IRELAND V UNITED KINGDOM: THEN AND NOW

'Those who cannot remember the past are condemned to repeat it'
George Santayana

'Those who want to repeat the past need first wilfully to forget it'

This paper is part of a work-in-progress on the law and Northern Ireland 1968-98. It is a treatment of the background to and events leading up to the decision in *Ireland v United Kingdom*. In the talk based on these notes, observations about the contemporary situation will be made which are inspired by the findings related below. These relationships across time, between the events that led up to that Strasbourg decision and the quasi-colonialism of today carry a powerful resonance for the present writer. The strands of comparison which will be developed in the presentation as a contemporary gloss on what is set out below will include: the similar ways in which the British military and political establishment reacted to the controversies generated by counter-terrorism policies then and now; the difference in outlooks as between the judges of today and the deferential response of the judiciary in England and Wales, both judicially and extra-judicially, to the actions of the military in Northern Ireland, and the limits of such difference; the importance of – and consequent hostility shown to - the European oversight mechanism throughout the proceedings and after final judgment in 1978; the distaste of human rights revealed by the military leadership in particular but by the government as well (Party being irrelevant to this); and most of all the value of the European system as an external mechanism of accountability. It is in an additional way troubling to recall the events below against a background of the strong move being presently made by the military in the UK to use the current uncertainty over rights to secure an exemption for themselves from rights scrutiny for their conduct abroad. It is vital that such politically lobbying be resisted. It may be that reopening the *Ireland v UK* case, as has been suggested recently, is a good way of forcing a relevant past into public view. Whatever the method used, it would be very good for the UK (perhaps soon to be outside the EU? perhaps soon to be beyond the reach of Strasbourg? Perhaps soon not to be the UK?) to be reminded of how its political and military leadership behaved at a time when the words 'sovereignty' and 'impunity' were interchangeable.

(1) The wider context

British troops were released onto the streets of Northern Ireland in the Summer of 1969. For the first three years of their activities in Northern Ireland they acted under the political direction of the then still subsisting devolved administration based in Stormont, a government that had been Unionist in complexion since the establishment of the six counties as a separate political entity in 1921. The public order situation in Northern Ireland worsened considerably after the army's arrival, partly because the circumstances of disorder in Northern Ireland were now too serious to be easily managed but also on account of the perception that the military forces were present as upholders of the status quo rather than as defenders of the Catholics whose exposure to rioting loyalists had been the initial rationale for their deployment. A curfew imposed in July 1970 in Catholic parts of Belfast proved especially controversial, with violence worsening considerably after its imposition. Ominously this phase saw the resurgence of the IRA (in a renewed 'Provisional' form) and its development into a coherent subversive force.

The year 1971 began much as the preceding year had ended, in a violent combination of subversive action and military reaction. It was clear that something had to be done. In the first nine months of 1971, thirty people were killed and many more were injured as a result of the civil disorder. In the first half of the year alone, the army conducted 346,385 vehicles searches, 1,234 searches of

occupied buildings and 5,793 searches of unoccupied premises, but these actions did not seem to be stemming the tide of subversion. Most of the searches were directed against the Nationalist community, forcing the M.P. for Nationalist West Belfast Gerry Fitt to warn Parliament as early as February 1971 that there was "absolutely no doubt" that the widespread searches frequently conducted by the British Army "in the highly emotional areas" in his constituency had led to increased disorder. Two months later Fitt repeated his claim, suggesting that the partisan conduct of the Army in the exercise of its search powers "had been causing a great deal of hostility." Matters finally came to their point of deepest crisis in the Summer. In June, serious rioting followed the confirmation of the young M.P. Bernadette Devlin's six month prison sentence for her part in disturbances in the Bogside in Derry. The Lord Chief Justice Lord MacDermott did not endear himself to the Nationalist community by asserting in the course of his judgment that the "private citizen has authority in law to help in the suppression of riots, and it is his common law duty to assist the constabulary to this end."

