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 SIR GERALD FITZMAURICE

1. On Articles 5 and 6 (art. 5, art. 6) (and in consequence with reference to Articles 14 and 15 (art. 14, art. 15)), and also on Article 50 (art. 50), I voted in favour of the Judgment of the Court (which I shall hereafter refer to as "the Judgment"). This covers heads 11-18 inclusive in the "Dispositif" or final, operative, part of the Judgment, which I shall hereafter speak of simply as "the Dispositif". In all of these heads 11-18, the view put forward on behalf of the United Kingdom is upheld. I have nevertheless certain special points to make in connexion with Articles 5 and 6 taken in combination with Articles 14 and 15 (art. 14+5, art. 14+6, art. 15+5, art. 15+6), to which I shall come later.

2. With regard to Article 3 (art. 3), as to which the Dispositif is made up of ten points (nos. 1-10 inclusive), I voted in favour of all of these except for the crucial Point 3 (alleged inhuman and degrading treatment involved by the use of the so-called five techniques[1] of interrogation). In the no less crucial Points 4 and 7, the Judgment exonerates the United Kingdom from the charge of using torture. On Point 6, and despite my contrary vote on Point 3, I voted in favour of the view that a practice of inhuman treatment existed at Palace Barracks in the autumn of 1971, because of the special acts of mistreatment that then occurred - (as to this, see below paragraph 30). Furthermore, although I voted in favour of Point 1, I did so with considerable reluctance, on grounds to be explained. I now propose to comment on the particular points relating to Article 3 (art. 3) that I have just mentioned, viz. nos. 1, 3, 4, 6 and 7, and also on Point 2 which involves a question of primary importance in the case, even though it is not central to the main substantive issue. On all other points connected with Article 3 (art. 3) I feel no call to add anything to the reasoning contained in the body of the Judgment, with which I agree.

Article 3 (art. 3)

The uncontested allegations

Point 1 of the Dispositif - (the Court holds that "although certain violations of Article 3 (art. 3) were not contested [by the United Kingdom], a ruling should nevertheless be given thereon").

3. The "certain violations" of Article 3 (art. 3) which, according to paragraph 152 of the Judgment, read in combination with sub-paragraphs (iv) - (vi) inclusive, of paragraph 147, the United Kingdom (astonishingly in my view) did not contest before the Court, were those of torture, and of inhuman and/or degrading treatment, held by the European Commission of Human Rights to have occurred, mainly, though not exclusively, through

[1] The techniques are listed and described in paragraph 96 of the Judgment; but see paragraph 19 below.

the use of the "five techniques". Even though "non-contesting" may not, formally, amount to "admitting", I find this rather wholesale United Kingdom non-contestation of the use of torture, etc., surprising, for reasons that will become apparent.

4. However, and be that as it may, the United Kingdom, on the basis of these admissions, and as described in paragraph 153 of the Judgment, gave "an unqualified undertaking" to the effect that the five techniques would not "in any circumstances be reintroduced as an aid to interrogation"; and also, as similarly described, took "various measures designed to prevent the recurrence of the events complained of and to afford reparation for their consequences", - measures particularised in some detail, either directly or by reference, in the same paragraph of the Judgment. Having done this, the United Kingdom, not unnaturally, argued that the case had become (as the expression goes) "moot"[2] that there was no point in the Court giving rulings on allegations that were not, or were no longer, controverted, so that the proceedings had ceased to have any worthwhile object, - and that even if the plaintiff Government was not willing to discontinue them, the Court should exercise a discretion in the sense of declining to pronounce on allegations that, because not disputed, were not now actually in issue between the Parties, - and in short, that to do so would be an entirely gratuitous dotting of the "i's" and crossing of the "t's".

5. Although I regard this attitude as very understandable, I nevertheless consider that the Court was right to conclude that it should pronounce on the matter. But my reasons for doing so are not the same as those which the Court gives in paragraphs 154 and 155 of the Judgment:

(a) To begin with - a point seemingly overlooked by the United Kingdom - it did not at all automatically follow that the Court would necessarily agree with all the findings of the Commission as to the character of the treatment of the detainees concerned who were undergoing interrogation in Northern Ireland, - and in point of fact the Court did not endorse the chief of these findings, namely that torture contrary to Article 3 (art. 3) of the European Convention was involved: it only concurred in the Commission's view that the treatment in question amounted to inhuman and/or degrading treatment. Therefore, had the Court accepted the United Kingdom contention that it need not and should not pronounce upon the non-contested allegations, the Commission's findings as to torture would have constituted the last word on the subject and, in the light of them, the United Kingdom would have stood convicted, so to speak, of that grave charge.

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[2] A convenient American locution for describing "an issue which during the course of a trial or pending an appeal has ceased to have practical importance" - (Radin's Law Dictionary, Oceana Publications, New York, 2nd Edn. 1970, p. 211); and see correspondingly the definition given in n. 1 on p. 86 of my separate opinion in the Northern Cameroons case before the International Court of Justice (I.C.J. Reports 1963, at p. 97).

(b) But if the Court, in the course of reviewing the Commission's findings, was entitled, and indeed bound, to indicate which of them it disagrees with, must not the same hold good for those findings on which the Court is disposed to concur? - especially when, despite the fact that the defendant Government no longer contests the allegations in question, the plaintiff Government still maintains them and (as is here the case) presses for a ruling from the Court on the ground inter alia that the latter is alone competent to make pronouncements having a judicial character, and with binding effect, - those of the Commission, though entitled to the greatest respect, not being invested with that status.

6. These seem to me to be better, or at least, more directly compelling grounds in support of the view expressed in Point 1 of the Dispositif, than the less concrete and more questionable ones stated in paragraph 154 of the Judgment, and summarized in the phrase according to which the function of the Court is "not only to decide those cases brought before [it] but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties", - in support of which dictum Article 19 (art. 19) of the Convention is cited. This, however, is not only to attribute to the Court a teleological role which, in my view, it was not originally intended to have[3], but also to place upon Article 19 (art. 19) of the Convention a weight greater than its language warrants. This provision (text in the footnote below[4]) is basically an instrumental one, the primary objective of which was to create machinery for the implementation of the Convention by setting up a European Court and Commission of Human Rights to "ensure the observance of the engagements undertaken by the High Contracting Parties". This of course is a purely adjectival provision that says nothing one way or the other as to what the engagements of the Parties under the Convention are, in what way the Court and the Commission are to secure the observance of those engagements, or what construction they are to put upon their functions in this respect. These are all matters dealt with - (to the extent that the Contracting Parties intended to go) - by other Articles of the Convention, - and if a general power "to elucidate and safeguard the rules instituted by the Convention" can be assumed, there is certainly no provision which invests the Court with any power to "develop" them, - (I am not of course speaking of that natural development that always occurs as an inevitable corollary of the legitimate

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[3] See my separate (partly dissenting) opinion in the Golder case before the Court, paragraphs 38-45 and the conclusion drawn in paragraph 46 (Series A no. 18, 1975).

[4] "To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention [my italics], there shall be set up:
(1) A European Commission of Human Rights hereinafter referred to as 'the Commission';
(2) A European Court of Human Rights hereinafter referred to as 'the Court'."

interpretative process properly belonging to the judicial function, but which is quite different from development as a conscious aim, this being, in my view, a quasi-legislative operation exceeding the normal judicial function).

