

# ***Ireland v. UK: The European Court of Human Rights and International Relations, 1971-8***

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## **Abstract**

It is rare for states to lodge inter-state cases with the European Court of Human Rights because they fear damaging their relations with the respondent states. Yet in 1971 the government of the Republic of Ireland began a case against the United Kingdom. This research uses archival material to reveal the private discussions that took place within the British and Irish Governments regarding the case until its conclusion in 1978, as well as the official communications issued between the governments. It finds that there were distinct differences of opinion and tension between the two governments regarding *Ireland v. UK*. Anglo-Irish relations were strong enough, however, that the case was largely kept separate from other aspects of their relationship. This article contributes to understanding of Anglo-Irish relations in the 1970s and to the literature on this and “the troubles”, which almost completely neglects *Ireland v. UK*.

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**Samantha Newbery<sup>1</sup>**

In 1976 the Republic of Ireland began the first inter-state case at the European Court of Human Rights.<sup>2</sup> *Ireland v. UK* remains a landmark case, not only because of its impact on legal definitions of torture, but because in December 2014 Ireland asked the Court to re-open the case in light of new evidence found in The National Archives, London.<sup>3</sup> Cases before the European Court of Human Rights fall into two categories: individual cases, in which a “person, nongovernmental organisation or group of individuals” lodges an application against one or more signatory states; and inter-state cases, in which the application is lodged by one or more states.<sup>4</sup> Inter-state complaints can also be made under other international human rights instruments, including the American Convention on Human Rights and the African Commission on Human and Peoples’ Rights.<sup>5</sup> Human rights concerns regularly appear on the

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<sup>2</sup> Scott Leckie, “The inter-state complaint procedure in international human rights law: Hopeful prospects or wishful thinking?”, *Human Rights Quarterly* (1988), 10, 276.

<sup>3</sup> Press Office, Department of Foreign Affairs and Trade, Republic of Ireland, “Statement by Minister [for Foreign Affairs and Trade, Charlie] Flanagan on the ‘Hooded Men’ case”, Dec 2, 2014, <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2014/december/hooded-men-case-northern-ireland/> [accessed April 29, 2016].

<sup>4</sup> European Convention on Human Rights and Fundamental Freedoms, articles 33 and 34.

<sup>5</sup> Rhona K. M. Smith, *Textbook on International Human Rights* (Oxford: Oxford University Press, 2011), p.128, 148.

international stage, with controversies over the relationship between the right to privacy and the US' surveillance powers seen since whistleblower Edward Snowden first leaked classified files in 2013 serving as just one example. Yet inter-state cases remain rare, at least in part because, as international human rights lawyer Scott Leckie has written in "The inter-state complaint procedure in international human rights law", they are "considered to be one of the most drastic and confrontational legal measures available to states".<sup>6</sup>

To explain Ireland's decision to initiate and continue with *Ireland v. UK* requires that it be placed in the context of "the troubles" and Anglo-Irish relations. "The troubles" can be said to have begun in August 1969 when the security situation in Northern Ireland deteriorated to the extent that the British Army was sent in to help the local police force, the Royal Ulster Constabulary (RUC). The security situation in the early years of "the troubles" was dire: there were fears Northern Ireland would descend into civil war.<sup>7</sup> Discussions between the British and Irish Governments, and therefore Anglo-Irish relations, frequently featured security, including the need for cooperation between the two states' police and armed forces due to the permeability of the border. Paul Gillespie explains in "From Anglo-Irish to British-Irish Relations" that between 1969 and 1999 Anglo-Irish relations became British-Irish relations as the UK's identity increasingly embraced Wales and Scotland.<sup>8</sup> For convenience, the term Anglo-Irish relations is used throughout this article.

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<sup>6</sup> Leckie, 'The inter-state complaint procedure in international human rights law', *Human Rights Quarterly* (1988), 10, 254.

<sup>7</sup> Ed Moloney, *A Secret History of the IRA* (London: Allen Lane, 2002), p.66.

<sup>8</sup> Paul Gillespie, "From Anglo-Irish to British-Irish Relations", in Michael Cox, Adrian Guelke and Fiona Stephen (eds), *A Farewell to Arms? From 'Long War' to Long Peace in Northern Ireland* (Manchester: Manchester University Press, 2000), pp.180-2.

August 1971 saw the introduction of internment without trial by the Northern Ireland Government in an effort to improve security. Internment allowed persons suspected of damaging or of intending to endanger peace and order to be arrested and imprisoned without trial. It was in response to this controversial policy, to allegations that prisoners had been mistreated and to deaths caused by the army and RUC that Ireland began to prepare its case alleging the UK had breached the European Convention on Human Rights and Fundamental Freedoms (ECHR).

Studies of “the troubles” have almost completely ignored *Ireland v. UK*.<sup>9</sup> This is difficult to explain given that the case was an international response to the UK’s management of “the troubles” and used a prominent human rights instrument. The somewhat less voluminous studies of Anglo-Irish relations also neglect to examine the influence of *Ireland v. UK* at any length.<sup>10</sup> Yet examining *Ireland v. UK* can allow for increased understanding of “the troubles” and of Anglo-Irish relations in the 1970s. Although the case has received attention from those writing from a legal perspective, the works taking this approach tend to focus on the procedures followed and on the Court’s 1978 decision. Specifically, they focus on the Court’s decision that, contrary to the European Commission of Human Rights’ 1976 opinion, certain interrogation techniques used in Northern Ireland did not constitute torture. These techniques were instead found to be “inhuman or degrading treatment or punishment”

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<sup>9</sup> See, for example, David McKittrick and David McVea, *Making Sense of the Troubles* (London: Penguin, 2001), p.68, 260.

<sup>10</sup> See, for example, Brendan O’Duffy, *British-Irish Relations and Northern Ireland: From Violent Conflict to Conflict Regulation* (Dublin: Irish Academic Press, 2007).

as prohibited by article 3 of the ECHR.<sup>11</sup> The wider political contexts of international human rights cases are not often the concern of legal scholars.

