰ Ultimately, the Irish Cabinet decided to refer the case to the European Court of Human Rights and Ireland was again successful on its article 3 allegations yet unsuccessful on its other allegations.⁴¹

Of particular relevance is the difference between the Commission's 1976 findings and the Court's 1978 judgment with regard to the 'five techniques' and article 3.⁴² The five techniques had been applied during the 'interrogation in depth' of 14 men in August and October 1971 under Operation Calabra. It involved a combination of sensory deprivation techniques applied over several days – hooding, a severe wall-standing position, sleep deprivation, continual white sound and a rationed bread/water diet.⁴³ In its 1976 Report, the European Commission of Human Rights found that the five techniques amounted to a practice of torture violating article

³⁸ NAI DFA 2006/133/677. Attorney General Declan Costello's memorandum for the Taoiseach entitled 'Future Procedures', dated 18th February 1976, para 4.

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ *Ireland v the United Kingdom* (1978) 2 EHRR 25. See also NAI DFA 2006/131/1422. Letter of Referral to the European Court of Human Rights, March 1976.

⁴² *Ireland v The United Kingdom*, Application No, 5310/71 Report of the Commission (25th January 1976), 402.

⁴³ 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* (Compton Report, 1971), Chapter IV, para. 47. [On British Ministry of Defence policy regarding the use of the 'five techniques', see also S Newbery 'Intelligence and Controversial British Interrogation Techniques: The Northern Ireland Case 1971-1972' \(2009\) 20 Irish Studies in International Affairs 103 and S Newbery *Interrogation, Intelligence and Security: Controversial British Techniques* \(Manchester University Press Manchester 2015\).](#)

3 of the Convention.⁴⁴ The Commission had found that the ‘five techniques’ as applied in combination had a systematic character similar to systems applied in previous times for inducing information or a confession.⁴⁵ Nevertheless, although the Court acknowledged the systematic character of the ‘five techniques and their purpose in extracting information, it ruled that the practice did not have the ‘intensity’ of pain and suffering to amount to a practice of torture but rather was a practice of inhuman and degrading treatment.⁴⁶ The Court ruled that the Convention attaches a special stigma to torture as ‘deliberate inhuman treatment causing very serious and cruel suffering’.⁴⁷

The controversy over the legal classification of the ‘five techniques’, whether constituting a practice of torture or inhuman treatment, continues to have contemporary significance because the Court’s approach has been invoked in other international contexts, even though the Court itself has evolved its approach in its more recent judgments.⁴⁸ For instance, the US Office of Assistant Attorney General, in the infamous Torture Memo written for the then US Attorney General Gonzales, cited the Court’s ruling as allowing ‘an aggressive interpretation as to what amounts to torture’ with regard to US operations in Afghanistan, Iraq and Guantanamo Bay.⁴⁹ Against this contentious debate, the Irish Government in late 2014 requested the European Court of Human Rights to revise its ruling in the original 1978 judgment that the ‘five

⁴⁴ *Ireland v The United Kingdom*, Application No, 5310/71 Report of the Commission (25th January 1976), 402.

⁴⁵ *ibid.*

⁴⁶ *Ireland v the United Kingdom* (1978) 2 EHRR 25, para 167. See also *Gäfgen v Germany*, Appl. no. 22978/05 (1 June 2010) para 90.

⁴⁷ *ibid.*

⁴⁸ *Al-Nashiri v Poland*, Appl. no. 28761/11 (ECtHR, 24 July 2014) para 516. Here, the Court ruled that the use by the CIA of various premediated techniques including hooding and stress positions (for instance, wall-standing) in detention sites in Poland constituted the practice of torture under article 3. See also *Selmouni v France*, Appl. no. 25803/94 (ECtHR, 28 July 1999) para 101 (reiterated that the Convention is a ‘living instrument’ and ‘given the increasingly high standard being required in the area of protection of human rights, what may have been classified as inhuman treatment in the past, may be classified as torture in the future’. *ibid.*

⁴⁹ KJ Greenberg and JL Dratel (eds), *The Torture Papers: The Road to Abu-Gharib* (Cambridge University Press 2005) 199. Note also the Baha Mousa Inquiry that demonstrated how some of the five techniques were employed by British Armed forces in Iraq in 2003, URL: www.bahamousainquiry.org (Vol 2, Pts IV-IX).

techniques’ were a practice of inhuman treatment, but not torture, in violation of article 3 of the Convention.⁵⁰ The Irish Government justified its request for revision on the discovery of ‘new facts’ within archival documents located in the British National Archives by the Pat Finucane Centre, the Irish Centre for Human Rights, NUI Galway and RTE’s Investigation Unit.⁵¹ Under Rule 80(1) of the Rules of the Court, the Court can revise a judgment where there is ‘the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party...’.⁵²