7. I can only conclude therefore, that in paragraph 154 of the Judgment the Court is acting out the consequences of a doctrine which it has itself propounded and decided to abide by, but which is neither propounded nor imposed upon it by the Convention as such. The Court could, without any misapplication of the Convention, have formulated a different, much less broad, doctrine. Whether this would have been preferable or not, it is clear that paragraph 154 of the Judgment reflects a subjective attitude of the Court, not an objective requirement of the Convention; and in consequence the more concrete reasons of a procedural character formulated in my paragraph 5 above seem to me to be more persuasive and less open to question than those on which the Court has based the conclusion stated in Point 1 of the Dispositif, - a conclusion with which, purely as such, I am nevertheless in agreement.

Relevance of the existence of a practice

Point 2 of the Dispositif - (the Court holds "that it has jurisdiction to take cognisance of the cases of the alleged violation of Article 3 (art. 3) to the extent that the applicant Government put them forward as establishing the existence of a practice [i.e. of torture, inhuman treatment, etc.]".)

8. The emphasis is on the words "a practice", but the intention of the pronouncement would have been clearer if the word "only" had figured before either "has jurisdiction" or "to the extent that", - for this has to be its intention. The reasons for it are explained in some detail in paragraphs 157-159 of the Judgment; but as the issue involved is likely to be unfamiliar to the general reader, it may be useful if I state my own understanding of it. Under the scheme of the European Convention, cases can come to the Court only if they have previously been before the European Commission, - and under Article 26 (art. 26) and the third paragraph of Article 27 (art. 27-3) of the Convention, the Commission can only accept a case for substantive consideration if, or rather, after, "all domestic remedies have been exhausted" - that is to say if all the remedies afforded by the local law or administrative machinery of the defendant State have been tried, but have proved unavailing or ineffective[5]. There is no difficulty - of principle at least - in applying this rule where the complaint involved is being made by or on behalf of the individual person or persons affected by the alleged infractions of the Convention. But the matter is more complex where what is complained of is the existence of a practice in the defendant State contrary to the Convention, and where the particular acts in question are

[5] This is an over-simplified statement of what can in fact be a complicated matter, and needs qualification in various respects. However, this is not the place for any exposition of the law on the subject.

cited simply as evidence of the existence of such a practice and not, so to speak, for their own sake, in the sense of the tribunal being requested to award damages or other compensation to the injured individual as such.

9. In the present case the Commission found, and the Court has endorsed that finding, that the normal domestic remedies rule does not apply to the "existence of a practice". This was crucial to the admissibility of the case because (or so it must be assumed) in many of the concrete instances or examples put forward, those concerned had not, or would turn out not to have, exhausted the legal or administrative remedies available to them in Northern Ireland or elsewhere in the United Kingdom; and therefore, had the claim rested on that basis, the Commission would, under paragraph 3 of Article 27 (art. 27-3) of the Convention, have been obliged to reject it as inadmissible, with the further consequence, that under the Convention as it now stands, it could not have come before the Court. Thus it was only on the basis of a complaint about a practice contrary to the Convention (the individual instances being relevant only as establishing the existence of that practice) that the Commission and Court could pronounce upon the substance of the allegations involved, despite the non-exhaustion of the domestic remedies that might have been available to the affected persons acting individually.

10. The rationale of any finding upholding the non-applicability of the domestic remedies rule where the complaint is about the existence of a practice, can only be based on the assumption that, normally, domestic forums, whether judicial or administrative, can only deal with concrete claims preferred by individuals on their own behalf, and cannot conduct roving enquiries into the existence of practices, for which special machinery would have to be set up such as (in the United Kingdom) a Royal or Parliamentary Commission, Departmental Committee of Enquiry, or other ad hoc body, examples of which in the present case are afforded by the setting up of the Diplock Commission and the Gardiner, Compton and Parker Committees (see Judgment paragraphs 58, 74, 99 and 100). But of course such bodies are not part of the ordinary domestic forms of recourse available to the individual and whose jurisdiction he can himself invoke: the initiatives and decisions necessary for their creation must be governmental or parliamentary.

11. Having regard to these considerations and to the fact that, as stated in the last sentence of paragraph 159 of the Judgment, the United Kingdom did not (before the Court, at least) contest the Commission's decision to admit the case on the basis above described, I voted in support of the Court's pronouncement embodied in Point 2 of the Dispositif - (in itself undoubtedly correct) - although it necessarily implies what it does not actually state, namely that where the existence of a practice contrary to the Convention is in issue, the normal domestic remedies rule does not apply. I

am nevertheless left with the feeling that the whole topic needs more extensive investigation.

Essential features of Article 3 (art. 3)

12. Article 3 (art. 3) is, so far as its text goes, a very simple provision which, in the light of the present case, may well appear to be altogether too simple. It reads:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

This wording, perhaps deliberately because of the virtual impossibility of arriving at any completely satisfactory definition of the notions involved, attempts none respecting torture, inhuman treatment, or degrading treatment. It is thus left to be determined in the light of the circumstances of each particular case whether what occurred amounted to, or constituted the specified treatment. Such a determination must necessarily be an entirely subjective one, so that differently constituted courts or commissions, functioning at different periods, might, on the basis of similar or analogous facts, reach different conclusions in border-line, or even not so border-line, cases. It results that there is little practical utility in speaking of torture or inhuman treatment, etc. "according to", or "within the meaning (or "scope" or "intention") of", Article 3 (art. 3) - (although the Judgment, probably by an oversight, uses such language here and there), - for that Article ascribes no meaning to the terms concerned, and gives no guidance as to their intended scope.

13. Nor does it serve to say that none of this matters because everyone knows what torture is, what inhuman treatment is, and what is degrading, - since the present case seems to show conclusively that ideas on these questions can differ very greatly, not only with reference to particular acts, but as to the very factors on which an assessment should be based. Yet it can certainly be said that some kinds of treatment recognisably amount to torture or inhuman or degrading treatment; whereas others, though censorable, do not.

14. Another feature of Article 3 (art. 3) that adds to the difficulties of interpreting and applying it correctly is to be found in its absolute character to which the Court draws attention in paragraph 163 of the Judgment. Unlike other provisions of the Convention, such as Articles 4-6, 8-11 and 15 (art. 4, art. 5, art. 6, art. 8, art. 9, art. 10, art. 11, art. 15), Article 3 (art. 3) provides for no exceptions, no special cases and no derogations on emergency grounds. It could scarcely have done so without impairment of the moral effect produced by its unqualified terms, and without opening the door to grave possibilities of abuse. Moreover, the motivation of the alleged treatment - e.g. that it has the, in itself, legitimate object of obtaining information – is rendered irrelevant by the unconditional wording of Article 3 (art. 3) - (torture is torture whatever its purpose, if inflicted compulsorily -

see footnote (19) below. But of course these aspects of the matter make it all the more important that the unfettered faculty thus conferred on the interpreting entity should be utilized with a keen sense of proportion, and without magnifying into contraventions of Article 3 (art. 3) acts which, because they are reprehensible, are felt to be deserving of stigmatization, but which do not, on any balanced view, amount to acts that involve treatment of the kind actually specified by Article 3 (art. 3).