This article focuses on the impact of *Ireland v. UK* on Anglo-Irish relations. The UK considered Ireland's actions to be unjustified and tension between the two governments increased as a result. Leckie has found that states usually value political and economic interests more highly than the protection of human rights in other countries.<sup>12</sup> This raises the question of why Ireland was prepared to risk Anglo-Irish relations by lodging and continuing with *Ireland v. UK*. This article finds that the answer lies in the closeness of their relations. Their relationship, as described by Gillespie, is "one of the most intimate relationships between neighbouring states anywhere in the world."<sup>13</sup> The private, internal views of each government towards the case and towards the opposing government can now be identified for the first time using records available in the national archives of the UK and Ireland. Similarly, the decision-making processes used by the two governments over the course of the case can also now be identified. In doing so, this article aims to contribute to understanding of Anglo-Irish relations in the 1970s, of this high profile yet neglected aspect of "the troubles", of the likelihood and possible impact of other inter-state cases and of the potential impact of the re-opening of *Ireland v. UK* on current relations between the two states.

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<sup>11</sup> See, for example, Malcolm D. Evans and Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford: Clarendon Press, 1998), pp.74-5, 81-2, 86-7, 93, 95.

<sup>12</sup> Leckie, 'The inter-state complaint procedure in international human rights law', *Human Rights Quarterly* (1988), 10, 254.

<sup>13</sup> Gillespie, "From Anglo-Irish to British-Irish Relations" in *A Farewell to Arms? From 'Long War' to Long Peace in Northern Ireland* (2000), p.182.

## **The European Commission of Human Rights, 1971-6**

The introduction of internment without trial on August 9, 1971 responded to rioting and increased violence in Northern Ireland. Until this time 1971 had seen 32 troubles-related deaths; the rest of the year was to see 148.<sup>14</sup> The deprivation of liberty, the observation that all 342 men arrested on the first day of internment were Catholic and allegations of brutality at the point of arrest and during transportation to places of detention swiftly fuelled violent protests. The Irish Minister for Foreign Affairs drew the United Nations' attention to the situation, and the Taoiseach (the Prime Minister of Ireland):

“[S]tated more than once that he would welcome a joint approach by the Irish and British Governments asking the United Nations Security Council to provide a U.N. Observer Group which would operate in the border area on both sides”.<sup>15</sup>

The first indication that the Irish Government were considering initiating proceedings under the ECHR was a letter to the Northern Ireland Civil Rights Association dated September 1, 1971, replying to the Association's call for such action.<sup>16</sup>

By late September the Irish Government had collected sufficient evidence to conclude “that there was a case for laying complaints before the [European] Commission [of Human Rights]”.<sup>17</sup> At this time and until the Commission was abolished in 1997 complaints made

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<sup>14</sup> David McKittrick et al., *Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles* (Edinburgh: Mainstream, 1999), pp.62-135.

<sup>15</sup> C. Nic Fhionnáin (Personal Secretary, Taoiseach's Office) to Sean B. Murphy (General Secretary and Publicity Officer, Sub-Postmasters' Union, Bray), Oct 27, 1971 [Dublin, National Archives of Ireland], [Taoiseach's Office Records] TAOIS 2002/8/493.

<sup>16</sup> K. Gannon (Personal Secretary to the Taoiseach) to Edwina Stewart (Honorary Secretary, Northern Ireland Civil Rights Association), Sept 1, 1971, TAOIS 2002/8/493.

<sup>17</sup> Sir John Peck (British Ambassador to Ireland) to Foreign and Commonwealth Office (FCO), Oct 19, 1971, [London, The National Archives], [Foreign and Commonwealth Office Records] FCO 41/787.

under the ECHR were first considered by the Commission.<sup>18</sup> After the Commission reported their opinions, the applicant government either referred the case to the Committee of Ministers or to the European Court of Human Rights to make a final judgment on whether the ECHR had been breached. The Irish Government was satisfied that breaches of the ECHR had taken place “in a substantial number of cases”<sup>19</sup> and felt responsible for the internees, who they considered to be Irish citizens.<sup>20</sup> They would have preferred, however, not to have taken the case. The Taoiseach, Jack Lynch, had told the British Prime Minister, Edward Heath, of the alleged breaches of the Convention in the hope that this “would have had the effect of eliminating the alleged behaviour”.<sup>21</sup> It did not.

Internal correspondence within the Irish Government revealed fears that a case under the ECHR “would inevitably be strongly resented by the British Government and lead to a considerable deterioration in Anglo-Irish relations”.<sup>22</sup> The Attorney General’s Office judged that dangers included that the UK “would be unlikely to be receptive to any latitude we would seek under the Anglo-Irish Free Trade Area Agreement” and that it “could prove difficult in acquiescing in concessions which you have negotiated for our Common Market entry”.<sup>23</sup> The Irish Ambassador was sent to tell the Foreign and Commonwealth Office (FCO) that they were under increased pressure to take action as a result of the November

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<sup>18</sup> Christian Tomuschat, “The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions”, in Ulrike Deutsch and Rüdiger Wolfrum (eds), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Berlin: Springer, 2009), p.7.

<sup>19</sup> Peck to FCO, Oct 19, 1971, FCO 41/787.

<sup>20</sup> Illegible (Department of Foreign Affairs (DFA)) to H.J. O’Dowd (Private Secretary to the Taoiseach), Nov 16, 1971, TAOIS 2002/8/494.

<sup>21</sup> D. O’Sullivan (Assistant Secretary, Department of the Taoiseach), Oct 18, 1971, TAOIS 2002/8/493.

<sup>22</sup> Illegible (on behalf of the Attorney General) to Minister, Nov 18, 1971, TAOIS 2002/8/495.

<sup>23</sup> Ibid.

1971 Compton Report into allegations of physical brutality against the security forces arising out of the events of August 9.<sup>24</sup> This report had failed to satisfy because it was inadequate—for instance because it only concerned allegations relating to the first day of internment—and because its findings were based on incomplete evidence.<sup>25</sup> Despite the dangers of taking the case, the Attorney General’s Office was of the view that these were outweighed by pressure from the Catholic minority in Northern Ireland and from the population of the Republic to take action.<sup>26</sup>

On December 16, 1971, just over two weeks after the decision to go ahead with proceedings was made, the Irish Government submitted its application to the European Commission of Human Rights. The application alleged that the UK had failed to comply with its obligation to respect human rights as articulated in article 1 of the ECHR; that deaths caused by the security forces constituted breaches of article 2 (the right to life); that there were various breaches of article 3 (the prohibition of torture and inhuman or degrading treatment or punishment); that internment violated articles 5 (the right to liberty and security) and 6 (the right to a fair trial); and that detention and internment were being carried out with discrimination on the grounds of political opinion in breach of article 14.<sup>27</sup> Further applications were made in February and March 1972, providing evidence pertaining to further breaches of these articles and alleging that the Northern Ireland Act 1972 violated

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<sup>24</sup> Ibid.