In its 2018 judgement, the European Court of Human Rights briefly mapped out a selection of documents that the Irish Government had submitted in support of its claim that the British Government had withheld certain important information from Commission and Court, namely relevant internal medical reports and information indicating a policy of withholding key facts concerning the five techniques, including the Ministerial authorisation.⁵³ Key medical evidence included Dr Leigh’s report on one of the men subjected to the five techniques (S.K). that was submitted to the Ministry of Defence in 1975 in consideration of the settlement of civil claims. Dr Leigh had earlier given evidence as the British Government’s expert witness before the European Commission of Human Rights and had argued that from his assessment of two illustrative cases (P.C. and P.S.), they suffered acute psychiatric symptoms at the time of being subjected to the five techniques.⁵⁴ ‘Any after-effects were diminishing and not severe and were partly due to living conditions in Northern Ireland’.⁵⁵ However, in his June 1975 Report, he

⁵⁰ Anon. ‘Government asks European Court to revise ‘Hooded Men’ ruling’, *Irish Times*, 3rd December 2014. See also ‘Government may decide on ‘Hooded Men’ case, court told’, *Irish Times*, 1st December 2014.

⁵¹ See RTE Investigation’s Unit, ‘The Torture Files’, June 4th 2014.

⁵² Rule 80(1) of the Rules of the European Court of Human Rights.

⁵³ *Ireland v United Kingdom*, Application No. 5310/71, Judgment (Revision) 20th March 2018,

⁵⁴ *ibid*, para 11.

⁵⁵ *ibid*.

considered certain symptoms displayed by SK to be a result of the five techniques.⁵⁶ Other documents indicated how the decision to use the interrogation methods had been a political decision taken by Ministers in both Stormont and Westminster, in particular the Secretary of State for Defence Lord Carrington.⁵⁷

In a 6/7 majority judgment, the Court rejected the Irish Government's claim that these 'new facts' met the Rule 80 criteria. They stressed how 'legal certainty' must prevail in a situation where there was any doubt about whether the new facts did actually have a 'decisive influence.'⁵⁸ Using this frame, they noted how the original 1978 judgment did not mention the issue of long-term effects. Rather it only referred to 'acute psychiatric disturbances during interrogation' and therefore, it concluded that this issue was not a decisive element in judicial decision-making.⁵⁹ They also disagreed that the British Government's general attitude towards co-operation and towards disclosure on the level of authorization had been unknown to the Court.⁶⁰ It pointed to how, in the original 1978 judgment, the Court had expressed regret about the British Government's attitude, noting the Commission's criticism that the latter had not always provided the assistance desirable.⁶¹ It also argued that the British Government had 'conceded from the start' that there had been authorization at 'a high level' and had been taught to members of the RUC at a seminar in April 1971.⁶²

⁵⁶ *ibid*, para 23.

⁵⁷ The National Archives, Ministry of Defence (hereinafter cited as TNA DEFE) 68/152. See also D Bonner 'Of outrage and misunderstanding: *Ireland v United Kingdom* –governmental perspectives on an inter-state application under the European Convention on Human Rights' (2014) 34(1) *Legal Studies* 47-75: 71 (note Bonner's discussion of reaction to Rees' memo).

⁵⁸ *Ireland v United Kingdom*, Application No. 5310/71, Judgment (Revision) 20th March 2018, para 122.

⁵⁹ *ibid*,132.

⁶⁰ *ibid*, 116. On Dr Leigh's 1975 report, the Court noted that it post-dated his witness hearings before the European Commission of Human Rights and that the report related to one of the 14 men who was not one of the two 'illustrative cases' (P.C. and P.S.) that were heard by the Commission.

⁶¹ *ibid*, 117.

⁶² *ibid*.

In her dissenting judgement, Judge O’Leary stressed the obligation on state parties to cooperate with the Convention mechanisms as understood at the time of the original proceedings.⁶³ Using this frame, she pointed to the significant weight attached to medical evidence by the Commission in its fact-finding⁶⁴ and in turn, how the Court relied on the Commission’s factual analysis.⁶⁵ She noted how the dissenting judges in the original proceedings had stressed the ‘systematic nature of the treatment, as well as the centrality to the judicial discussion of the treatment’s purpose and effects’.⁶⁶ Therefore, in her view, the medical evidence played ‘an important, indeed central role’ in the original proceedings and would have been central (or a ‘decisive influence’) for the Court’s 1978 ruling.⁶⁷ She also disagreed that the new facts were ‘not unknown’ to the Court as ‘it is difficult to understand how this Court *knew* as established facts in 1978 what other suspected but were previously unable to prove until the archive had been declassified, found and compiled’.⁶⁸ This judgment is since under appeal to the Grand Chamber of the European Court of Human Rights, which means the legal issues remain contentious.⁶⁹

STRATEGIC USE IN LITIGATING ON ARTICLE 3 OF THE CONVENTION

When internment was introduced on August 9th 1971, a complex set of dynamics was set in motion that led to the *Ireland v United Kingdom* case being submitted in December 1971. It dramatically changed internal conversations within Foreign Affairs, Taoiseach and Attorney

⁶³ *Ireland v United Kingdom*, Application No. 5310/71, Dissenting Judgement 20th March 2018, para 27. For detailed discussion of archival documents on level of authorization, see Judge Maguire’s judgment in *McGuigan and McKenna case* (2017) NIQB 96, 142-154.