In July the IRA stepped up its campaign of violence in the hope of precipitating the direct rule from London which it saw as the prelude to a united Ireland. Surrounded by increasing levels of violence and aware of the hostility towards it of a large minority of its own population, the beleaguered Unionist Government had one last card to play. Internment seemed to have worked before, when IRA campaigns had threatened to get out of control. The new Prime Minister Brian Faulkner, who had assumed office in March, had been at Home Affairs in the latter phases of its last successful deployment, during the IRA Border campaign of 1957-62. He had had first hand experience of its apparent effectiveness then. Consultation with London revealed no Westminster veto and accordingly the policy was put into effect in the early morning of 9 August 1971.

The SPA regulations that were relied upon dated from 1956-7 and were confusing to security officers and suspects alike. Regulation 10 permitted the arrest, and detention for questioning for not more than forty-eight hours, of any person where this was for "the preservation of the peace and maintenance of order". It was this regulation that the Chief Constable of the RUC used to authorise the army to make the first wave of arrests. The men taken were on lists supplied to the army by the RUC special branch. Once in custody, these suspects were then rearrested under regulation 11(1), a necessary preliminary to being subsequently validly "detained" under regulation 11(2). These "detention orders" were issued by the civil authority and were unlimited in duration, but despite the fact that they could give rise to indefinite incarceration, they did not technically amount to internment, which was effected by the issuance of an entirely separate order by the Minister of Home Affairs under regulation 12(1). This was the regime that was applied to the 350 men who were taken in the initial army swoop on 9 August (from a final list of 452 suspects). Of these, 104 were released within two days while the rest were made the subject of indefinite detention orders, with many of these were then being made the subject of internment orders. From the start, it was clear that the policy was certain to fail. The violence that surrounded its introduction alone claimed the lives of twenty people with many more being left homeless in the sectarian attacks that it precipitated, Whereas the pre-internment months of 1971 had seen 30 politically-related fatalities, the remainder of the year witnessed a further 143 such deaths. The IRA was able to mount such a vigorous counter-attack largely because the men taken on 9 August and in the days that followed were invariably the wrong people, veterans of earlier IRA campaigns rather than members of the current organisation. The result was that the IRA gained all the alienating benefits of internment while suffering few of the operational disability that would have flowed from its effective application. As Reginald Maudling was to remark much later, "[t]he experience of internment ... was almost by universal consent an unmitigated disaster that has left an indelible mark on the history of Northern Ireland."

Neither the Stormont government nor the security forces showed much awareness of this "universal consent" in the months that followed the introduction of their policy. The numbers arrested by the security forces with a view to their possible detention and internment in the first four months of the operation of the policy were 362 (August), 164 (September), 278 (October) and 455 (to 25 November).The appeal system in the SPA provided for an "advisory committee ... specially appointed by the Minister of Home Affairs" to consider representations from internees. The chairman of the Committee was required to be "a person who holds or has held high judicial office or is a Recorder or County Court Judge or a practising Barrister of at least ten years' standing." In the panic that surrounded the introduction of internment in August 1971, this committee was not even set up and it was not until the end of September that Reginald Maudling was able to announce its establishment, proudly telling the Westminster House of Commons at the time that "among the members accepting appointment is an Englishman, a former judge in the High Court of Kenya, Mr P N Dalton, appointed by the previous Government as a member of the Immigration Appeal Tribunal, and who is himself a Roman Catholic." The Committee (with two other members, neither of them lawyers) allowed internees to appear before it, but statements of evidence against them were always anonymously made. Unsurprisingly, the impact of this Committee was minimal. In the first three months of its operation, only sixteen of its recommendations led to releases. By the start of February 1972, the Committee had recommended release in a total of 25 cases, in three of which cases the men had remained in detention, having refused to swear the following "loyalty oath", imposed on them as the price of their freedom, "I swear by Almighty God that for the remainder of my life I will not join nor assist any illegal organisation nor engage in any violence nor counsel nor encourage others so to do."