15. The real dilemma that faced the Commission and the Court in the present case, and which would face any tribunal trying to apply Article 3 (art. 3) with some sense of proportion and objectivity, is that the Convention contains no prohibition covering intermediate forms of maltreatment that clearly fall short of, or only doubtfully attain, that degree of severity, which could, without evident exaggeration, justify classifying them as inhuman, or as amounting to torture; but of which it can be said that they are of such a nature that, if they are not actually caught by the strict language of the Convention, they deserve to be, and so deserve because, while not contravening those particular human rights specifically embodied in the Convention, they are nevertheless irreconcilable with the high ideal of human rights considered in the abstract. Confronted with such a situation, a tribunal seems to be faced with a choice that amounts to a choice between evils: either it must appear to condone or absolve the acts concerned, however blameworthy, by pronouncing them not to amount to infractions of the Convention because not covered by the language of the only provision of it (Article 3) (art. 3) that could, theoretically, be applicable, - or else the tribunal must strain the language of that provision so as to include them, although on a dispassionate reading of it, and on the basis of ordinary standards of meaning, they would not normally be regarded as covered. In short, not to put too fine a point on it, it must "develop" the Convention in this respect - (see paragraph 6 above).

16. International tribunals are in these respects more vulnerable than national ones, and an international tribunal placed as has been described above, finds itself in a situation in which it can only register and proclaim to the world its disapproval of what has occurred (while at the same time remaining within the four corners of its functions as a forum for the application of the Convention) if it can hold that the conduct concerned amounts to a specific breach of the Convention - in this case of Article 3 (art. 3) since no other provision is relevant in the context of the use of the five techniques. The impulse to yield to the temptation here involved is one that all must sympathize with and respect. The Convention is obviously defective in not providing for lesser forms of ill-treatment than such as fall indubitably within the categories of torture or of what is "inhuman", - categories which, both of them, imply treatment reaching a serious, even an extreme degree of cruelty, barbarity or severity, and not something which, though to be condemned, is in comparison mild, and would be so regarded

by all those who have either experienced or come close to or known cases of, or who have the imagination to feel in their own flesh and sinews the reality of what torture and truly inhuman treatment consist of. I shall revert to this.

17. Speaking purely as a jurist - (and in what other capacity can I or any member of a court claim to have a right to speak in adjudicating on a case?) - it seems to me that the legitimate inference to be drawn from the fact that the Convention made no provision against lesser forms of ill-treatment than such as would amount to torture, or fall into the category of the inhuman, is that these lesser forms were not intended to be covered. It would be reasonable to suppose that, at the date when the Convention was framed, during the aftermath of war and atrocity, it would have been the severer forms of ill-treatment that the Parties would have had in mind, those that, as I have said, amount recognisably to torture or inhuman treatment, etc. These were, at the time, well known, within contemporary experience, easily discerned. To have gone further would have necessitated much more careful and detailed consideration – and also drafting. Provision was made for "degrading treatment", but this involves another order of concept entirely. If the Parties to the Convention should now wish to go beyond what they originally provided for, it is for them to do so by amendment of the Convention, not for a tribunal whose task is to interpret it as it stands.

18. If the views expressed in the preceding six paragraphs above (12-17) have some validity, certain precepts, if I may so call them, emerge; - and by not endorsing the Commission's finding that the use of the five techniques, and certain other forms of treatment, constituted torture, the Court has certainly to that extent acted in accordance with those precepts - (see Points 4, 7 and 9 of the Dispositif and the reasons in support given in the body of the Judgment - in particular in parts of paragraph 167). This is not surprising, for no other view seems reasonably possible unless it is to be held that inflicting any degree of suffering that is not merely trivial amounts to "torture". I shall revert to this matter in connection with the Commission's findings on that part of the case, - this being relevant in the context of Point 4 of the Dispositif. Meanwhile, the Court, though rejecting the notion of torture, did find (Point 3) that the use of the five techniques, and certain other acts, involved inhuman and degrading treatment contrary to Article 3 (art. 3). Since I was alone amongst the members of an otherwise (on this question) unanimous Court, in disagreeing with this view, it becomes incumbent on me to indicate my reasons for so doing. First, however, something must be said about the facts concerning the five techniques.

Nature of the five techniques

19. The five techniques referred to in Point 3 (see below) are listed and described in paragraph 96 of the Judgment; but as the Court, at least in respect of certain of them, had difficulty in arriving at exactly what they

entailed, and there are some conflicts of evidence, I feel it necessary to make a few factual comments. The list and descriptions in the Judgment are taken from the report of the Commission representing the latter's conclusions (pp. 396-397) of the stencilled version), but do not reproduce all its nuances and qualifications. The following points arise: -

Wall-standing

(i) As regards the phrase "for periods of some hours", see footnote 10 below. The Commission's version says that the "exact length of time ... could not be established", but mentions periods "totalling" 23 and 29 hours. Clearly these periods could not have been continuous, and one of the Compton reports[6] (as quoted on p. 247 of the Commission's own report)[6a] speaks of "periodical lowering of the arms to restore circulation". There must have been other intervals also, - see (vii) below.

(ii) The term "spread eagled against the wall" cannot convey the correct picture, for the body was away from the wall and not in contact with it except through the fingers or flat of the hand (see (iii) below). If, however, the fingers (or part of the hands) were placed "high" above the head yet touched the wall, the body would necessarily be fairly close to the wall, resulting in a much less strained position.

(iii) "The weight of the body mainly on the fingers", - "mainly", which implies that it was sometimes on the flat of the hand, again reducing the stress.

(iv) "Causing them to stand on their toes" - this is not a necessary consequence of standing with legs apart and feet back; the stance is equally compatible with standing on the flat of the foot, whether the fingers or flat of the hand were against the wall, though more easily so in the latter case.

(v) It is therefore difficult to credit that those concerned were not able to vary their position from time to time, if only momentarily, which would bring relief.

(vi) The Commission states (p. 397) that the Compton report described "the position [of the detainee] as being a different one", and (p. 247) quotes the latter's much less detailed version as "Making the detainees stand against a wall in a required posture (facing wall, legs apart, with hands raised up against wall) ...". It also describes how detainees were not allowed to depart from this posture and were if necessary compelled to resume it.

(vii) It appears, however, from p. 248 of the Commission's report that although "some" detainees were standing "continuously" at the wall for

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[6] This was the report of the Committee set up in August 1971 by the United Kingdom Home Secretary, under the chairmanship of Sir Edmund Compton, G.C.B., K.B.E., to consider allegations of ill-treatment of detainees - see Judgment, paragraph 99.

[6a] For reasons of convenience the quotations which I give are those provided by the Commission. There is some obscurity as to the exact source from which the Commission is itself quoting - but there seems to be no doubt that as given on p. 247 they do reproduce the Compton formulation.

periods of from 6-16 hours, this was "subject to breaks for bread and water and for toilet visits".

Hooding - as to one query that might arise, see footnote 11 below. Moreover the words "all the time", used in paragraph 96 of the Judgment, obviously cannot be taken literally. The fact, not mentioned in this paragraph - but see the Commission's and the Compton report - that the hood was removed during interrogation and - (at least in the particular cases cited) - when the detainee was alone - (provided, according to the Commission, that he kept his face to the wall) - seems to show that the principal object of the hooding was less to cause distress to the detainee than to prevent him seeing or communicating with other detainees. I think it worthwhile mentioning this, although I am aware that the absolute and unconditional character of Article 3 (art. 3) of the Convention makes the object or purpose of the treatment irrelevant (see paragraph 14 above), so long as it really constitutes treatment of the kind specified, - but it may all the same have considerable relevance to the question of whether or not it does constitute such treatment - (see as to this footnote 19 below).