⁶⁴ *ibid*, 62.

⁶⁵ *ibid*.

⁶⁶ *ibid*.

⁶⁷ *ibid*.

⁶⁸ *ibid*, para 69.

⁶⁹ A O’Faolain ‘State to Appeal European court ruling on hooded men ‘torture’, *Irish Times*, 12th June 2018.

General's Office about internationalising the Northern Ireland conflict through human rights multilateral institutions. As Brice Dickson illustrates, earlier attempts by nationalist NGOs from the late 1960s to pressure the Irish Government to take an inter-state case repeatedly failed.⁷⁰ Mahon Hayes, former Legal Adviser to the Department of Foreign Affairs recalled how both he and Declan Quigley, Assistant Legal Adviser to the Attorney General's Office, were frequently discussing whether the evolving conflict could be framed within the European Convention of Human Rights. However, they concluded the rule on exhaustion of domestic remedies was a huge obstacle which they were unlikely to overcome and therefore was neither legally or politically viable if their case would be only thrown out at the Admissibility stage.⁷¹ Under international law, the exhaustion of domestic rule developed within the regime of diplomatic protection, a political mechanism for invoking state responsibility. This rule requires that individual victims first exhaust all domestic legal remedies available, that is, to 'make "normal use" of remedies "likely to be effective and adequate"'.⁷² The underlying principle is that the state is afforded 'an opportunity...to redress any violation [of its international obligations] within the domestic arena'.⁷³ With the 'move to institutions' in the post-war era, this rule was incorporated as an admissibility criteria within statutes of international human rights institutions.⁷⁴

⁷⁰ B Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press Oxford 2010) 46 et seq (detailing the attempts by the applicants' lawyer James Heaney to gain the support for the applications from the Irish Minister for External Affairs). See also NAI DFA 2001/43/1304.

⁷¹ Interview with Mr Mahon Hayes on October 19th 2006. The archival and oral history research in this section draws on research funded by the Irish Research Council to Prof W.A. Schabas (conducted at Irish Centre for Human Rights, NUI Galway) and by University of Sussex to Dr A. O'Sullivan. See A. O'Sullivan and W.A. Schabas *Ireland v United Kingdom case under the European Convention on Human Rights* (Cambridge, forthcoming).

⁷² Judge N Bratza and A Padfield 'Exhaustion of Domestic Remedies under the European Convention on Human Rights' *Judicial Review* 3(4) (2015) 220-226, 221, citing the *Donnelly v United Kingdom*, Application Nos 5577-5583/72, Report of the Commission (1975).

⁷³ *ibid.*

⁷⁴ See D. Kennedy, 'International Law and the Nineteenth century: History of an Illusion', *Nordic Journal of International Law* 65 (1996) 385-420: 392 and Bratza and Padfield, 'Exhaustion of domestic remedies', 221 respectively.

After internment was introduced, the Irish Department of Foreign Affairs conducted a covert investigation that continued periodically from 9th August to late November 1971 and involved the collection of countless statements from witnesses through liaising with local NGOs, solicitors, local SDLP members and the Sunday Times Insight team.⁷⁵ At the same time, the potential of an inter-state case under the European Convention on Human Rights was continually in play within and outside parliament in the months leading to the Irish Cabinet decision on 30th November 1971. It is clear from the Ministerial briefs submitted to Cabinet that the Cabinet's decision was influenced by a complex set of dynamics that included considerable public pressure throughout the autumn of 1971, the public outrage after publication of the Compton Committee's Report in November 1971, the failure of the Irish Government's diplomacy with their British counterparts over the former's two key immediate objectives, ending internment and abolition of Stormont, and the Attorney General's legal assessment of the voluminous evidence, concluding the high probability of success on article 3 allegations.⁷⁶

The Admissibility Stage and 'Administrative Practice'

During the preparation of Ireland's application, Mahon Hayes sought the advice of an international lawyer with considerable expertise on the European Convention's jurisprudence – 'a very reliable source'.⁷⁷ His contact recommended that the Irish Government should situate the article 3 allegations within a wider range of allegations of breaches of the Convention, arising from the implementation of internment 'even though we have good reasons for doubting

⁷⁵ Interview with Mr Sean Donlon, 8th February 2007.