<sup>25</sup> Samantha Newbery, *Interrogation, Intelligence and Security: Controversial British Techniques* (Manchester: Manchester University Press, 2015), pp.88-91.

<sup>26</sup> Illegible (on behalf of the Attorney General) to Minister, Nov 18, 1971, TAOIS 2002/8/495.

<sup>27</sup> Application of the Government of Ireland, Dec 15, 1971, [Dublin, National Archives of Ireland], [Department of Foreign Affairs’ Records] DFA/2002/19/513.



article 7 (no punishment without law).<sup>28</sup> These were solemn, weighty allegations to make against a neighbouring state in such a public, international form.

Ireland's decision antagonized the British Government. Indeed, throughout the case the UK's attitude was one of irritation. As the Commission began collecting evidence to inform its decision on which allegations were admissible and therefore worthy of full investigation, the British Government began considering how they might persuade Ireland to drop the case. The British Ambassador, Sir John Peck, was instructed to ask the Irish Government to withdraw their application to the European Commission of Human Rights.<sup>29</sup> Peck believed Lynch, with whom he had a "close working relationship",<sup>30</sup> was not fully committed to continuing with the case.<sup>31</sup> This view may have encouraged Britain's efforts to end the case before the Commission formulated its opinion but Peck may have misunderstood Lynch's attitude towards the case. The incentives the British Government considered offering the Irish Government included that while they would not have a seat at a conference on a solution to the difficulties in Northern Ireland, they could be allowed to send a panel to one session to present their views.<sup>32</sup> It is not known whether this approach was made, but evidence of the Irish Government's attitude towards the case in later months and years strongly suggests that nothing short of a decisive end to the practices they complained of would convince them to terminate the case.

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<sup>28</sup> Ireland's submission to the Commission, Feb 22, 1972, DFA 2002/19/513; Ireland's supplementary application to the Commission, Mar 3, 1972, DFA 2002/19/513.

<sup>29</sup> Peck to Sir Stewart Crawford (Deputy Under Secretary of State, FCO), 26 June 1972, [London, The National Archives], [Northern Ireland Office Records] CJ 4/204.

<sup>30</sup> M. Cullis, "Obituary: Sir John Peck", (Jan 20, 1995), *The Independent*, <http://www.independent.co.uk/news/people/obituary-sir-john-peck-1568846.html> [accessed April 29, 2016].

<sup>31</sup> See, for example, Peck to Crawford, June 26, 1972, CJ 4/204.

<sup>32</sup> Crawford to N.F. Cairncross (Northern Ireland Office (NIO)), July 3, 1972, FCO 87/139, 2.

Kelvin White, Head of the FCO's Republic of Ireland Department, showed his irritation in a letter to a colleague in the Northern Ireland Office (NIO) in July 1972 that noted:

“Irishmen who trek up to Stormont [the seat of Northern Ireland's government] could profitably be left with the impression of a hard-worked group of officials, too often distracted from the proper task of governing Northern Ireland by the need to shape a defence for British Ministers against charges in fact levelled against the previous Unionist regime.”<sup>33</sup>

Despite the UK's irritation, communications between the two governments on the subject of the case were confined to official communications that formed part of the case, letters between the Prime Minister and the Taoiseach, meetings involving their respective Ambassadors and discussions at the Anglo-Irish Meeting of September 1973. In their first written submissions to the Commission on the case the UK claimed Ireland had made little attempt “to take effective action against the I.R.A.” Ireland replied in their written submissions that their government “completely rejects and denies these statements”.<sup>34</sup> These differences of opinion would continue to be expressed through formal, official channels until the case ended in 1978.

On October 1, 1972 the Commission declared the majority of Ireland's allegations admissible. Application number 5310/72, in respect of the Northern Ireland Act 1972, had been withdrawn during the admissibility hearings, while the only part of the main application

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<sup>33</sup> Kelvin White (Head of the FCO's Republic of Ireland Department) to Cairncross, July 14, 1972, FCO 87/140.

<sup>34</sup> Ireland's Counter-Observations to the Commission, Introductory Comments, May 29, 1972, DFA 2002/19/513.

declared inadmissible was the allegations under article 2 (the right to life).<sup>35</sup> The merits stage that followed saw the Commission investigate the facts before the collection of evidence phase began.<sup>36</sup> The merits stage saw both states make efforts to pursue a friendly settlement, a provision of the ECHR that allows a case to be terminated early. The fifteen months that the Commission spent on the merits stage can, however, more accurately be characterized as a period involving tension, disagreements and misunderstandings.

The first difficulty to arise during the merits stage came about in early 1973 when the UK requested an extension to the deadline for submitting its reply to Ireland's written observations on the merits of the case. When asked by the Commission for their reaction to the request, the Irish Government requested a refusal on the grounds that their counterparts had already had plenty of time; that Ireland had never sought an extension, despite having less resources and facilities in comparison to Westminster; that the UK had already sought and been granted extensions for all submissions; and because:

“The matters complained of by the Government of Ireland are continuing up to the present date and the continuing discrimination, in particular, contributes very largely to the violence and deaths in Northern Ireland.”

Further, Ireland told the Commission that it had:

“[R]efrained from making further submissions in regard to recurrences of the matters complained of because they are anxious to avoid delay in the proceedings”.<sup>37</sup>

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<sup>35</sup> “Complaints against Britain under the European Convention on Human Rights”, Nov 22, 1972, TAOIS 2003/16/478.

<sup>36</sup> Ibid.

<sup>37</sup> Mahon Hayes (Agent of the Government of Ireland), draft official response to A.B. McNulty (Secretary to the European Commission of Human Rights), TAOIS 2004/21/471.

Their commitment to continuing with and completing the case was therefore clear. It was also evident that improving stability in Northern Ireland was the motivation for this commitment.