Subjection to noise - paragraph 96 of the Judgment and the Commission's report (p. 397) describe the noise as "a loud and hissing noise". The Compton report, as cited by the Commission (p. 247), says "a continuous and monotonous noise", and as to its loudness says "of a volume calculated to isolate them [the detainees] from communication".

Deprivation of sleep - the Judgment says "Pending their interrogations, depriving the detainees of sleep": the Commission's version adds "but it was not possible to establish for what periods each witness had been without sleep". The Compton version on the other hand says "Depriving the detainees of sleep during the early days of the operation [i.e. of the detention]", and says nothing about for how long.

Deprivation of food and drink - the Judgment describes this as "subjecting the detainees to a reduced diet during their stay at the [interrogation] centre and pending interrogations". The Commission had said the same but added that it was "not possible to establish to what extent they were deprived of nourishment and whether or not they were offered food and drink but refused to take it" - i.e. went on hunger-strike. This last is a point of considerable significance given the fanatical atmosphere often prevalent. The Compton report on the other hand is more specific, and speaks of deprivation of nourishment "other than one round of bread and one pint of water at six-hourly intervals". In characterising this as "physical ill-treatment" the report adds "for men who were being exhausted by other means at the same time".

20. My object in citing these details has been partly to ensure that the readers of this Opinion do not underestimate the character of the five techniques, - for it is far from my intention to do anything so unbecoming as to play down these practices. The remainder of my object has been to show

that, despite all the efforts of the Commission and the Court, there still remains an element of considerable uncertainty on a number of points of obvious importance when it comes to assessing the degree of overall severity entailed by their use - e.g. the length and frequency of the periods of hooding and deprivation of sleep, food and water, the quality of the subjection to noise (something which affects some people very badly, others hardly at all), the real length of the maximum continuous period of wall-standing involved, and to some extent the exact posture, in which quite slight variations could make a considerable difference to its bearability. It is also noticeable with reference to the wall-standing that the Compton report, while unqualifiedly calling all the other four techniques "physical ill-treatment" (though only for a certain reason in the case of deprivation of nourishment), does not speak of the wall-standing posture itself as being per se ill-treatment, but says only that "the action taken to enforce this posture constituted ill-treatment" - i.e. the action taken to get the detainee back into the posture if he departed from it. This may be an immaterial detail, but it enhances the area of uncertainty. Paragraph 99 of the Judgment brings it out also how the Compton Committee held that the five techniques "constituted physical ill-treatment but not physical brutality as it [the Committee] understood that term". The distinction is an important one.

21. On the basis of this analysis of the facts, so far as I am able to carry it, I shall now give the reasons why I cannot agree with the finding in Point 3 of the Dispositif that the use of the five techniques constituted "inhuman" treatment - (I shall come to "degrading" treatment later).

Alleged inhuman and/or degrading treatment

Point 3 of the Dispositif - (the Court holds [by sixteen votes to one] that "the use of the five techniques ... constituted a practice of inhuman and degrading treatment, which practice was in breach of Article 3 (art. 3)").

A. "inhuman" treatment

22. According to my idea of the correct handling of languages and concepts, to call the treatment involved by the use of the five techniques "inhuman" is excessive and distorting, unless the term is being employed loosely and merely figuratively (see examples below[7]), - and it is clearly not in any such lax or light-hearted sense that Article 3 (art. 3) intends it. Subjection to the five techniques was certainly harsh treatment, ill-treatment, maltreatment, and other descriptions could be found; but the

[7] To give examples of figurative use within most people's experience: - One hears it said "I call that inhuman", the reference being to the fact that there is no dining-car on the train. "It's degrading for the poor man", one hears with reference to an employee who is being given all the unpleasant jobs. "It's absolute torture to me", - and what the speaker means is having to sit through a boring lecture or sermon. There is a lesson to be learnt here on the potential dangers of hyperbole.

"inhuman" involves a totally different order or category of concept to which, in my opinion, the five techniques, even used in combination[8], do not properly belong[9]. To regard them as doing so is to debase the currency of normal speech, because there is then no way left in which to differentiate or distinguish, or to describe instances of truly inhuman treatment. If anything that causes an appreciable amount of aching, strain, discomfort, distress, etc., or of deprivation of sleep or sustenance, is to be regarded as "inhuman", what words shall be found to characterize the much graver treatment that could without serious question be considered inhuman? To give concrete examples, if standing someone against a wall in a strained position over a considerable period[10], or keeping him with a hood over his head for a certain time[11], amounts to "inhuman" treatment, what language should be used to describe kicking a man in the groin, or placing him in a blacked-out cell in the company of a bevy of starving rats? That would also be merely inhuman treatment presumably? - and I say "merely" because, although the latter instances would clearly constitute inhuman treatment, they would apparently be rated no differently from, and as no worse than, the former relatively minor ones, if these also are to be characterized as "inhuman". If the extreme term is to be used for any infliction of physical or mental harm or stress, no way of marking out or attaching the necessary weight to the genuine case remains, - for to employ such locutions as "very inhuman" or "severely inhuman" would obviously be ridiculous[12]. Thus, pretty well everything physically or mentally injurious becomes "inhuman" - which is to reduce the whole concept to an absurdity, - just as, supposing that one subscribed to that view of humanity that seems to underlie Burns' well-known couplet about "Man's inhumanity to man"[13], one would be forced to the pessimistic conclusion that there is nothing so inhuman as the human.

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[8] It is fairly clear that all five techniques could not have been employed simultaneously on the same person, though two or three of them might have been combined in that sense. What the Judgment is actually referring to is the fact that each of the individuals concerned was subjected in one way or another and at one time or another, to all five techniques and not only to one or two.

[9] Of course they might do so in practice, in particular cases - e.g. if used on the old or infirm - but the question has to be considered on the basis of the average case.

[10] The evidence on this point is unsatisfactory. I deduce that - (though not always) - the periods were long in the aggregate, but cannot have been continuous - see ante paragraph 19 (i) and (vii).

[11] There has been no suggestion that this impeded normal breathing.

[12] Equally, to characterize the instances I have given and other similar ones that could be thought of, as cases of "torture" is to misapply the latter term which is an expression having its own proper sphere. It would also be to abolish the distinction between torture and inhuman treatment which Article 3 (art. 3) of the Convention specifically makes. Of course all torture is "inhuman" but not all inhuman treatment involves or amounts to torture.

[13] From Man was made to Mourn: the couplet runs "Man's inhumanity to man makes countless thousands mourn."

23. Article 3 (art. 3) of the European Convention was not, however, intended to trade in paradoxes or propound conundrums such that it takes months of consideration in order to come to a final conclusion as to whether certain treatment can properly be said to attain the proportions of the inhuman. To my mind, that epithet should be kept for something that is immediately recognisable for what it is, - something much more than what occurred in the present case, - something different in kind. "What's in a name?"[14] - it may be asked. The answer is "everything", if it involves placing a course of conduct in a wrong category, with consequences that are both inappropriate and unjust.