⁷⁶ See W.A. Schabas and A O'Sullivan 'Of Politics and poor weather: How Ireland sued the UK under the European Convention on Human Rights' (2007) 2 Irish Yearbook of International Law 3-29. See also NAI DT 2001/5/1.

⁷⁷ NAI DFA 2004/7/1936. Handwritten letter from Mahon Hayes to Declan Quigley, undated.

the chances of successfully sustaining these allegations'.⁷⁸ In support, he considered an 'important feature' of an application to the Commission, much more than before a domestic criminal court, is 'the building up of an atmosphere of irresponsibility and disregard for human rights' and therefore, Hayes recommended that the Irish Government 'should invoke every case which is backed by reasonable evidence...., even if we have good grounds for assuming that they will be eliminated on technical (as opposed to merits) grounds'.⁷⁹ In the end, the Irish Government's application to the European Commission of Human Rights in 1971 raised unlawful killings under article 2 and arbitrary interference with private life (searching of homes) under article 8 in addition to the allegations under article 3, 5 and 6 (in conjunction with article 15 and 14) aforementioned.⁸⁰

The technical ground that Hayes referred to in his letter to Declan Quigley was the rule on exhaustion of domestic remedies. Within the Commission's earlier jurisprudence, there were two ways to overcome the exhaustion of domestic remedies rule in an inter-state case. There was the general application of the rule where individual victims, alleging violations of the Convention, had been unsuccessful before the domestic courts or other relevant domestic mechanisms and therefore, the state party can argue that all legal avenues domestically had been exhausted.⁸¹ There was also the concept of 'administrative practice', which is linked theoretically to the exhaustion of domestic remedies rule.⁸² The underlying principle is that 'where there is a practice of non-observance of certain Convention provisions, the remedies prescribed will of necessity be side-stepped or rendered inadequate'.⁸³

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ NAI DFA 2002/19/513. Application of the Government of Ireland, dated 15th December 1971.

⁸¹ Bratza and Padfield, 'Exhaustion of domestic remedies', 221-223.

⁸² In international law, the exhaustion of domestic remedies rule had certain exceptions to overrule the application of the rule, that is, where the domestic remedies were ineffective or illusory.

⁸³ *Ireland v The United Kingdom*, Application No, 5310/71 Report of the Commission (25th January 1976), 254, citing the Greek Case ('if there is an administrative practice of torture or ill-treatment, judicial remedies prescribed would tend to be rendered ineffective by the difficulty in securing probative evidence...').

In the Commission's jurisprudence, an administrative practice has two requirements, a 'repetition of [the alleged] acts' and an 'official tolerance'. The former involves 'a substantial number of acts...which are the expression of a general situation', that is, the acts demonstrate a pattern of violations. The latter means 'though the acts...are illegal, they are tolerated in the sense that the superiors of those immediately responsible through cognisant of such acts, take no action to punish...or prevent their repetition'.⁸⁴ Alternatively, a higher authority faced with numerous allegations 'manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings, a fair hearing...is denied'.⁸⁵ We focus here on the strategic use by the Irish Government of the 'official tolerance' element within the concept of administrative practice. In its submissions, the Irish Government argued the acts alleged were 'of such a character, over such a length of time and in such circumstances' that it was impossible for the acts to have occurred without the knowledge of 'superiors to those immediately responsible'.⁸⁶ In this respect, they stated to the Commission that they were not making allegations 'personally against any member of the British Government'.⁸⁷ In reply, the British Government denied any authorisation for acts contrary to article 3 and argued that the level of tolerance envisaged in the Greek case was 'a superior of such a rank as to be entitled to speak for the Government',

⁸⁴ *ibid.* In its 1976 Report, the Commission stated that 'when tolerance is found to exist on lower levels, [...] normally assumed that higher authorities...would offer redress for violation [...] However, the Commission must take into account the difficulty of securing probative evidence and [whether] the higher authorities...exercised their duty...to identify the practice and to prevent occurrence or repetition'. See *Ireland v The United Kingdom*, Application No, 5310/71 Report of the Commission (25th January 1976), 385.

⁸⁵ *ibid.*

⁸⁶ *ibid.*, 257.

⁸⁷ *Ibid.* 256.

