COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF IRELAND v. THE UNITED KINGDOM

(Application no. 5310/71)

JUDGMENT

STRASBOURG

18 January 1978

SEPARATE OPINION OF JUDGE MATSCHER

1. Concerning the notion of torture (Article 3 of the Convention) (art. 3)

According to the reasoning of the majority of the Court in the present case, the principal criterion for distinguishing between inhuman treatment and torture is the intensity of the suffering inflicted. To my great regret I cannot agree with this interpretation.

My position on this is close to that adopted in the Commission's unanimous opinion in the present case (pp. 389-402 of the report), which opinion is in turn based on the interpretation of the essential elements of Article 3 (art. 3) of the Convention developed in previous cases, mainly in the First Greek Case (pp. 377-379 of the report). In my view, the distinguishing feature of the notion of torture is the systematic, calculated (hence deliberate) and prolonged application of treatment causing physical or psychological suffering of a certain intensity, the aim of which may be to extort confessions, to obtain information or simply to break a person's will in order to compel him to do something he would not otherwise do, or again, to make a person suffer for other reasons (sadism, aggravation of a punishment, etc.).

There is no doubt that one can speak of torture within the meaning of Article 3 (art. 3) only when the treatment inflicted on a person is such as to cause him physical or psychological suffering of a certain severity. However, I consider the element of intensity as complementary to the systematic element: the more sophisticated and refined the method, the less acute will be the pain (in the first place physical pain) which it has to cause to achieve its purpose. The modern methods of torture which in their outward aspects differ markedly from the primitive, brutal methods employed in former times are well known. In this sense torture is in no way a higher degree of inhuman treatment. On the contrary, one can envisage forms of brutality which cause much more acute bodily suffering but are not necessarily on that account comprised within the notion of torture.

Moreover, this notion of torture, to which I subscribe, does not differ essentially from those recently worked out by various international bodies, including the United Nations (see, for example, Article 1 of Resolution 3452 (XXX), adopted by the General Assembly on 9 December 1975). The notion seeks only to stress some of the features which are also included in those other notions and which seem to me to be the most important.

As regards the unanimous findings of fact by the Commission and the Court (paragraphs 96-107 of the judgment), the five techniques, as used in unidentified interrogation centres, constituted a highly sophisticated and refined system aimed at obtaining information or confession: "The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute

psychiatric disturbances during interrogation" (paragraph 167 of the judgment). They thus constitute a typical example of torture within the meaning of Article 3 (art. 3) of the Convention.

2. Concerning Article 14 (art. 14) of the Convention

In my opinion, there is discrimination within the meaning of Article 14 (art. 14) of the Convention where a measure which in itself meets the requirements of the system for protecting the fundamental rights guaranteed by the Convention is applied in a different way to individuals or groups of individuals within the jurisdiction of a State Party to the Convention and when this difference in treatment is not justified by objective and reasonable motives (judgment of 23 July 1968 on the merits of the "Belgian Linguistic" case, Series A no. 6, pp. 34-35, para. 10). A fortiori, there is discrimination where the different treatment is accounted for by motives based mainly on one of the criteria cited by way of example (see the words "such as ...") in Article 14 (art. 14) and expressly stated to be discriminatory.

My line of argument here follows the position of principle - a correct one, I think - which this Court adopted in the case of Engel and others (judgment of 8 June 1976, Series A no. 22, para. 72) and which seems to me also to underlie the reasoning of the majority of the Court in the present case, namely that discrimination can also exist as regards restrictions - in themselves legitimate - on the rights guaranteed by the Convention. To put it another way, the wording of Article 14 (art. 14) - "enjoyment of the rights and freedoms set forth in [the] Convention" - must be given a broader conceptual scope so as to include therein, over and above enjoyment in the strict sense, the way in which the rights and liberties in question may have been restricted.

In the present case we are dealing with the application of the extrajudicial powers of detention and internment which the Court has rightly - in view of the circumstances prevailing in Northern Ireland at the relevant time - considered to be compatible with the system for protecting fundamental rights set up by the Convention (Articles 5 and 6 taken together with Article 15 (art. 15+5, art. 15+6).

It may be regarded as established that in the period up to 5 February 1973 these measures were applied only against Republican terrorists and not against Loyalist terrorists and that likewise in the subsequent period the measures in question affected the latter only to a far lesser extent. The crucial point is whether this different treatment was justified by objective and reasonable motives. If so, the difference is legitimate; if not, it constitutes discrimination within the meaning of Article 14 (art. 14).

There is no doubt that the extrajudicial measures were introduced at a time when terrorism of Republican origin had reached a high level. It has also been proved, however, that terrorism from Loyalist sources existed at the same time and on an increasing scale. That, from the quantitative point of view, a larger number of serious outrages were attributable to the

Republican terrorists does nothing to alter the fact that in this same period two brands of terrorism were simultaneously rife in Northern Ireland. Moreover, at least from 1972 onwards, the two varieties of terrorism represented a comparable menace to law and order in the country. Nonetheless, up to 5 February 1973 the British authorities continued to apply the emergency measures to the Republican terrorists alone.

The reasons put forward by the respondent Government to justify such a difference hardly convince me, and it must also be remembered that, on this particular point, the respondent Government were very unforthcoming during the enquiry (pp. 107 et seq. and 153 et seq. of the Commission's report), so that an unfettered assessment of the evidence does not operate in their favour. Examination of the material before the Court would seem to me rather to permit the conclusion that, besides the bias on the part of the authorities which characterises the general situation in Northern Ireland not only in the course of history but also at the time in question, there was hesitation over talking equally energetic action against the Loyalist terrorists and over using emergency powers against them because of fear of the political repercussions of such a step. In my view, this is not a justification based on objective and reasonable motives. For want of such justification, the different treatment, which has been proved objectively, constitutes discrimination within the meaning of Article 14 (art. 14) of the Convention.

There is also another point of view to be taken into account. If the authorities deemed it necessary in order to combat terrorism to take emergency measures which weighed heavily on the population concerned, and if these measures were applied to only one section of the population whereas, in order to combat a comparable terrorist campaign originating from the other side - insofar as it was seriously combated -, they thought that they could confine themselves to the ordinary means of prevention and punishment, the question also arises whether the emergency measures were really indispensable within the meaning of Article 15 (art. 15) of the Convention.