24. Furthermore, as I pointed out in paragraphs 15 and 16 above, and would like to stress again because it involves the real difficulty latent in border-line cases, the fact that certain conduct was wrong, even very wrong, does not suffice to bring it under, or make it contrary to Article 3 (art. 3), which specifies a particular type of wrong, - and if the wrong conduct in question is not of that type, then - however regrettably - it is compatible with Article 3 (art. 3), - not, of course, for that reason to be considered as licensed by the latter - but not contrary to it; and if that is a consequence to be deplored, then, as I have said, the remedy is to amend the Convention, but neither the European Commission nor the Court can do that.

25. If instead of dealing in subjectivities, some objective criteria of what constitutes the inhuman are sought, the dictionaries furnish a very positive reply[15]. The definitions given are "barbarous", "savage", "brutal", "cruel"[16]. The Judgment of the Court in the present case considers the matter only extremely briefly in one short paragraph (the first sub-paragraph of paragraph 167) which devotes only 5-6 lines to inhuman treatment. These consist mainly of affirmations and assumptions. The essential phrase, after referring to the five techniques as having been "applied in combination, with premeditation and for hours at a stretch", - (as to this see my paragraph 19 and footnotes (8) and (10) above) - reads as follows:

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[14] Romeo and Juliet, Act II, Scene 2, line 43.

[15] The principal dictionaries I have consulted are the Shorter Oxford ("shorter" only than the full Oxford in several volumes, and itself running to 2,500 pages); the superlative American Random House Dictionary of the English Language - probably the best one-volume English Dictionary extant; Webster's Third International; and, in the popular category, Professor Garmonsway's excellent Penguin English Dictionary.

[16] Speaking of persons, not actions, the dictionaries use such descriptions as "callous", "unfeeling", "destitute of natural kindness or pity", "lacking in the normal human qualities of sympathy, pity, warmth, compassion or the like". But the absence of such feelings, natural enough in the circumstances of the present case, does not suffice of itself to make the acts or treatments involved "inhuman", - and it is the quality of these that must be looked to. Other lines of definition, such as "not of or like the human race" and "not of the ordinary human type", are question-begging and evocative of a smile - remembering Burns (see end of paragraph 22 supra).

> "they caused, if not actual bodily injury [which means that they did not do so], at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation."

Most people feel "disturbed" during an interrogation that must necessarily be of a rigorous, searching and quasi-hostile character, and it is not surprising that there was medical evidence of it in certain particular cases. But what is the basis of the term "intense", qualifying "suffering", physical and mental? Such language is surely excessive and disproportionate and not justified by the evidence. To many people, several of the techniques would not cause "suffering" properly so called at all, and certainly not "intense" suffering. Even the wall-standing would give rise to something more in the nature of strain, aches and pains, fatigue, and the like. To speak of "intense physical ... suffering" comes very near to speaking of torture, and the Judgment rejects torture. The sort of epithets that would in my view be justified to describe the treatment involved (treatment that did not cause bodily injury) would be "unpleasant, harsh, tough, severe" and others of that order, but to call it "barbarous", "savage", "brutal" or "cruel", which is the least that is necessary if the notion of the inhuman is to be attained, constitutes an abuse of language and, as I have said earlier, amounts to a devaluing of what should be kept for much worse things. It is hardly a convincing exercise.

26. After the passage from paragraph 167 just quoted in paragraph 25 above, the Judgment continues:

> "They [i.e. the five techniques] 'accordingly' [my inner-quote marks] fall into the category of inhuman treatment 'within the meaning of Article 3 (art. 3)' [same remark]."

This is pure assertion. As I pointed out earlier (paragraph 12), there does not exist any "within the meaning of Article 3 (art. 3)" because that provision furnishes neither definition nor any aid to it. Consequently, what this phrase really signifies is "within the meaning that the Court has elected to ascribe to Article 3 (art. 3)". The "accordingly" is presumably predicated mainly upon the previous "they caused ... intense ... suffering", - and I need not re-state what I have said about that. But again, it does not convince: it leaves a large area of indeterminacy filled with question-marks. For my part, I consider that the concept of "inhuman" treatment should be confined to the kind of treatment that (taking some account of the circumstances) no member of the human species ought to inflict on another, or could so inflict without doing grave violence to the human, as opposed to the animal, element in his or her make-up. This I believe is the sense in which the notion of "inhuman" treatment was intended to be understood in Article 3 (art. 3), - as something amounting to an atrocity, or at least a barbarity. Hence it should not be employed as a mere figure of speech to denote what is bad treatment, ill-treatment, maltreatment, rather than, properly speaking, inhuman treatment.

B. "degrading" treatment

27. Much of what I have said about exaggeration and distortion in relation to inhuman treatment applies equally, mutatis mutandis, to the notion of degrading treatment, though less strongly. As a matter of interest some dictionary meanings of the notions of "degrading" and "degraded" are given in the footnote below[17], - but in everyday speech these terms are used very loosely and figuratively (see footnote (7) above). On such a basis almost anything that is personally unpleasant or disagreeable can be regarded as degrading by those affected. In the present context it can be assumed that it is, or should be, intended to denote something seriously humiliating, lowering as to human dignity, or disparaging, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one's sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt, - although here one may pause to wonder whether Christ was really degraded by being made to don a purple robe and crown of thorns and to carry His own cross. Be that as it may, the examples I have given justify asking where exactly the degradation lies in being deprived of sleep and nourishment for limited periods, in being placed for a time in a room where a continuous noise is going on, or even in being "hooded" - (after all, it has never been suggested that a man is degraded by being blindfolded before being executed although, admittedly, this is supposed to be for his benefit). The wall-standing may be different and I shall revert to that.

28. What emerges is that the whole matter is far too subtle and complex to be dealt with satisfactorily on the basis of the Judgment's over-simplified approach. This is contained in only 3-4 lines following on those from its paragraph 167 quoted in my paragraphs 25 and 26 above. They read:

> "The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance."

That is all the Judgment says by way of defining or describing degrading treatment, and it calls for the following comments:

(a) Feelings of "fear, anguish and inferiority" are the common lot of mankind constantly experienced by everyone in the course of ordinary everyday life: this is "la condition humaine". Yet no one would consider

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[17] Literally, "degraded" (de-graded) means reduced to a lower grade, rank, position or status; but the relevant meanings in the present context, as given in the dictionaries (see n. 15 supra) would be to "lower in estimation, character or quality" (Shorter Oxford); to "lower in dignity or estimation; bring into contempt" (Random House). Other descriptions used are "to debase" (ibid), "to humiliate" (Penguin). The relevant notions here are clearly those of humiliation, bringing into contempt, loss of esteem, and debasement, presumably from status as a human being.

himself, or regard others, as humiliated and debased because of experiencing such feelings, even though some experience them very easily and others only for greater cause. Thus it is not the subjective feelings aroused in the individual that humiliate or debase but the objective character of the act or treatment that gives rise to those feelings - if it does - and even if it does not, - for it is possible for fanatics at one end of the scale, and saints, martyrs and heroes at the other to undergo the most degrading treatment and feel neither humiliated nor debased, but even uplifted. Yet the treatment itself remains none the less degrading. The Judgment therefore applies here quite the wrong test, and does not ask any of the right questions, such as, for instance, what there is - if anything at all - that humiliates or debases in being kept on a reduced diet for a time, and whether this can really be called "degrading" treatment without great exaggeration or distortion.