Nonetheless, the UK's request for an extension was granted. In their written observations the UK took the opportunity to demonstrate that they were particularly concerned about the Commission's investigations into whether the so-called "five techniques" of interrogation used against fourteen internees were torture. They did so by asking the Commission not to express an opinion on the legal issues concerning the techniques on the grounds that they were no longer being used.<sup>38</sup>

February 1973 saw a general election in Ireland that brought Liam Cosgrave into power as Taoiseach, and the appointment of a new Minister for Foreign Affairs and a new Attorney General. Declan Costello, the new Attorney General, said privately that he was in favour of settling the case.<sup>39</sup> Evidence shows that the Irish Government as a whole remained open to discussions about securing a friendly settlement. It is unlikely that the British Government was ever in a position to propose terms that would have satisfied the Irish Government.

Heath wrote to Cosgrave about the case in May 1973. This message is another example of a formal claim by the UK that the case was damaging progress in Northern Ireland. Sources do not allow for exploration of to what extent this public claim was also the private reason why Heath and his government wanted the case to be postponed. Heath pointed out that Northern Ireland was entering a particularly busy period, with upcoming

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<sup>38</sup> "The European Convention on Human Rights; Application No. 5310/71; (Merits); Counter Memorial of the United Kingdom Government", Mar 1973, DFA 2004/7/2585, 60.

<sup>39</sup> See, for example, Declan Costello (Attorney General) to Garret FitzGerald (Minister for Foreign Affairs), June 6, 1973, DFA 2004/7/2586, 2.

local government and Assembly elections and a discussion at Westminster of the Constitution Bill. The latter would lead to discussions:

“[A]bout the formation of an Executive [for Northern Ireland] which would satisfy the conditions laid down in the Bill for the devolution of power”.

He thanked the Irish Government for their “active co-operation” regarding the border, but went on to say:

“My purpose here is simply to point out as forcefully as I can that to pursue a policy of co-operation with HMG [Her Majesty’s Government] while simultaneously pursuing allegations of torture, discrimination, etc. against HMG seems to me contradictory.”<sup>40</sup>

These efforts could not be kept separate, Heath argued.

Ireland refused to agree to a joint approach to the Commission requesting a postponement of the July 1973 hearings in case it caused the minority in Northern Ireland to feel betrayed.<sup>41</sup> Yet Cosgrave did agree to a postponement, on the grounds that it was undesirable to risk adding to the difficulties of the political situation immediately after the general election for the new Northern Assembly.<sup>42</sup> Costello also acknowledged, not only privately but in a briefing for the Ambassador to use when speaking to the Prime Minister, that “developments [at the European Commission of Human Rights] in Strasbourg cannot help but influence developments in Northern Ireland.”<sup>43</sup> In this instance *Ireland v. UK* was temporarily put to one side in pursuit of improvements to “the troubles”.

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<sup>40</sup> Edward Heath (Prime Minister) to Liam Cosgrave (Taoiseach), undated (May 30, 1973), [London, The National Archives], [Cabinet Office Records] CAB 164/1329.

<sup>41</sup> Christopher Roberts (10 Downing St) to Michael Alexander (FCO), June 15, 1973, FCO 41/1109.

<sup>42</sup> “Draft instruction to Ambassador in London”, undated (June 1973), TAOIS 2004/21/471.

<sup>43</sup> *Ibid.*

The Irish Government acknowledged that in this instance the case should be postponed for the good of other developments in Northern Ireland. This encouraged the erroneous belief among members of the British Government that Ireland was not completely committed to achieving the improvements to the conditions in Northern Ireland that the Irish Government had outlined in their application to the Commission. Ireland was committed to pursuing changes to the conditions that motivated this case. They were, however, open to resolving the case through a friendly settlement. The UK failed to accept that this was Ireland's position.

The closest the two governments came to achieving a friendly settlement was in the autumn and winter of 1973. The Foreign Secretary, Alec Douglas-Home, told the Prime Minister that he wanted the case to end before further oral hearings and before the detailed examination of evidence began.<sup>44</sup> Ireland was willing to consider terminating the case, but disagreed about the timing. Communications between the two governments remained cordial despite the misunderstandings that plagued this period.

*Ireland v. UK* was one of twelve items on the agenda for the Anglo-Irish Meeting of September 17, 1973.<sup>45</sup> The UK believed it was agreed at this meeting that after they approached the Commission about discussing a friendly settlement, Ireland would agree to participate in these discussions.<sup>46</sup> However, Ireland did not understand that the UK wanted to adjourn the merits hearings that were set to begin on October 2. They viewed an adjournment as unacceptable and told the UK this on September 28.<sup>47</sup>

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<sup>44</sup> Sir Alec Douglas-Home (Foreign Secretary) to Heath, undated (Mar 1973), FCO 41/1109.

<sup>45</sup> Index, "Anglo-Irish Meeting", Sept 1973, TAOIS 2004/21/673.

<sup>46</sup> "Message from the Prime Min., The Rt. Hon. Edward Heath MP to the Taoiseach, Mr Liam Cosgrave TD", Sept 27, 1973, TAOIS 2004/21/471, 1.

<sup>47</sup> Cosgrave to Heath, Sept 28, 1973, FCO 87/275.

Privately, White once again expressed his annoyance, telling the Permanent Under Secretary of State for the FCO's Private Secretary:

“The Strasbourg exercise is going badly wrong. The most probable cause is Irish incompetence; I suspect that what the two Prime Ministers agreed on 17 September has not been properly conveyed to those in Dublin responsible for the conduct of the Strasbourg case.”<sup>48</sup>

At this point however, official correspondence between the two premiers remained cordial and they were both careful to avoid worsening Anglo-Irish relations further. Heath told Cosgrave in a letter of September 27:

“I should of course be very sorry if there had been any misunderstanding between us: I can assure you that we went ahead with the conversation [with the Commission about a friendly settlement] in the firm belief that you knew that we were doing so, and were content.”<sup>49</sup>

Cosgrave's reply of the following day displayed a similar attitude, beginning, “I, like you, am most anxious to avoid any misunderstandings about the ... case.”<sup>50</sup>

The merits hearings went ahead on October 2-5, 1973, though the Commission postponed the hearings on article 3 until December because the UK had not yet provided adequate evidence on the allegations pertaining to this article.<sup>51</sup> On October 10 Costello

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<sup>48</sup> White to Private Secretary to the Permanent Under Secretary, Sept 27, 1973, FCO 87/275.