The reaction of the English and the Northern Ireland judiciary to the internment crisis in these early days showed an interesting difference of emphasis. The very first case arising out of the events of 9 August 1971 came not before the Belfast courts but before Ackner J. in the English Queen's Bench Division on 1 September that year. Sir Desmond Ackner had been appointed to the Bench as recently as the previous January, and before him in a Vacation sitting were two applicants for habeas corpus who had both been detained aboard HMS Maidstone, a ship moored in Belfast Lough. Each had been interned before, Sean Keenan for five and a half years in 1940 and again for four years in 1957, and James McElduff for two years in 1958-9. Ackner J. was content to assume that he had jurisdiction to hear the application, a point on which the Court of Appeal was subsequently to take a different view. This preliminary ruling meant that the judge had to confront the central and ambitious argument mounted by the applicants, which was nothing less than that the Special Powers Act was ultra vires the Government of Ireland Act 1920, to the extent that it empowered the British army to exercise police powers not available to the general public. The submission was stronger than its ambitiousness might have suggested; section 4(3) of the 1920 Act forbade the Parliament of Northern Ireland from acting in various areas and it also expressly prohibited the legislature from making laws "in respect of ... the army". The applicants argued that, in common with other sections and regulations in the SPA, the arrest and detention power in regulation 11 must be invalid insofar as it empowered a "member of any of Her Majesty's Forces on duty" to arrest suspects on certain grounds, since it therefore constituted legislation "in respect of ... the army" for the purposes of the 1920 Act.

This argument was to prove successful before the Northern Ireland Court of Appeal in early 1972, but it did not impress Mr Justice Ackner. The submission was "erroneous". The judge asserted that the crucial section in the 1920 Act did not prevent the Northern Ireland Parliament from legislating for the provision of facilities, "of which, for example, the Army in its unfettered discretion [could] take advantage." As Ackner J. somewhat rhetorically put it, "[c]ould it be validly argued that section 4(3) of the Act would render legislation by the Northern Ireland Parliament void because it allowed members of Her Majesty's Forces to travel at reduced rates on the public transport?" Viewed in this

light it was clear that the SPA did not make laws "in respect of' the army; it "merely provide[d] facilities of which the Army [could] in its unfettered discretion avail itself." In this respect the SPA was in Ackner J.'s eyes "comparable to the Housing (Additional Powers) Act Northern Ireland 1939 in which the Northern Ireland Parliament ha[d] legislated to extend the powers of local authorities so as to enable them to provide accommodation specifically for persons employed in naval, military and air force establishments." The examples chosen by Mr Justice Ackner indicate that he did not see this case as involving the application of any common law principle of individual liberty in the applicants' favour. Indeed there is no reference to such a principle in his judgment.

That he was unsympathetic to the men before him is perhaps even more clearly revealed in the way in which he addressed their second substantive argument, namely that their detention was invalid because "they had not been told specifically which of the grounds specified in regulation 11 [were] relied upon to justify their arrest." According to the applicants this was sufficient to demonstrate that "there was reasonable and probable cause for contending that no valid grounds in fact exist[ed]." The authorities seem to have accepted that no grounds for arrest were communicated to either of the two men. To this Ackner J. responded:

The Minister of Home Affairs has not yet been asked to specify which of the grounds set out in regulation 11 is relied upon for the arrest. It is nowhere asserted that if asked, he would refuse to specify the grounds nor has it been contended that I should so infer. Moreover neither applicant has asserted, nor has it been asserted on his behalf, that to the best of his knowledge, information and belief none of the grounds specified in the regulation could properly be applied to him. On this subject both applicants have chosen to remain conspicuously silent. Out of this altogether negative position, the applicants cannot in my judgment establish the reasonable and probable cause which they are obliged to do, to justify my granting leave.