(b) Nor does "possibly breaking their physical or moral resistance" furnish any more satisfactory test. Again it is the character of the treatment that counts, not its results. It is easy to think of ways in which physical and moral resistance can be broken without any resort to ill-treatment, the use of force, or acts of degradation. Alcohol will do it, and often does. More generally, simple persuasion, or consideration and indulgence, will do it. As has been well said, "There is no defence against kindness"[18]. The degradation lies not in what the treatment produces, but in how it does it: it might produce no result at all, but still be degrading because of its intrinsic character. That various kinds of treatment - and they cover a wide range - are capable of diminishing or breaking down physical or moral resistance is obvious, but the degradation, if any, consists not in that but in the particular methods employed.

29. In consequence, I find the reasoning of the Judgment quite unconvincing on this issue, - and I feel a further difficulty, which is that it is very possible for treatment to be in fact degrading without necessarily involving an infraction of Article 3 (art. 3) as such. For instance, there can be small doubt that the very process of being detained, held in custody, and subjected to interrogation, even in the most legitimate way, is in itself humiliating, and generally considered as debasing. But it could not, merely on that account, be held contrary to Article 3 (art. 3) of the Convention. It might be contrary to others of its provisions, such as Articles 5 and 6 (art. 5, art. 6), but that equally would not make it contrary to Article 3 (art. 3) also. Again, the element of compulsion is inseparable from holding in custody and its accompaniments, and it is always humiliating to be compelled. Clearly therefore, a breach of Article 3 (art. 3) under this head requires not only degrading treatment but a certain kind or degree of such treatment. As to this, and subject to the possible exception of the wall-standing element, it

[18] From Outsider in Amsterdam, by Jan van de Wetering, Corgi Edn. 1977, p. 170.

does not seem to me that the use of the five techniques was of that order or attained that degree of gravity. Three of them involved no degradation at all in the proper sense of the term, a fourth (hooding) might be a border-line case (see under "Hooding" in paragraph 19 above, and also the latter part of paragraph 27). Thus only the wall-standing could be said without much exaggeration or distortion to fall on the far side of the line. However, since the Court's findings on inhuman and degrading treatment related essentially to the combined use of the five techniques, and in my view none of these amounted, properly speaking, to the inhuman and only one with reasonable certainty to the degrading, I had no alternative but to vote against Point 3 of the Dispositif as a whole.

Point 6 of the Dispositif - (the Court holds unanimously that "there existed at Palace Barracks in the autumn of 1971 a practice of inhuman treatment, which practice was in breach of Article 3 (art. 3)").

30. I voted in the affirmative on this Point, on the basis of the situation as described in paragraphs 110, 111 and 174 of the Judgment. As is made clear in paragraphs 110 and 111 of the Judgment, these detainees underwent much severe ill-treatment which, looked at as a whole, seemed to me to amount to inhuman treatment.

Torture

Point 4 of the Dispositif - (the Court holds that "the ... use of the five techniques did not constitute a practice of torture within the meaning of Article 3 (art. 3)").

Point 7 - (referring to Point 6 (supra) and the practice at Palace Barracks: the Court holds that "the [said] practice was not one of torture within the meaning of Article 3 (art. 3)").

31. For reasons already stated (see my paragraph 12 above) the phrase in the above formulations "within the meaning of Article 3 (art. 3)" is inapt, and should have been omitted or modified to read "contrary to Article 3 (art. 3)".

32. Since I agree with the findings in Points 4 and 7 above, and voted with the majority, I would not need to comment on them but for three factors, - first, the Commission regarded the use of the five techniques as amounting to torture; secondly, this finding on the part of the Commission received wide publicity and led to a general acceptance of the view, particularly in the Press, that the United Kingdom authorities concerned had in fact been guilty of using torture (and such impressions, once given currency, are difficult to eradicate); and thirdly, even before the Court, one-fifth to one-quarter of its Members thought the use of the five techniques constituted torture - (the voting was 13-4 on Point 4 and 14-3 on Point 7). Finally, the Court's own observations on the matter are sparse and I feel that some amplification is called for.

33. As with the topic of degrading treatment, much of what I said earlier about the exaggerated use of language in connexion with inhuman

treatment, and the distorting effect this produces, applies mutatis mutandis to the question of what treatment amounts to torture; but for this reason I can be relatively brief. The test applied by the Court, though a correct one, was mixed up with a number of other factors which, in view of the absolute character of Article 3 (art. 3) of the Convention, are strictly irrelevant - see paragraph 14 above; but in order not to interrupt the main thread of my argument, I relegate discussion of this to a footnote[19].

It is not clear what the purpose of the reference to extracting confessions, the naming of others, etc. is. If it is intended to indicate that the existence of such objectives is a necessary ingredient before the treatment concerned can constitute torture, such an idea must be firmly rejected. Torture is torture whatever its object may be, or even if it has none, other than to cause pain, provided it is inflicted by force - (of course the suffering experienced in the dentist's chair, however intense, is not technically torture because the patient submits to it of his own volition).

However, the real question suggested by the references to the objectives of the torture is whether there can ever be an objective justifying its use. In strict terms of Article 3 (art. 3) of the Convention, the answer must be in the negative: the prohibition is unqualified and therefore absolute - see paragraph 14 above. Yet there have been cases in which the extraction of information under torture or extreme ill-treatment has led to the saving of hundreds, even thousands of lives. On this matter the temperate and carefully balanced separate opinion of Mr. J.E.S. Fawcett, President of the European Commission, recorded on pp. 495-7 of the Commission's report in the present case, repays careful study.

34. The Court's reason for rejecting the charge of torture is really contained in one sentence in the final sub-paragraph of paragraph 167 of the Judgment, namely that although the five techniques "undoubtedly amounted to inhuman and degrading treatment ..."

> "they did not occasion suffering of the particular intensity and cruelty implied by the word torture ..."

(This passage is completed by the addition after the word "torture" of "as so understood", the object and effect of which escape me - but see footnote (19)). The same test of "intensity" is applied again in connexion with the happenings at Palace Barracks in the autumn of 1971. Despite this, and its

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[19] Prefacing the passage from paragraph 167 of the Judgment quoted first in my paragraph 34, and which sets out the Court's notion of what is not torture, are some lines qualifying this by an "although" clause, and stating that although the object of the five techniques was "the extraction of confessions, the naming of others and/or information, and although they were used systematically", they did not cause the necessary intensity of suffering, etc. This qualification, in slightly different terms, also precedes the second passage quoted in my same paragraph.

finding of inhuman treatment, the Court, speaking of the acts complained of, said (third sub-paragraph of paragraph 174) that

> "the severity of the suffering that they were capable of causing did not attain the particular level inherent in the notion of torture as understood by the Court ..."

And this was completed by a reference back to the former pronouncement in paragraph 167.