<sup>49</sup> “Message from the Prime Min., The Rt. Hon. Edward Heath MP to the Taoiseach, Mr Liam Cosgrave TD”, Sept 27, 1973, TAOIS 2004/21/471, 1.

<sup>50</sup> Cosgrave to Heath, Sept 28, 1973, FCO 87/275.

<sup>51</sup> “Verbatim record of the hearing of the parties on the merits held in Strasbourg from 2 to 5 October 1973”, [Dublin, King's Inns Library], Declan Costello's Papers; Summary of correspondence and events in pursuit of a friendly settlement September to October 1973, undated, FCO 87/399, 5.

accepted the Commission's invitation to discuss a friendly settlement on behalf of the Irish Government. His acceptance letter asked that the UK formulate proposals for settlement before a friendly settlement meeting took place, warning that otherwise it was "difficult to see how the proposed meeting can have a positive outcome".<sup>52</sup>

On November 15, 1973 representatives of the two governments met at the Council of Europe's offices in Paris. This was to be the only official meeting to discuss a friendly settlement and as close as they were to come to terminating the case. Despite Ireland's request, the UK did not put forward any proposals for settlement.<sup>53</sup> Instead, they listed the political changes already made in Northern Ireland.<sup>54</sup> Privately they later blamed the lack of progress regarding a friendly settlement on Ireland for not providing guidance on what they wanted to see in the UK's proposals.<sup>55</sup> Ireland might have responded by pointing out that they had publicly stated their aims in pursuing the case in their original applications to the Commission. The pressures they faced from communities within Northern Ireland and the Republic of Ireland continued and terminating the case would therefore have been politically difficult. Yet the British Government as an institution, as well as its constituent politicians and civil servants, persistently struggled either to understand or to accept why Ireland was pursuing it. This disposition was exemplified by Adrian Thorpe of the FCO who told a colleague in the NIO that, "[t]he Irish, as we know to our cost, do not always think logically".<sup>56</sup>

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<sup>52</sup> Costello to Cosgrave, Oct 10, 1973, TAOIS 2004/21/471; Attorney General's Office, "Draft Reply to Commission", Oct 10, 1973, TAOIS 2004/21/471.

<sup>53</sup> Costello, "'Friendly Settlement' Negotiations – November 15<sup>th</sup> 1973", Nov. 6, 1973, DFA 2004/7/2586, 1.

<sup>54</sup> Arthur Galsworthy (British Ambassador to Dublin) to FCO, July 13, 1974, FCO 87/402, 1.

<sup>55</sup> "Speaking Note", Aug 1975, FCO 87/481, 1.

<sup>56</sup> Adrian Thorpe (FCO) to Richard Cox (NIO), Feb 5, 1973, CJ 4/583, 1.



Despite the British Government's disappointment that the Sunningdale Agreement of December 1973 on power-sharing in Northern Ireland did not lead to a friendly settlement "being hammered out in post-Sunningdale spirit",<sup>57</sup> and their acceptance that once the final witness hearings had taken place in July 1974 a settlement was unlikely,<sup>58</sup> they once again stated their willingness to pursue a friendly settlement. They did this during the final speech in their oral conclusions on the evidence in March 1975.<sup>59</sup> The pending production of the report in which the Commission would express its opinions on whether the ECHR had been breached, and a desire to avoid the case then going to the European Court of Human Rights, had given the UK renewed impetus for pursuing a settlement.

In August 1975 representatives of both governments met with the Commission to hear its preliminary findings. At this meeting the Commission again offered to facilitate a friendly settlement. Ireland maintained the view that they could not proceed until the UK put forward terms.<sup>60</sup> Personal views were exchanged at a meeting of British and Irish civil servants in December, at which the British representative stated the belief that the misunderstandings had largely been on the Irish side and that it was "obvious" that it was up to Ireland to "set forth" terms.<sup>61</sup> It is possible that without the frequency and direct nature of communications between the two governments concerning the case—especially face-to-face meetings involving

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<sup>57</sup> J.B. Donnelly (Republic of Ireland Department, FCO) to Brian Major (position unknown), Jan 2, 1974, FCO 87/399, 1.

<sup>58</sup> Donnelly to G.W. Harding (Republic of Ireland Department, FCO), July 31, 1974, FCO 87/402.

<sup>59</sup> Appendix 2, "Principal dates relating to the proceedings", Ireland V. the UK: A Guide to the Report of the European Commission of Human Rights, DFA/2003/17/406; G.W. Watson to Douglas Janes (NIO), Apr 11, 1975, CJ 4/1259, 6.

<sup>60</sup> Costello to FitzGerald, Aug 15, 1975, TAOIS 2005/151/715.

<sup>61</sup> Richard A. O'Brien (First Secretary, Irish Embassy, London) to Secretary, DFA, Dec 17, 1975, DFA 2010/19/1721.

premiers and Ambassadors—that the case may have had a more damaging effect on “the troubles” and Anglo-Irish relations.

At the end of the case, however, the British Ambassador commented that one reason why a friendly settlement was never reached was that personal animosity had developed between the two small groups involved in the case.<sup>62</sup> Indeed, the Irish Ambassador noted in 1976 that the Attorneys General in post at that time “had not got on well together”.<sup>63</sup> It is useful to distinguish between the private and official attitudes held by the two governments and key post-holders. The sheer number of people on each side who had a view on the case, and the diversity of their views, complicated the decision-making processes on both sides and may have made it difficult for each government to show a united front. Although it is possible to understand one another’s positions and to disagree, in *Ireland v. UK* it seems that the UK did not fully understand Ireland’s stated reasons for initiating and continuing with the case and therefore did not understand their reasons for insisting on seeing proposals before friendly settlement discussions could proceed.

### **The European Court of Human Rights, 1976-8**

Garret FitzGerald, Ireland’s Minister for Foreign Affairs in 1976, noted in his autobiography *All in a Life*, that this was a particularly difficult year for Anglo-Irish relations.<sup>64</sup> He explained that neither the arrests in the Republic of Ireland of two groups of armed men belonging to the SAS or the assassination of the new British Ambassador, Christopher Ewart-Biggs, on Irish territory helped their relationship. The Commission’s Report also caused tension, he noted, especially when an unidentified member of the Irish Government broke an

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<sup>62</sup> Robin Haydon (Ambassador) to David Owen (Foreign Secretary), Feb 15, 1978, CJ 4/2077, 3.