It would...neither be fair nor reasonable to regard condonation by subordinate officers of acts forbidden by higher authorities as an administrative practice for which the Government is responsible and there was no evidence of such toleration.⁸⁸

On the five techniques, in particular, the British Government submitted that the Commission should distinguish the techniques from other article 3 allegations and decline to proceed further as these had been expressly discontinued.⁸⁹

These competing positions over the concept of ‘official tolerance’ were submitted by both legal teams because this concept of administrative practice had never before been applied successfully in practice. In the earlier *Denmark et al v Greece*, the European Commission of Human Rights decided that there was insufficient evidence submitted at that point to indicate an administrative practice of a violation of article 3.⁹⁰ Therefore, although the Irish Government’s arguments were rooted in the Commission’s jurisprudence, this avenue was to some extent uncharted territory and there was no absolute guarantee of successfully overcoming the exhaustion of domestic remedies hurdle.⁹¹ However, the Irish legal team had greater confidence on the article 3 allegations, in particular on the five techniques, because the Compton Committee’s Report was considered to be supporting evidence of an administrative practice.⁹²

⁸⁸ *ibid*, 266 (here, they stressed the orders and regulations that prohibited ill-treatment).

⁸⁹ *Ireland v. United Kingdom*, Appl. nos. 5310/71 and 5451/72 (Commission Decision as to Admissibility, 1 October 1972), 85.

⁹⁰ *Ireland v The United Kingdom*, Application No, 5310/71 Report of the Commission (25th January 1976), 254, citing the Greek Case.

⁹¹ Interview with Mr Mahon Hayes on October 19th 2006.

⁹² *ibid*.

The strategy suggested by Mahon Hayes' 'very reliable source' proved to be prophetic because the European Commission of Human Rights in its admissibility decision admitted every allegation in the original application except the allegations of unlawful killings under article 2 (right to life) and of arbitrarily interfering with private life through searching homes under article 8 (right to private and family life).⁹³ On article 3, the Commission found that there can be no doubt that the employment of 'five techniques' constituted an administrative practice. However, it left open for consideration on the merits whether the Commission should decline to proceed further with its examination (on the merits) in light of their discontinuance.⁹⁴ Regarding the other article 3 allegations, the Commission found that, although not admitted, the British Government did not submit any counter-evidence or make any detailed comments on the evidence submitted by the Irish Government. It also agreed with the Irish Government that the article 3 allegations had to be examined as a whole and other forms of alleged ill-treatment cannot be considered in isolation from the five techniques.⁹⁵ In this sense, the Commission found that the Irish Government sustained its arguments to overcome the exhaustion of domestic remedies rule and in turn, most of its application (as an arguable case) was admitted for assessment on its merits.

When the Commission rendered its decision, both the Agents of the Irish and British Governments were profoundly shocked. Mahon Hayes recalled that he and the British Agent Paul Fifoot remained on in Strasbourg at the end of the Admissibility hearings to await the decision. The rest of both legal teams had already left.⁹⁶ When the decision was finally delivered, Hayes sat 'disbelieving' as he heard how each allegation, except two allegations,

⁹³ *Ireland v. United Kingdom*, Appl. nos. 5310/71 and 5451/72 (Commission Decision as to Admissibility, 1 October 1972), 85 et seq.

⁹⁴ *ibid*, 86.

⁹⁵ *ibid*, 86.

⁹⁶ Interview with Mahon Hayes on October 19th 2006.

had been admitted to the Merits stage. When he turned to look at Paul Fifoot, he ‘was in state of shock’.⁹⁷ The British officials ‘were horrified. They never thought that so much would be admitted –they may have thought that some little thing would have got through as a token...But obviously [they] were horrified, shock beyond belief’.⁹⁸ Hayes explained that for the Irish legal team, there were greater celebrations at the outcome of the Admissibility decision than at other stages of the legal proceedings because the admissibility stage was read as particularly critical. It had been assumed that the Irish Government would be successful to a small extent because at the very least, the credibility of the Convention ‘would have been affected...if the Commission threw out this major inter-state case’.⁹⁹

The Merits Stage and Article 3 of the Convention

Another strategic use of the Convention language and its institutions was the Irish Government’s pursuit of its claim on article 3 and the interrogation methods during the merits stage. The central legal argument was that the interrogation methods were a violation of article 3 of the Convention in terms of the ‘physical, mental and psychological results of such extreme “authorised forms of interrogation” [which were] a continuing process with grave sequelae’.¹⁰⁰ The legal outcome sought by the Irish Government was for the Commission to define the rights under article 3 and ‘to set more acceptable standards as to what constitutes torture or inhuman treatment... than those accepted by the [British] Government’.¹⁰¹ Within this remit, it requested the Commission pronounce on the five techniques ‘even though they have now been

⁹⁷ *ibid.* See also *Ireland v. United Kingdom* (n 104) (admitted all allegations, except the allegations under article 2 and article 8, in conjunction with article 14). However, subsequent individual petitions alleged a ‘shoot to kill’ policy, see *McKerr v United Kingdom* (Appl.no. 28883/95) (ECtHR, 4 May 2001).