35. Although I agree with these pronouncements, and they are correct as far as they go, and propound the essential test that has to be applied, they nevertheless fail to bring out the real point latent in them, which is that not only must a certain intensity of suffering be caused before the process can be called torture, but also that torture involves a wholly different order of suffering from what falls short of it. It amounts not to a mere difference of degree but to a difference of kind. If the five techniques are to be regarded as involving torture, how does one characterize e.g. having one's finger-nails torn out, being slowly impaled on a stake through the rectum, or roasted over an electric grid? That is just torture too, is it? Or might it perhaps amount to "severe" torture?! Or what words do you find to mark the difference between treatment of that kind and the mere aches, pains, strains, stresses and discomforts of the five techniques, which pale into insignificance in comparison with the searing, unimaginable, agony of the other? These are not in the same category at all, and cannot be spoken of in the same breath. Nor is the point academic, as it might be if torture of the order I have mentioned were a thing of the past. But it is not; and in Europe itself there are countries in which such practices have been prevalent in quite recent periods. So what does the European Commission do when, as it easily might, it finds itself faced with a case of real torture? Just pronounce it to constitute treatment contrary to Article 3 (art. 3) of the Convention? Fortunately for the Court, it, at least, has avoided digging this pit for itself.

36. May I conclude this part of the case by registering my emphatic opinion that if a commendable zeal for the observance and implementation of the Convention is allowed to drive out common-sense, the whole system will end by becoming discredited. There can be no surer way of doing this than to water down and adulterate the terms of the Convention by enlarging them so as to include concepts and notions that lie outside their just and normal scope.

ARTICLES 5 AND 6, TAKEN IN CONJUNCTION WITH ARTICLE 15 (art. 15+5, art. 15+6)

37. Although, as I said in the opening paragraph of the present Opinion, I agree with the Court on all the Points in the Dispositif dealing with the above-mentioned provisions, there is one question of method, not affecting the substance of the matter, but having important implications, that I think it desirable to draw attention to as a matter of fairness to governments placed as the United Kingdom Government has been in this case.

ARTICLES 5 AND 15 (art. 5, art. 15)

38. Article 5 (art. 5) is the provision of the European Convention that safeguards freedom of the person by, in effect, prohibiting arrest or detention except for certain indicated purposes or in a number of listed cases. When, in circumstances of public emergency, a government wants to carry out arrests or detentions which it believes will not - or may not - fall within the permitted exceptions, Article 15 (art. 15) allows it (within stated limits and under specified conditions) to do so by taking measures derogating from what would otherwise be its obligations in this respect.

39. It is obvious that once a government has invoked Article 15 (art. 15) - (it has to give what amounts to a notice of derogation to the Secretary-General of the Council of Europe) - the only relevant, or at least the principal issue will be whether the circumstances required by Article 15 (art. 15) in order to validate the derogations are present, and whether the derogations themselves fall within the limits laid down. Briefly, there must be "war or other public emergency threatening the life of the nation", and the derogations must not exceed what is "strictly required by the exigencies of the situation". Accordingly when, as in the present case, acts contrary to Article 5 (art. 5) are alleged by the plaintiff Government to have occurred, but the defendant Government has invoked Article 15 (art. 15), while the plaintiff Government denies that the conditions required by that provision are fulfilled, the enquiry ought to start with this Article (art. 15) since, if it was properly invoked, and if the acts or conduct complained of are validated under it, it will become unnecessary to consider whether, had this not been the case, they would have involved derogations from - i.e. infractions of - Article 5 (art. 5). Only if it appeared that Article 15 (art. 15) could not operate in favour of the defendant Government, either because there was not real public emergency or because the acts or conduct in issue went beyond what was required in order to deal with it, would it become essential to investigate the acts or courses of conduct themselves, so as to establish whether they did or did not amount to breaches of Article 5 (art. 5).

40. It may be asked what advantage this method of proceeding would have over that hitherto followed by the Court, namely of first enquiring whether there has, or but for Article 15 (art. 15) would have been, a breach of Article 5 (art. 5), and, if the answer is in the affirmative, only then going on to consider the applicability of Article 15 (art. 15). It seems to me not only that there are clear advantages in the method I suggest, but also that not adopting it is liable often to place the defendant Government in a false position.

41. If of course the defendant Government has not invoked Article 15 (art. 15) at all, and simply takes its stand on a denial that Article 5 (art. 5) has been infringed (e.g. because the arrest or detention involved came within one of the cases permitted by that provision), then clearly an enquiry into the Article 5 (art. 5) position is all that is necessary or possible. But

where Article 15 (art. 15) was invoked, this either implies a tacit recognition that Article 5 (art. 5) has, or very possibly has been infringed, or renders that issue irrelevant except upon the assumption that, in all the circumstances of the case, Article 15 (art. 15) would not in any event validate the infraction. This last matter therefore becomes the primary issue and should be gone into first. Had the Court followed this method in the present case, some fourteen paragraphs and five pages of the Judgment could virtually have been omitted.

42. But the point has a substantive as well as a merely procedural aspect:

(a) Where it is the fact (as the Court has found in the present case) that although there would have been a breach of the Convention under Article 5 (art. 5), if that provision had stood alone, - but that, by reason of the operation of Article 15 (art. 15), the putative or potential breach resting on Article 5 (art. 5) is so to speak redeemed, discharged or re-habilitated, - then what really results, when the ultimate situation is reached, is simply that there is no breach of the Convention at all, as such. In these circumstances, it seems to me wrong, or at least inappropriate, to give the impression, as there will be a tendency to do, at least initially, that there is a breach of the Convention because the acts complained of, taken by themselves, would have derogated from Article 5 (art. 5). The whole point is that once the respondent Government has pleaded justification under Article 15 (art. 15), the situation as it might exist under Article 5 (art. 5) alone cannot properly be taken by itself. The Court's present method of dealing with the matter is to hold that there has been a breach of the Convention because of derogations from it under a certain Article, - but then to hold that, by reason of the provisions of another Article, these derogations are excusable. But this is clearly incorrect. Article 15 (art. 15), where applicable to the facts of the case, does not merely excuse acts otherwise inconsistent with Article 5 (art. 5): it nullifies them qua breaches of the Convention as a whole, - or at least justifies them, so that no breach results.

(b) This being so, it seems to me that the present system puts the emphasis in the wrong place. It involves coming to the consequences of the respondent Party having pleaded Article 15 (art. 15), only after establishing that there has been a breach of Article 5 (art. 5), thus putting that Party in the posture of being, in principle, a Convention-breaker, although it has taken all the steps necessary to invoke and bring into play Article 15 (art. 15) which specifically provides that, in certain circumstances "any High Contracting Party may take measures derogating from ... this Convention". Moreover, there being in consequence no breach of the Convention as such, there cannot have been any breach of Article 5 (art. 5) either, - for Article 15 (art. 15) has acted retrospectively to prevent that. The respondent Party is therefore left in the invidious and false position of having prima facie violated the Convention, and having merely as it were subsequently atoned for that violation by bringing itself under Article 15 (art. 15), - whereas the

true situation is that such a Party should be deemed never to have breached Article 5 (art. 5) at all as regards any acts for which Article 15 (art. 15) was invoked and found to be applicable.

ARTICLES 6 AND 15 (art. 6, art. 15)

43. Exactly the same considerations as those just discussed apply here also. But in my view Article 6 (art. 6) has no relevance at all to the question of the validity of the arrest and detention of those concerned in the present case, - while in so far as it might have, it would only apply to matters already so completely covered by Article 5 (art. 5) that it would be a work of supererogation to take them up again. I therefore agree with paragraph 235 of the Judgment that it is unnecessary to give a decision on the point, but that in any event, and a fortiori for the reasons stated in my paragraphs 39-42 above, any United Kingdom derogations under Article 6 (art. 6) would become justified and cease to be such, by virtue of Article 15 (art. 15).