<sup>63</sup> Galsworthy to FCO, Mar 13, 1976, CJ 4/1267.

<sup>64</sup> Garret FitzGerald, *All in a Life: An Autobiography* (London: Macmillan, 1991).

agreement between the two governments by briefing the press on the report before it was published. The British Government retaliated with a carefully written press briefing.<sup>65</sup> The timing of the report was unfortunate, but *Ireland v. UK* was only one element of Anglo-Irish relations in the 1970s.

The presentation of the Commission's Report was not the end of *Ireland v. UK*. Procedure dictated that a final decision had to be made by either the Committee of Ministers or the European Court of Human Rights. When considering which body to refer the case to, Declan Quigley of the Attorney General's Office and Mahon Hayes, the official spokesperson before the European Commission of Human Rights and the European Court of Human Rights as Agent of the Government of Ireland, drew their colleagues' attention to the danger that the Committee of Ministers would be "more sympathetic towards the British" than the Court would be. Reasons included that the worldwide publicity that "the troubles" had received would make "many normal persons" think the British security forces should be given "wide latitude" in Northern Ireland, and that therefore it may be in Ireland's interests to ask the Court to consider the case instead.<sup>66</sup> Prime Minister Harold Wilson told the Taoiseach that referring the case to the Court:

"[W]ould be regarded by my Government as entirely unjustified... Fruitful cooperation between our Governments in relation to Northern Ireland would be difficult to maintain while such a Case is being argued in full public view."<sup>67</sup>

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<sup>65</sup> Ibid., pp.279-83.

<sup>66</sup> Declan Quigley (Attorney General's Office), Apr 10, 1975, DFA 2010/19/1721; Hayes to Minister, Jan 31, 1975, DFA 2010/19/1721.

<sup>67</sup> "Bilateral brief for the Prime Minister to use with the Taoiseach at the European Head of Government meeting on 1/2 December 1975: Speaking Note", FCO 87/482.

The strength of this statement demonstrates not only the desire to avoid endangering other aspects of Anglo-Irish relations, but the expected damage that a referral to the European Court of Human Rights would do to the UK's international reputation.

The Commission adopted its report on January 25, 1976.<sup>68</sup> It expressed the opinion that article 6 did not apply to the powers of detention and internment without trial; that these powers were “not in conformity” with article 5 but were permitted under article 15, which allows for derogation from some of the ECHR's obligations in times of emergency; that it found no discrimination contrary to article 14; that there cannot be a separate breach of article 1's obligation to respect human rights; and that there had been numerous breaches of article 3, including that the “five techniques” of interrogation constituted torture.<sup>69</sup> When the report was made public some months later, its content received coverage in many UK and Irish newspapers and, as noted by the NIO and most likely welcomed by the rest of the government given the Commission's opinion that there had been breaches of the ECHR, “attracted less interest than we might have expected” further afield.<sup>70</sup>

At a Cabinet meeting of March 9, 1976 the Irish Government decided to refer the case to the European Court of Human Rights.<sup>71</sup> Ireland's national public service broadcaster, RTÉ, announced this decision the following day,<sup>72</sup> and the referral was made on March 13.<sup>73</sup>

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<sup>68</sup> Appendix 2: Principal dates relating to the proceedings, “Ireland V. the UK: A Guide to the Report of the European Commission of Human Rights”, DFA/2003/17/406.

<sup>69</sup> *Ireland against the United Kingdom of Great Britain and Northern Ireland*, Report of the Commission (5310/71) [1976], pp.489-91.

<sup>70</sup> J.M. Stewart (NIO) to Patrick Wright (10 Downing St), Sept 7, 1976, FCO 87/986.

<sup>71</sup> Galsworthy to FCO, Mar 11, 1976, FCO 87/978.

<sup>72</sup> Galsworthy to FCO, Mar 10, 1976, FCO 87/978.

<sup>73</sup> Appendix 2: Principal dates relating to the proceedings, “Ireland V. the UK: A Guide to the Report of the European Commission of Human Rights”, DFA/2003/17/406.

Ireland acknowledged that “[i]t is the normal practice for such reports to be referred in the first instance” to the Committee of Ministers, and so referring the case to the Court would be “an unusual step which might be regarded as confrontatory [sic] by the British”.<sup>74</sup>

The British Government reacted badly to Ireland’s decision, not least because there had been no mention of an intention to refer the case to the Court at the March 5 meeting between the Prime Minister and the Taoiseach. A telegram from the Foreign Secretary, James Callaghan, to various British embassies also noted:

“[I]t seems surprising that after the very full investigation made by the European Commission of Human Rights over the last four years, the Government of the Irish Republic should now have decided to submit the matter to a further process of adjudication.”<sup>75</sup>

“Diplomatic action”, namely an instruction to the ambassador in Dublin:

“[T]o acquaint the Secretary of the Taoiseach’s Department with HMG’s displeasure at the Irish Government’s discourteous initiative, especially in the light of the recent meeting at Downing Street”

was discussed by members of the NIO, FCO, Ministry of Defence, Attorney General’s Office and Treasury Solicitors.<sup>76</sup> The British Ambassador was told by the Irish Government that the:

“Cabinet were rushed into a hasty decision by inaccurate information from Strasbourg that the Commission themselves were about to refer the case to the Court”.<sup>77</sup>

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<sup>74</sup> ‘K’ to Minister, Mar 20, 1975, DFA 2010/19/1721.

<sup>75</sup> James Callaghan (Foreign Secretary) to certain missions, Mar 11, 1976, CAB 164/1330.

<sup>76</sup> “Note of a meeting on the Irish State Case held in the Northern Ireland Office, 11 March 1976 at 12 noon”, CJ 4/1266.

<sup>77</sup> Resident Clerk to Private Secretary in Luxembourg, Apr 1, 1976, CJ 4/1267.