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ NAI DFA 2003/17/392. ‘Submission of the Irish Government to the European Commission of Human Rights’ (Memorial) 29th November 1972’, p8, para 4.

¹⁰¹ *ibid.*, p9, para 5.

suspended' so that the British Government 'should not be left in any doubt' as to their obligations under the article 3 of the Convention. The Irish Government pursued its claim through its interpretation of the Convention jurisprudence, as set out in its Memorial, and through its advocacy for witness hearings, including expert witnesses.

The hearings of the Irish Government's witnesses began in late November 1973 and were held again in early 1974.¹⁰² The hearings were set against the failure of the friendly settlement negotiations facilitated by the European Commission of Human Rights in Paris in mid-November¹⁰³ and in the midst of the final preparations for the Sunningdale Conference in early December 1973.¹⁰⁴ Ultimately, the strategies of the two Governments towards friendly settlement were diametrically opposed. The overall aim of British officials was to discuss friendly settlement with a view to successfully terminating the Commission proceedings 'without a Report and preferably without further witness hearings'.¹⁰⁵ They sought to get the Irish officials to say what the outstanding issues were and what they sought to achieve from the case. In contrast, the overall aim of Irish officials was to delay discussions on friendly settlement in order to schedule witness hearings to coincide with the Sunningdale talks. They sought British proposals that could then be considered and would not outline what would be grounds for a sufficient settlement in the first instance. Both sides maintained their diametrically opposed positions during the Paris meeting and the President of the European Commission of Human Rights struggled to mediate a common ground. For its part, the Commission tried to glean some measure of progress during the meeting, on which to base

¹⁰² *Ireland v The United Kingdom*, Application No, 5310/71 Report of the Commission (25th January 1976), 230 and 232 (26th November 1973-1st December 1973 and 25th February-2nd March 1974).

¹⁰³ The National Archives, Home Office (hereinafter cited as TNA CJ) 4/593. Transcript (Paris Meeting) November 15th 1973 and CJ 4.593. Record of the Meeting on the question of friendly settlement, November 23rd 1973.

¹⁰⁴ J McEvoy, *The Politics of Northern Ireland* (Edinburgh University Press 2008) 75.

¹⁰⁵ TNA CJ 4.593. Background brief for the Paris meeting of November 15th 1973.

further discussion. They even tendered certain suggestions, such as introducing broadly based legislation to guarantee human rights, an idea described internally by British officials as ‘unrealistic’.¹⁰⁶

The European Commission had earlier decided to approach the Irish Government voluminous evidence through ‘illustrative cases’. On the interrogation methods., the Commission heard witness testimony from two of the fourteen men subjected to the five techniques as ‘illustrative cases’.¹⁰⁷ What we focus on is the Irish Government’s expert testimony on the long-term psychological effects, which was a significant dimension of the Irish legal team’s evidence. They sought to use this expert testimony to refute the British Government’s claim that the sensory deprivation techniques did not result in long-term psychological effects and in turn, that the issue was moot due to the discontinuance of the five techniques.¹⁰⁸ In contrast, the Irish Government sought to demonstrate that the five techniques were well-known within psychiatry literature, were considered to cause long-term psychological effects and as a consequence, the issue was not moot, neither for the individual men involved nor given the possibility of re-introducing the five techniques through parliamentary approval.¹⁰⁹

During the witness hearings, the British counsel poorly cross-examined the Irish expert witness, Professor Robert Daly, and the Irish legal team were able to capitalise on ensuing discussion, leading to significant evidence being submitted to the European Commission of Human Rights. As context, the British counsel Hazan objected to further testimony from

¹⁰⁶ TNA CJ 4.593. Record of the Meeting on the question of friendly settlement, November 23rd 1973.

¹⁰⁷ *Ireland v The United Kingdom*, Application No, 5310/71 Report of the Commission (25th January 1976), 396.

¹⁰⁸ NAI DFA 2005/4/781. Transcript of the Sub-Commission hearings of witnesses, Doc NCT/JT/12, 57. See also Hansard, ‘Interrogation Techniques (Parker Committee’s Report)’, Vol 832 (2nd March 1972). In the House of Commons debate, Prime Minister Edward Heath stated that the five techniques would not be used in any future operations but interrogation in depth would continue. His understanding was that if a British Government were to decide ‘on whatever grounds I would not like to foresee’ to re-introduce the methods, they would ‘probably’ need parliamentary approval. *ibid*.

¹⁰⁹ *ibid*, 56.