The novel idea developed by Mr Justice Ackner here was that arrestees must seek out the reasons for their arrest and must declare that none of the preconditions for the application of the arrest power apply to them. It was not obvious how this reasoning could be squared with the well-known case of *Christie v .Leachinsky*, and when one of the men took his case to the Northern Ireland Queen's Bench the following month, McGonigal J. refused to follow his English colleague, and found in favour of the applicant on the basis both that the fact of the arrest and the reasons for it had not been adequately communicated. The language of the judge on that occasion was in marked contrast to that deployed by his English colleague. These entitlements amounted to "a fundamental right" which could not be taken away "without the clearest words." In a decision handed down two months after McGonigal's judgment, O'Donnell J. ordered the release of an applicant who had been detained under the SPA notwithstanding his having been given bail on criminal charges that had been brought against him, the judge declaring angrily that the "authorities have acted with scant regard for the law, and the liberty of the subject." Even a conservative judge like Mr Justice Gibson (who was subsequently involved in controversial "shoot-to-kill cases and who in 1987 was to lose his life in an IRA attack) chose to follow the decision of his colleague McGonigal J. when a similar issue came before him in 1972, there not being "any obvious practical reason why the civil authority or arresting officer should not have made up his mind under which regulation he proposes to arrest a person or why when he does so he should not declare his reason."

These cases from the Northern Ireland judges exposed the legal inadequacies of the internment policy. But the main problems remained political. The anti-Nationalist effect of internment was becoming increasingly obvious as time went by, not least because no suspect from the Loyalist community ever seemed to be apprehended (and this did not in fact occur until as late as February 1973). By February 1972, when the power had been in operation for six months, a total of 2,357 arrests had been made, 923 detention orders had been issued and 631 persons had been formally interned. On the day that these latter figures were released, there were still 598 internees and a

further 159 people detained under regulation 11(2). The policy continued unabated through February and March that year, though by now the ever escalating violence was making the position of its chief advocate, the Stormont administration, increasingly untenable. Quite the contrary; the policy of internment seemed more and more futile and counter-productive.

At the end of March, after the Unionist cabinet had resolutely refused to accept the transfer of responsibility for law and order from Belfast to Whitehall, Mr Heath's Government finally moved to suspend Stormont and to introduce a period of direct rule from London. A new post of Secretary of State for Northern Ireland was created, with its first occupant being the respected Conservative William Whitelaw. This change of regime was marked by a promise from the Prime Minister that the policy of internment would be wound down and this seemed at first to be the Government's firm intention, On 7 April, Mr Whitelaw in his capacity as successor to the old Minister of Home Affairs announced the immediate release of 47 internees and 26 detainees. By mid-May a further 186 men had been released. At the same time, the Government declined to make any new internment orders and in fact none were made during the first seven months of direct rule. Even detention orders under regulation 11(2) were pruned back, with only 107 being made during the same period. The cumulative effect of this policy was that, by the start of November, no fewer than 628 internees and 334 detainees had been released, and only 167 internees and 119 detainees were now left in incarceration. It was clear that the Government's embarrassment over its inherited policy of internment had combined with its desire to bring the violence to an end effectively to override any security advantages that internment might still in some circles have been perceived to have had. Paralleling these liberalisations on the security front was a serious effort by the Government to bring about a lasting political settlement. The strategy in the Summer of 1972 involved Mr Whitelaw in direct and secret talks with the IRA leadership in July and in an attempt at an all Party conference on political options in Darlington in September.