A brief prepared by Cabinet Secretary Sir John Hunt and the NIO contained the view that this “lame explanation ... did not carry conviction”.<sup>78</sup> Given that in January 1975 the Irish Government had given some consideration to whether to take the case to the Court or to the Committee of Ministers, it appears there was either dishonesty or forgetfulness in operation when the Ambassador, Donal O’Sullivan, was told that at the time of the March 5 meeting the government had not even begun to consider whether to refer the case to the Court.<sup>79</sup>

Ireland stated in its application to the European Court of Human Rights that its aim was:

“[T]o ensure the observation in Northern Ireland of the engagements undertaken by the respondent government as a high contracting party to the Convention and in particular of the engagements specifically set out by the applicant government in the pleadings filed and the submissions made on their behalf and described in the evidence adduced before the Commission in the ... hearings before them”.<sup>80</sup>

Their reasons for going to the Court, rather than the Committee of Ministers, remained as they were in early 1975: they feared that “if the matter were left to the Committee of Ministers, which is a political forum, considerations of partisanship ... might apply.”<sup>81</sup> FitzGerald later claimed the move was also motivated by a desire to “avoid unnecessary damage to Anglo-Irish relationships through a politicisation of our differences in the Committee of Ministers of the Council”.<sup>82</sup> Despite the UK’s displeasure at Ireland’s

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<sup>78</sup> Ibid.

<sup>79</sup> Galsworthy to FCO, Mar 13, 1976, CJ 4/1267.

<sup>80</sup> Foster (UK Delegation, Strasbourg) to FCO, Mar 11, 1976, FCO 87/979, 3.

<sup>81</sup> Galsworthy to FCO, Mar 11, 1976, FCO 87/978.

<sup>82</sup> FitzGerald, *All in a Life* (1991), p.283.

decision, no evidence has been found to suggest that it damaged any other element of Anglo-Irish relations.

As this was the first inter-state case to go before the European Court of Human Rights there was no precedent as to how to proceed. The President of the Court, Giorgio Balladore Pallieri, presumed there would be written pleadings and adopted the view that Ireland would present their case first.<sup>83</sup> Proceedings went ahead with little controversy. Press attention focused on the British Attorney General, Samuel Silkin's, "unqualified undertaking" given during the Court's hearings of February 8, 1977 that the "five techniques" would "not in any circumstances be reintroduced as an aid to interrogation".<sup>84</sup> This was not a new position: Prime Minister Edward Heath had announced in the House of Commons on 2 March 1972 that the techniques would "not be used in future as an aid to interrogation."<sup>85</sup>

Both governments continued to see the value of a friendly settlement. Although Douglas Janes of the NIO noted that the UK's original reasons for seeking a settlement had "almost evaporated" after the Commission's Report was published and its opinions were found not to be as damning as feared,<sup>86</sup> the two Attorneys General met in March 1977 to discuss a settlement. The meeting was "very cordial" but it became clear that the concessions Ireland would need in order to agree to a friendly settlement could not be made. For instance, Costello asked the British Government to consider taking action against the people responsible for the acts the Commission had found to be in breach of article 3's prohibition of

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<sup>83</sup> "Record of a meeting in the President's Office at the Human Rights Building in Strasbourg on 18 May 1976", CJ 4/1269, 2.

<sup>84</sup> C. Walker, 'Britain gives pledge never again to use deprivation techniques', *The Times*, Feb 9, 1977, TAOIS 2007/116/770, NAI.

<sup>85</sup> *Hansard*, HC Vol.832, col.744 (Mar 2, 1972).

<sup>86</sup> Janes to Kenneally (NIO), Oct 26, 1976, CJ 4/1613.

torture and inhuman or degrading treatment or punishment.<sup>87</sup> There were practical barriers to this, including the difficulty of persuading members of the police or military to give evidence in court,<sup>88</sup> as well as dampened enthusiasm for a friendly settlement among members of the British Government now that most of the damage the case could do had already been done.<sup>89</sup>

It is not clear what incentives there were for the Irish Government's pursuit of a friendly settlement. Silkin concluded that their decision to consider pursuing a friendly settlement:

“[W]as probably a tactical move to enable to [sic] Irish Government to answer criticisms of their unwillingness throughout the case to make proposals with a view to a friendly settlement”.<sup>90</sup>

Ireland had, however, remained of the view throughout that it was not their responsibility to make these proposals. An upcoming general election in Ireland may also have influenced the government's portrayal of their attitude towards a friendly settlement. Further, 1977 was yet another year in which there was tension in Anglo-Irish relations, not least because of the trial of the SAS men arrested in the Republic,<sup>91</sup> and it is possible this also influenced the Irish Government's attitude towards the case.

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<sup>87</sup> Samuel Silkin (Attorney General) to James Callaghan (Prime Minister), Mar 25, 1977, [London, The National Archives], [Prime Minister's Office Records] PREM 16/1725.

<sup>88</sup> Peter Rawlinson (Attorney General), “Verbatim record of the hearing of the parties on the merits held in Strasbourg on 12 and 13 December 1973”, Declan Costello's Papers, 33.

<sup>89</sup> P.L.V. Mallet (Republic of Ireland Department, FCO) to Private Secretary/Mr Judd, Mar 30, 1977, FCO 87/639.

<sup>90</sup> Owen to British Embassy, Dublin, Apr 4, 1977, CJ 4/1612.

<sup>91</sup> Henry Patterson, *Ireland's Violent Frontier: The Border and Anglo-Irish Relations During the Troubles* (Houndmills: Palgrave Macmillan, 2013), p.108.



The Court gave its judgement in *Ireland v. UK* on January 18, 1978. It found that although there had been no violations of articles 5, 6 and 14 there had been violations of article 3.<sup>92</sup> In these general terms its judgment was in keeping with the opinion of the Commission. The principal difference was that the Court did not judge the “five techniques” of interrogation to be torture because they “did not occasion suffering of the particular intensity and cruelty implied by the word torture”, though the techniques were judged to be in breach of article 3’s prohibition of inhuman and degrading treatment.<sup>93</sup> This was the Court’s first judgment “on the meaning of inhuman and degrading treatment and torture”.<sup>94</sup> *Ireland v. UK* has therefore played a key role in developing international human rights standards. From a procedural perspective all that remained was for the Committee of Ministers to ensure the respondent government abided by the Court’s judgment. The Committee agreed with the UK’s statement that the judgment did not require them to take any further action.<sup>95</sup> The case had finally come to a close.