ARTICLE 14 (art. 14)

44. This is the Article (art. 14) according to which States Parties to the Convention must not practise any discrimination in granting to persons within their jurisdiction enjoyment of the rights and freedoms which the Convention provides for. I agree with the Court in not accepting the contention of the Irish Government that there was discrimination because the Northern Ireland authorities, while subjecting various persons belonging to or suspected of connexion with IRA terrorist organizations to detention, did not do the same in respect of "loyalist" organizations of a terrorist character. The Court rejected this view, broadly because it did not regard the two sets of cases as comparable. I would go further, however, and question whether Article 14 (art. 14), the text of which is set out in the footnote below[20], has any application at all in the present case.

45. The point is that in the present case, the alleged discrimination relates not to the way in which a right provided for by the Convention is accorded - (i.e. it is accorded to some but not to others) - but to the way in which it is denied - (denied to some but not to others). At first sight this may seem to be only a case of the two sides of the same coin. But is this so? It seems a curious proposition that because one class of persons is deprived of liberty in a manner prima facie contrary to Article 5 (art. 5), therefore any or all other classes, if in a comparable position, must also be. This gets very near to saying that because one man is illegally arrested all must be - surely the reverse of the truth, - as it would equally be if it was said that because one man is lawfully arrested, therefore all those whom it is possible lawfully to arrest must in fact be arrested. In any event, arresting people is not granting

[20] "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

them a right but depriving them of one - even if for just cause. Hence the issue is the negative one of inflicting an (at least potential) wrong, or at any rate disability, on some but not on others. Can it ever be discriminatory in the normal acceptation of the term to wrong or inflict a disability on some people, but not on others even if they deserve it? If not, then the question of discrimination within the meaning of Article 5 (art. 5) cannot arise at all on the basis on which it has been put by the plaintiff Government, and there is no need to enter into the question whether it was correct not to arrest the "loyalist" terrorists when the IRA terrorists were arrested. This is really a false antithesis and a false issue. A more genuine one may underlie it, but it would need a different formulation and approach and I am not called upon to go into that here.

SEPARATE OPINION OF JUDGE EVRIGENIS

Having felt unable to agree with the majority of the Court on points 4, 7, and 9 of the operative provisions of the judgment, I think it my duty to set out the reasons why I am of a different opinion.

(a) The majority of the Court considered that the combined use of the five techniques constituted inhuman and degrading treatment but not a practice of torture within the meaning of Article 3 (art. 3) of the Convention. I think, on the contrary, that the acts complained of, whilst amounting to inhuman and degrading treatment, do also come within the notion of torture. On this point I share the unanimous opinion of the Commission, which was not contested before the Court by the respondent Government. My disagreement with the majority of the Court concerns both of the premises underlying its reasoning, namely (i) the definition of the notion of torture and what distinguishes it from inhuman treatment as well as (ii) the assessment of the combined use of the five techniques from the factual point of view.

(i) The definition of torture - and hence the feature distinguishing torture from inhuman treatment - on which the judgment is based does not appear to differ appreciably from the one adopted by the Commission in its report. According to the Commission, torture is an "aggravated form of inhuman treatment", the latter in turn being such treatment as "deliberately causes severe suffering, mental or physical" (report, pp. 377, 379). For its part, the judgment defines torture as "deliberate inhuman treatment causing very serious and cruel suffering" (paragraph 167). Since the two definitions concentrate on the effects of the acts in question on the victim, it is difficult to distinguish between what should be regarded as an "aggravated form" of "treatment causing severe suffering" on the one hand and the infliction of "very serious and cruel suffering" on the other. To find the distinction between the two definitions of the notion of torture becomes even more difficult by reason of the fact that the Court draws some parallel between its own definition and that given by the United Nations General Assembly (in Resolution 3452 (XXX) of 9 December 1975, Article 1), which is in substance identical to the Commission’s definition.

The fact remains that this terminology, which is not very enlightening in itself, has to be seen as reflecting the tendency, apparent in the reasoning of the majority of the Court, to place the distinction between torture and inhuman treatment very high up on the scale of intensity of the suffering inflicted. Indeed, the judgment appears to reserve the category of "torture" exclusively for treatment which causes suffering of extreme intensity. I cannot agree with this interpretation.

The notion of torture which emerges from the judgment is in fact too limited. By adding to the notion of torture the notions of inhuman and degrading treatment, those who drew up the Convention wished, following

Article 5 of the Universal Declaration of Human Rights, to extend the prohibition in Article 3 (art. 3) of the Convention – in principle directed against torture (cf. Collected Edition of the "Travaux Préparatoires", volume II, pp. 38 et seq., 238 et seq.) – to other categories of acts causing intolerable suffering to individuals or affecting their dignity rather than to exclude from the traditional notion of torture certain apparently less serious forms of torture and to place them in the category of inhuman treatment which carries less of a "stigma" - to use the word appearing in the judgment. The clear intention of widening the scope of the prohibition in Article 3 (art. 3) by adding, alongside torture, other kinds of acts cannot have the effect of restricting the notion of torture. I might advance the hypothesis that, if Article 3 (art. 3) of the Convention referred solely to the notion of torture, it would be difficult not to accept that the combined use of the five techniques in the present case fell within its scope. I do not see why the fact that the Convention, with the sole aim of increasing protection of the individual, condemns not only torture but also other categories of acts should lead to a different conclusion.

The Court's interpretation in this case seems also to be directed to a conception of torture based on methods of inflicting suffering which have already been overtaken by the ingenuity of modern techniques of oppression. Torture no longer presupposes violence, a notion to which the judgment refers expressly and generically. Torture can be practised - and indeed is practised - by using subtle techniques developed in multidisciplinary laboratories which claim to be scientific. By means of new forms of suffering that have little in common with the physical pain caused by conventional torture it aims to bring about, even if only temporarily, the disintegration of an individual's personality, the shattering of his mental and psychological equilibrium and the crushing of his will. I should very much regret it if the definition of torture which emerges from the judgment could not cover these various forms of technologically sophisticated torture. Such an interpretation would overlook the current situation and the historical prospects in which the European Convention on Human Rights should be implemented.

(ii) I take a stronger position than the majority of the Court as regards the assessment of the combined use of the five techniques from the factual point of view. I am sure that the use of these carefully chosen and measured techniques must have caused those who underwent them extremely intense physical, mental and psychological suffering, inevitably covered by even the strictest definition of torture. The evidence which, despite a wall of absolute silence put up by the respondent Government, the Commission was able to gather about the short- or long-term psychiatric effects which the practice in question caused to the victims (paragraph 167 of the judgment) confirms this conclusion.

(b) I voted in favour of the view that a practice of torture existed in the cases referred to in point 7 of the operative provisions. I cannot characterise in another way treatment which, on the basis of the facts relied on by the Court (paragraph III of the judgment), caused "substantial" and "massive" injuries to detainees.

(c) I voted in favour of the view that Article 3 (art. 3) had been violated in the cases referred to in point 9 of the operative provisions. The practices described in the Moore case (paragraph 124 of the judgment) constituted, in my opinion, degrading treatment within the meaning of this provision.