The Darlington initiative ended in failure, not least because the Nationalist SDLP refused to attend on account of the continuance of internment. The contact with the IRA also led nowhere. A two week ceasefire that the organisation had put in place around the time of its meeting with Mr Whitelaw was ended by the killing of nine people (four of them soldiers) in a two day period, and the level of violence during the rest of the Summer remained stubbornly high. One of the worst ever incidents in the whole troubles occurred on 21 July when 26 IRA bombs in Belfast killed eleven and injured 130. It was against this background that the political atmosphere began to change in the Autumn of 1972, with a new emphasis on law and order surfacing once again. Internment had throughout remained an attractive option to the security forces and it was one that the politicians were now once again willing to contemplate. The problem they faced was that internment's legal origins in the old SPA made a simple return to it next to impossible, politically. Accordingly Mr Whitelaw and his colleagues set about restructuring the law so as to retain the advantages of executive detention without (it was hoped) the almost universal opprobrium that the old regulations had attracted.

The result was the Detention of Terrorists (Northern Ireland) Order 1972 which came into force on 7 November. It did away with the crudities of the old SPA regime and in particular dispensed with the emotive word "internment", but it kept in place the principle of executive detention, albeit now more effectively legitimised by the introduction of layers of quasi-judicial scrutiny. As we have seen, one of the particularly embarrassing features about the old SPA internment power had been its lack of finesse in the area of due process. By the time of its supersession in November 1972, the SPA Appeal Committee had recommended the release of a mere 69 of the 588 internees whose cases it had examined. The 1972 Order replaced the SPA committee with a body of "commissioners" whose job it was to make "detention orders" (on foot of "interim custody orders" issued by the Secretary of State). When suspects subject to such orders had their cases considered by one of these

commissioners, they were required to be informed of "the nature of the terrorist activities" associated with them and they were also allowed to have legal representation if they wanted it. These safeguards were diluted by the fact that a commissioner could remove a suspect from his or her own adjudication if their presence was considered to be "contrary to the interests of public security" or to be a danger to "the safety of any person". A "Detention Appeal Tribunal" was established to hear appeals by detainees against the decisions of the commissioners. All the proceedings of the commissioners and the Tribunal were required to be "in private," and all the personnel involved were appointed by the Secretary of State, with each having to be someone who "holds or has held judicial office in any part of the United Kingdom or is a barrister, advocate or solicitor in each case of not less than ten years' standing in any part of the United Kingdom." The posts were remunerated and tenure was at the discretion of the Secretary of State.

It is difficult to underestimate the value to the Government in being able to present internment in this new disguised light as a quasi-judicial process. When the Order came into force, all internees were automatically recategorised as persons held under interim custody orders. This was the somewhat tenuous basis for the claim by the Northern Ireland Office Minister responsible for steering the order through a Commons debate that "internment as such [was] no more." In a similar vein, another Minister enthused that the order "does away with internment by order of the Executive" and creates new independent machinery to consider cases of suspected terrorists who cannot be brought before the Schedule, paragraph 15. Under paragraph 16, the commissioner had to tell the suspect or his representatives of the "substance of the matters" dealt with in his or her or their absence, but only insofar as "the needs of public security and the safety of persons" permitted. ordinary criminal courts." The number of people interned in this new, more attractively packaged way quickly began to rise once again. Whereas, as we have seen, there were just 167 internees and 119 detainees in the month before the new Order came into effect, by mid-April 1973, there were 409 suspects in incarceration under the 1972 Order, with the average length of time spent in detention now being estimated at seven months. Between 1 February 1973 and 31 October 1974, interim custody orders were issued in respect of 725 individuals. Far from dying away as was promised after the introduction of direct rule, internment continued in this new form to be an important part of security policy through 1974 and much of 1975, with the final batch of detainees not being released until 5 December 1975. The legal professions appear to have erected no obstacle in the way of its smooth operation. The Government seems to have encountered little difficulty in securing the services of sufficient numbers of lawyers to man the ranks of the commissioners, and the functionaries who took on the job appear to have transformed into detention orders the great majority of the interim custody orders that came before them. There were twenty such commissioners, most of whom were Scottish sheriffs, English circuit judges or part-time recorders. They heard their cases in the Maze prison complex, where they also lived "separated from the detainees and prisoners only by screening and wire". Counsel for the Crown in these cases was also always an imported professional, being exclusively drawn from the English Bar. The Northern Ireland barristers were allowed only to represent the "respondents", as those held in detention were known. Proceedings before these Commissioners were inevitably peculiar. The evidence for the Crown came almost exclusively from the army or the police and was normally given from behind a screen. Sometimes voice scramblers were used as a further precaution against detection. Despite all these safeguards, the hearings frequently went in camera so that the "respondent" and his lawyer could not be permitted to remain to hear the evidence. In the first year of the Order's operation, these commissioners reviewed 579 cases, composed of 296 interim custody orders made under the 1972 Order or the later (equivalent) 1973 Act and 283 former "internees" and "detainees" inherited from the old SPA regime. In 453 of these cases, the commissioners issued detention orders, and in 126 of them the release of the suspect was ordered.