## **Conclusion**

The British Government maintained the view that it was contradictory of the Irish Government to pursue *Ireland v. UK* whilst also pursuing progress in Northern Ireland. By contrast, FitzGerald stated publicly in 1976 that the case has:

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<sup>92</sup> *Case of Ireland v. The United Kingdom: Judgment* (5310/71) [1978], pp.57-8.

<sup>93</sup> *Ibid.*, pp.39-40.

<sup>94</sup> R.J. Spjut, “Torture under the European Convention”, *American Journal of International Law* (1979), 73, 267.

<sup>95</sup> “Appendix X: Resolution(78)35 on the Judgment of the European Court of Human Rights of 18 January 1978 in the ‘Case of Ireland against the United Kingdom’ (Adopted by the Committee of Ministers on 27 June 1978 at the 290<sup>th</sup> meeting of the Ministers’ Deputies)”, CJ 4/2076, 3.

“[N]ot deflected and will not deflect the Irish Government from continuing the close co-operation which exists between the two Governments in their common fight against terrorism which ignores all human rights”.<sup>96</sup>

In *Ireland v. UK* cooperation over progress in Northern Ireland was most evident in the agreement to postpone the merits hearings originally scheduled for July 1973.

Yet the following year FitzGerald acknowledged during a meeting with the US Secretary of State, Cyrus Vance, that *Ireland v. UK* had proved to be a problem in relations between the two governments.<sup>97</sup> This serves as a reminder that there were sometimes differences between official, formal governmental views and the views of individuals involved in the case. The distinction can and should also be made between the private views of individuals and the views they expressed in their official roles as Prime Minister, Attorney General and so on, though there is a relationship between an individuals' private opinions and their official opinions. A distinction can also be made between views towards the opposing government, towards individuals and towards the case itself. Differences of opinion between the two governments and between individuals working on the case were mitigated, with some degree of success, through frequent communications between them.

It is clear that Ireland's decision to initiate and continue with the case caused tension, and that the British Government privately, and occasionally officially, expressed their displeasure with the Irish Government's decisions. The tension arguably arose most of all from the British Government's limited acceptance of Ireland's motivations for initiating and continuing with the case. Successive British prime ministers criticized the Irish Government

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<sup>96</sup> Statement issued by Government Information Bureau on behalf of the Government, not for release before 1pm Sept 2, 1976, DFA 2008/79/3076, NAI.

<sup>97</sup> Report of "Meeting between the Minister for Foreign Affairs and U.S. Secretary of State Vance at State Department Washington, 17 March 1977", DFA 2007/111/1899.

for believing the case could be kept separate from other aspects of Anglo-Irish relations. This article has shown that Anglo-Irish relations were strong enough that despite Ireland's strong feelings about the case they agreed to a temporary postponement for the sake of stability in Northern Ireland. The two governments were able to agree on this aspect of "the troubles" whilst simultaneously disagreeing on the value of *Ireland v. UK*. These findings have the potential to enrich the existing literature on Anglo-Irish relations.

Reflecting on the case after the Court passed its judgment, Robin Haydon, British Ambassador, wrote that it:

“[B]rings out the unique character of Anglo-Irish relations. It is surely unlikely that any other state with which we have such close relations would pursue a case against HMG so vehemently and with a view to having us pilloried internationally. This is a striking indication of the complexity of this relationship.”<sup>98</sup>

It was indeed a complex relationship. Research into the nature of Anglo-Irish relations concerning Northern Ireland in 1971-8 and how this affected the course of "the troubles" has already been conducted.<sup>99</sup> A new contribution to knowledge of Anglo-Irish relations is that relations concerning *Ireland v. UK* were strained, predominantly because of fundamentally different views on the wisdom of the UK's choices regarding how to tackle the deteriorating security situation in Northern Ireland. This can contribute to the understanding of the course of "the troubles" presented by the existing literature. Despite their difficulties the Anglo-Irish relationship was intimate, as claimed by Gillespie, and the analysis in this article supports the assertion that the Irish Government believed that this political relationship could withstand action under the ECHR. This belief was proved correct.

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<sup>98</sup> Haydon to Owen, Feb 15, 1978, CJ 4/2077, 7.

<sup>99</sup> See, for example, Patterson, *Ireland's Violent Frontier* (2013).

Ireland's concern for the Catholic minority in Northern Ireland may have motivated their 2014 announcement that they had decided to ask the European Court of Human Rights to reconsider their 1978 ruling that the "five techniques" did not constitute torture. They have argued that British Government records now available in The National Archives, London, show that the UK withheld key information from the Commission in the original case. The law firm who, on behalf of the Republic of Ireland, represent the men exposed to the "five techniques" are continuing their High Court action to compel the release of further British documents.<sup>100</sup> If the Court decides to re-open the case, it is likely that its effects on Anglo-Irish relations will be of a similar scale and type as those identified in this article. Relations, in general terms at least, continue to be multi-faceted, cordial and close.

Inter-state cases at the European Court of Human Rights remain unusual.<sup>101</sup> Philip Leach, a Professor of law, has argued in *Taking a Case to the European Court of Human Rights* that the inter-state process for alleged breaches of the ECHR "has been remarkably under-used" and that this is explained by "the broader realities of inter-state relations".<sup>102</sup> *Ireland v. UK* is also unusual in that internal government records for the applicant and the respondent governments have been made available to the public in the last fifteen years and are accessible to English speakers. It presents a rare and heretofore neglected opportunity to evaluate how international relations can be affected by inter-state complaints alleging

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<sup>100</sup> Alan Erwin, "Britain committed war crime with its torture of 'Hooded Men' in 1971, lawyer tells High Court", (Feb 16, 2017), *Belfast Telegraph* <http://www.belfasttelegraph.co.uk/news/northern-ireland/britain-committed-war-crime-with-its-torture-of-hooded-men-in-1971-lawyer-tells-high-court-35454897.html> [Accessed Apr 27, 2017].

<sup>101</sup> Smith, *Textbook on International Human Rights* (2011), 106.

<sup>102</sup> Philip Leach, *Taking a Case to the European Court of Human Rights* (Oxford: Oxford University Press, 2011), p.13.

breaches of international human rights law. The finding that these two states were able to have such contrasting views on some aspects of “the troubles” while also cooperating and continuing to work closely together may encourage the lodging of other inter-state complaints when breaches of international human rights instruments are believed to have taken place.

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