Professor Robert Daly, then Professor of Psychiatry in UCC. Hazan argued that Daly's testimony would be repetitive as the five techniques were admitted by the British Government and it was unnecessary to explore the issue in expert witness testimony. Rather the question of whether the interrogation methods were a practice in breach of article 3 was solely for legal argument. The Irish counsel Rory O'Hanlon explained that the aim of the expert testimony was to give expert opinion on whether the use of five techniques 'is calculated to produce psychological injury' and whether they are acceptable methods or 'harmful' against whom they are used.¹¹⁰ He argued that Daly's evidence was necessary to response to the British Government's position that five techniques, while admitted, 'are not cruel or inhuman or brutal treatment'.¹¹¹ He argued that Daly's evidence was 'very relevant and very important for the delegates to get the expert view...as to whether in their view the use of five techniques is capable and likely to produce serious nervous disturbance'.¹¹² Daly then clarified for the Sub-Commission that his testimony was to make clear that psychiatrists in Britain did know the nature of the procedures, that they had published in this regard and that it had been discussed previously in Britain that illness resulted from these techniques being applied.¹¹³

In reply, Hazan strongly objected to Daly's evidence because it was merely a reference to some other author; 'I cannot cross-examine about it since obviously this witness cannot have any personal experience of Russian, Chinese and any other techniques'.¹¹⁴ O'Hanlon countered that although the British Government had admitted the five techniques, the Compton Committee's Report described each technique as being for a 'perfectly innocent security purpose'.¹¹⁵

¹¹⁰ *ibid*, 55. This is a partial transcript of the Sub-Commission's hearings of witnesses. In the recent *Ireland v UK* case proceedings, the President of the European Court of Human Rights lifted the confidentiality of the Commission's transcripts in full with the consent of both the Irish and British Governments.

¹¹¹ *ibid*, 56.

¹¹² *ibid*.

¹¹³ *ibid*,59.

¹¹⁴ *ibid*, 62.

¹¹⁵ *ibid*.

Therefore, he argued that ‘it is highly relevant’ to explain how these five techniques were already well-known as interrogation processes before ever they were applied in Northern Ireland and that there was ‘no reality in the suggestion that they were not used for the purposes of breaking down the morale and resistance of the persons concerned’.¹¹⁶ O’Hanlon rejected the idea that the methods such as hooding was used simply to prevent a prisoner from looking around or constant noise to prevent the men chatting to each other. Hazan continued to emphasise that Daly could not possibly know about the practice of these interrogation methods as it is only something he reads in some other book’ and in any case, he rejected the theory that the existence of some book meant the United Kingdom ‘are put on notice and we know all about it’.¹¹⁷

The delegates adjourned and decided they would hear the psychiatric evidence on the effects of the five techniques, including on the question of long-term after-effects.¹¹⁸ O’Hanlon then brought Daly through his view of the psychological stress caused by each technique and then, the effects of the techniques applied in combination.¹¹⁹ When Hazan turned to cross-examine Daly, he was not aware that Daly had previously been a psychiatrist in the British Army because Daly had been instructed by Irish counsel not to disclose this before the Commission.¹²⁰ Hazan focused on Daly’s lack of attendance at and personal knowledge of interrogations and how Daly’s understanding was only drawn from academic studies.¹²¹ Hazan then pointed out that there was no direct literature on the five techniques but Daly said he was

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*, 63.

¹¹⁸ *ibid.*, 66.

¹¹⁹ *ibid.*, 66-77.

¹²⁰ Interview with Mahon Hayes 19th October 2006. The Irish legal team felt that as Professor Daly knew about the five techniques in his capacity as a member of the British Army, and ‘was involved in the consideration of the techniques when he was in the British Army’, they could not use Daly’s own knowledge as evidence. Rather they decided that Professor Daly would submit his expert opinion drawn from psychiatric studies within academic literature. *ibid.*

¹²¹ NAI DFA 2005/4/781. Transcript of the Sub-Commission’s hearings of witnesses, Doc NCT/JT/12, 77-78.

aware of the techniques in the literature before they were applied in Northern Ireland.¹²² However, Hazan continued to pursue the point, arguing that there was ‘no book’ to Daly’s knowledge written about the five techniques rather there was literature about variations of these kinds of methods that had been used historically.¹²³ Daly replied that he was unsure if he could answer Hazan’s question. He did not know if the British Official Secrets Acts applied to what he said before the Commission. Professor Opshal from the Commission explained that anything said in the confidential hearings was immune from legal proceedings.¹²⁴ Daly then proceeded to explain how he was aware that the five techniques had been written down and that British Military Psychiatrists had accessed to this literature,

In that sense, I feel free to say that I was present at a discussion and a conference in 1969 in which the specific techniques were discussed, and I was given literature about them. It was a secret conference.¹²⁵

Hazan responded with a series of questions designed to understand fully what conference Professor Daly had attended. It was the 1969 US/UK Military Psychiatry Conference, a secret military conference between the British and American military psychiatrists that was held every two years. At the conference, professional psychiatric papers were read and discussed.¹²⁶ Daly explained that while the particular paper was discussed and copies were provided in advance, it ‘was headed in such a way that it indicated it was not allowed to be discussed outside’.¹²⁷ When Hazan asked if Daly remembered the particular paper’s title, the latter was reluctant to reveal the information for fear of getting the author ‘into trouble’.¹²⁸ Hazan replied that the information was necessary given the issue had now arisen and Prof Opsahl interjected

¹²² *ibid.*, 78.