A disgruntled “respondent” could take his or her case to the Detention Appeal Tribunal and the former Court of Appeal judge Sir Henry Gordon Willmer came out of retirement at the age of seventy-three to chair its proceedings, remaining in place until 1975. The work that he and his team faced was hardly onerous. In its first five months it considered only seventeen appeals, ordering the discharge of the detainee in five of these cases. After ten months, it had heard 34 cases and had directed release in twenty-five of these. While these release rates might be thought commendably high, they should be seen in the context of the greatly increased use of executive detention, in comparison at any rate with the Spring and Summer of 1972. The paradoxical effect of the ostensibly liberal November 1972 measure was to increase the number of suspects held indefinitely without charge or trial. Without the gift of foresight, the *New Law Journal* could perhaps be forgiven for having given the Order “a cautious welcome”, and for having noted that viewed together with another unconnected legal initiative, it was pleasant to be able “to register at least two cheers in favour of’ the proposals.

(2) “Interrogation in depth”

The most serious legal issue to arise out of the policy of internment was to dog the British government throughout much of the 1970s, eventually giving rise to the Strasbourg judgment that is the subject of this conference. Almost immediately following the introduction of internment in August 1971, allegations began to surface of serious ill-treatment of and brutality towards internees by the security forces. The Government responded quickly, establishing an inquiry on 31 August, chaired by the Parliamentary Commissioner (or “Ombudsman”), Sir Edmund Compton, a man whose independence was brought home to the House of Commons by the Prime Minister’s assurance that “his capacity [was] that of a judge.”’ The Committee dealt with forty allegations of ill- treatment and found in favour of the official version of events in most cases, something that was made almost inevitable by the refusal of all but two of the detainees to have anything to do with the proceedings (in stark contrast to the 95 army witnesses, 26 police witnesses and 11 prison officer witnesses who appeared, many of them with legal representation). But one set of findings, the central thrust of which was never disputed by the authorities, proved sensational.

Compton and his two colleagues His Honour Edgar S Fay QC and Dr Ronald Gibson, found that eleven of the 350 men originally arrested on 9 August had been removed to a secret location for “interrogation in depth” between 11 and 17 August. It subsequently transpired that a twelfth man had been similarly dealt with at the same time and that two more men were interrogated in the same fashion in October, the latter two being the subject of a supplementary report from Compton and his colleagues. The Committee reported that these men had been subjected to five techniques of sensory deprivation which had been authorised at a high level. Though the body of the Report does not refer to the fact, a number of RUC Officers had been orally instructed in these practices at the English Intelligence Centre at a seminar in April 1971. The five techniques were: (a) “Wall-standing”, in which suspects were forced to remain for periods of hours “spread-eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers.” (Though it was denied in the Comp ton report, this was afterwards admitted to have necessitated the men standing in the “stress position”.) (b) “Hooding”, which involved “putting a black or navy coloured bag over the detainee’s heads and, at least initially, keeping it there all the time except during interrogation”; (c) “subjection to noise”, which involved “pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise”; (d) “deprivation of sleep” particularly pending interrogation; and (e) “deprivation of food and drink”, under which detainees were given a reduced diet during their stay at the centre and prior to interrogation.”