¹²³ *ibid.*

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ *ibid.*, 78-79.

¹²⁷ *ibid.*, 79.

¹²⁸ *ibid.*

to remind Daly that his answers before the Commission were not the same as publishing anything.¹²⁹ In reply, Daly revealed that the psychiatrist was Lieutenant-Colonel Stevenson and that he (Daly) could probably locate the particular paper for the afternoon's session.¹³⁰ Later in the afternoon, before the testimony of the other Irish expert witness Professor Baastians, O'Hanlon informed the Commission that Professor Daly had located the paper 'which is a paper entitled "Medical aspects of Interrogation" delivered by Lt Col Stephens'.¹³¹ He had already given a copy of the paper to Mr Hazan 'and we feel it would be of help to the delegates to have this paper made available to them and we are willing to do this'.¹³²

This segment of the Commission's witness transcript reveals that the Irish legal team had to first succeed in getting this expert testimony heard in face of strong objections from British counsel. Once the Commission delegates had agreed to hear Professor Daly's testimony on the psychiatric effects of the techniques, the examination and cross-examination allowed Professor Daly to explore the extent of what was known about the specific 'five techniques' within both the literature and internally, within the British Armed forces. Due to Hazan's cross-examination, the Irish legal team were able to submit into evidence before the Commission a psychiatric paper specifically on the 'five techniques' that had been confidentially circulated among British Military psychiatrists, who attended the 1969 conference. It also reveals that the Commission delegates were aware that the conflicting expert evidence on the long-term psychological effects of the five techniques was in fact between former (Daly) and current (Leigh) British Military psychiatrists. By using expert testimony, the Irish legal team succeeded in raising the question of long-term psychological techniques before the Sub-Commission delegates. In their 1976 Report, the Commission found that, despite the conflicting evidence,

¹²⁹ *ibid*, 80.

¹³⁰ *ibid*, 81.

¹³¹ *ibid*, 86.

¹³² *ibid*.

it was satisfied long-term effects could not be excluded and it did not preclude a finding of practice of torture given the systematic nature of the combined techniques.¹³³ In this sense, the Commission privileged the counter-narrative of the Irish Government's expert testimony as against the British Government's expert testimony because they accepted the 'systematic nature' of the combined techniques.

5 CONCLUSION

The Irish legal team, through the use of the concept of administrative practice, succeeded in securing for the merits hearing an examination of British Government's policy of internment and its use of discontinued interrogation methods. This outcome was not considered an inevitability by the Irish legal team, who believed that their allegations, other than article 3 allegations, were much more unlikely to be admitted. Rather the Irish legal team had greater confidence in overcoming the admissibility hurdle on its article 3 allegations. Their strategy of submitting a wide-ranging inter-state petition resulted in the Irish Government's political assessment of both internment and the interrogation methods being examined at the merits stage, including through the use of witness testimony. The Irish legal team's interpretation of 'official tolerance' in the context of Northern Ireland in 1971 meant that it focused on 'superiors to those immediately responsible' and could avoid alleging Ministerial authorization.

Within the merits stage examination, the witness hearings of psychiatric expert opinion on the interrogation methods was also not an inevitability but rather the outcome of an intensely contested dispute between the Irish and British counsels before the Commission's Sub-

¹³³ *Ireland v The United Kingdom*, Application No, 5310/71 Report of the Commission (25th January 1976), 402.

Commission delegates. As we noted, significant evidence of British military psychiatrists' awareness of the five techniques as sensory deprivation techniques was entered into evidence before the Commission due to the British counsel's cross-examination. The latter evidence demonstrated to the Commission that the dispute among psychiatrists, referred to in its 1976 Report, was between former and current British Military psychiatrists. In this way, the Convention institutions permitted the Irish Government to deploy the Convention's language strategically and secure certain of its arguments in accordance with the institutions' bias. Nevertheless, as was noted in the original proceedings, the British Government's co-operation was described by the Commission as at times less than desired. This meant that key evidence on the authorization of and psychiatric effects of the use of the five techniques, as revealed in the recent *McKenna v McGuigan* and the *Ireland v United Kingdom* cases, was not submitted before the Commission. Therefore, the Irish Government's strategic deployment of rights language, in order to secure its particular account, operated within an institutional framework that relies on state party disclosure.