The Government defended the techniques as being designed to increase security and facilitate effective interrogation. It pointed out that they had been used many times in situations of post-war colonial agitation, including in Palestine, Malaya, Kenya, Cyprus, the British Cameroons (1960-1), Brunei (1963), British Guiana (1964), Aden (1964-67), Borneo/Malaysia (1965-66), and the Persian Gulf (1970-71). Compton had been specifically asked to consider the question of physical brutality and the committee's controversial conclusion was that while these techniques of sensory deprivation definitely constituted "physical ill-treatment", they did not amount to physical brutality. The key finding was the following: "We consider that brutality is an inhuman or savage form of cruelty, and that cruelty implies a disposition to inflict suffering, coupled with indifference to, or pleasure in, the victim's pain. We do not think that happened.' The Home Secretary, in his introduction to the Report, was accordingly able to emphasise that the Committee had "found no evidence of physical brutality, still less of torture or ii In defending the Report in Parliament he declared that he could not "think of any country in the world where such a standard of thoroughness and impartiality would have been maintained." Public disquiet about the behaviour of the security forces was not so easily allayed. On 17 October 1971, shortly before the main Compton report was published, the *Sunday Times* had carried extensive and detailed allegations of what still seemed in ordinary parlance (even after Compton) to be brutality towards detainees. Sensing the likelihood of such disquiet, the Home Secretary announced in his introduction to Compton a second inquiry to provide "authoritative advise upon the procedures for the interrogation of persons suspected of involvement in a terrorist campaign, including their custody while subject to interrogation, and the application of those procedures."

In the immediate aftermath of the Compton Report, attention focussed on the nature and composition of this second, crucial inquiry. Its membership was announced on 30 November. It was to be a committee of Privy Counsellors, with the chairmanship being taken by Lord Parker of Waddington, the seventy-one year old judge who had just retired after thirteen years as Lord Chief Justice. His most famous trial had been that of the spy George Blake whom he had jailed for forty-two years. The second judicial figure on the Committee was Lord Gardiner, who had been Lord Chancellor in the previous Labour Government and who had earned a reputation as a liberal on issues relating to crime and civil liberties. The third member of the three-man committee was therefore likely to be of critical importance to the resolution of the issues before it. He was J A Boyd-Carpenter who was Conservative MP for Kingston-upon-Thames, a seat he had held since 1945, during which time he had served in a succession of Tory administrations. In his autobiography, Boyd-Carpenter makes no reference to his service on the Parker Committee, but there is one intriguing and possibly relevant remark: "In the latter part of 1971 the Prime Minister, Edward Heath, who had sent for me in connection with another matter, offered me the Chairmanship of the Civil Aviation Authority", an appointment which however "would not be announced for some time." Following the publication of the Parker report, Boyd-Carpenter quit the Commons and went on to chair the Authority that had been promised to him, now rejoicing in the elevated status of a member of the House of Lords, as Baron Boyd-Carpenter of Crux Easton. As expected, his presence proved absolutely crucial since the committee split over its final recommendations, with Boyd-Carpenter joining Lord Parker in issuing a majority report, over a strong dissent from Lord Gardiner.

The majority report is a truly remarkable document. It considered that while it was true that "some if not all the techniques in questioning would constitute criminal assaults and might also give rise to civil proceedings under English law", it was nevertheless not appropriate to express "any view in respect of the position in Northern Ireland in deference to the courts there." Even more remarkable, this possible unlawfulness did not necessarily mean that the techniques should as a matter of principle be prohibited. The majority considered that, provided they "are applied as envisaged by those responsible for Service training, the risk of physical injury is negligible" and that "while long-term mental injury cannot scientifically be ruled out, particularly in the case of a

constitutionally vulnerable individual, there is no real risk of such injury if proper safeguards are applied in the operation of these techniques." The majority's anxiety not to prejudge court proceedings in Northern Ireland did not inhibit it from asserting that there was "no doubt that the information obtained by these two operations directly and indirectly was responsible for the saving of lives of innocent citizens". The operation had been an outstanding success in other ways: "As direct result [of it] the following new information was obtained: (1) Identification of a further 700 members of both IRA factions, and their positions in the organisations. (2) Over forty sheets giving details of the organisation and structure of the IRA units and sub-units. (3) Details of possible IRA operations; arms caches; safe houses; communication and supply routes, including those across the border; and location of wanted persons. (4) Details of morale, operational directives, propaganda techniques, relations with other organisations and future plans. (5) The discovery of individual responsibility for about incidents recorded on police files which had previously remained unexplained." Parker and Boyd-Carpenter reported all these claims as matters of fact, without accompanying evidence. While they recognised the "danger that, if the techniques are applied to an undue degree, the detainee will, either consciously or unconsciously, give false information", this had not happened here, they said, since "the information given was quickly proved to be correct except in a few cases"." Thus, although neither man subscribed "to the principle that the end justifies the means," each was convinced that "there was "no reason to rule out these techniques on moral grounds and that it [was] possible to operate them in a manner consistent with the highest standards of our society."

The majority report's support for the techniques was not unqualified, however. Its recommendation that there be new and tighter guidelines, a stronger ministerial involvement, an advisory committee, a system of medical care and even a complaints procedure might have made it difficult for ministers to accept even if the committee had been unanimous. Particularly sensitive would have been the majority's suggestion of the possible need for "steps to ensure protection for those taking part in the operation" , a proposal that seemed to imply the need for legislation to authorise sensory deprivation, not an easy matter for any Minister to contemplate taking to the floor of the House. Lord Gardiner's dissenting report was unequivocal that the procedures "were and are illegal" and that "their use [could] not be continued without legislation". Apart from the legal position, the former Lord Chancellor was equally clear in his mind that the practices were not "morally justifiable" and that they should be immediately discontinued. He ended his dissent with a passionate statement of his own personal judgment on the whole affair: "The blame for this sorry story, if blame there be, must lie with those who, many years ago, decided that in emergency conditions in Colonial-type situations we should abandon our legal, well-tried and highly successful war time interrogation methods and replace them by procedures which were secret, illegal, not morally justifiable and alien to the traditions of what I believe still to be the greatest democracy in the world." The effect of the Gardiner dissent was greatly to undermine the credibility of the majority opinion when the Report was finally published on 2 March 1972. (It had been with the Secretary of State since the end of January.) The *New Law Journal* in an editorial described many parts of Parker's and Boyd-Carpenter's report as "staggering" in its implications; though it "disclaims any allegiance to the principle that the end justifies the means ... it is only in terms of that principle that the majority's conclusions make sense at all." The Government's reaction was also muted. The Prime Minister declined to take the majority opinion as even a qualified endorsement of sensory deprivation; quite on the contrary, in welcoming the report he assured Parliament that the conduct it sanctioned would no longer be engaged in, and that in particular "the techniques which the Committee examined will not be used in future as an aid to interrogation." The Nationalist MP Frank McManus intervened to accuse the authors of the majority report of having attempted "to whitewash what went on," with the MP also alleging that the Government had acted only because it had been "shamed by force of public opinion into discontinuing barbaric practices".

The Government's response was due not only to the force of Lord Gardiner's dissent or to the public disquiet referred to in such mocking terms by Frank McManus. In December 1971, the Irish Government had lodged an application with the European Commission of Human Rights complaining that the alleged ill- treatment of internees in Northern Ireland was in breach of the United Kingdom's obligations under the European Convention on Human Rights. The Irish focus was particularly on the degree to which the five techniques of interrogation constituted torture, inhuman or degrading treatment, contrary to article 3 of the Convention. For much of the rest of the 1970s, Anglo-Irish relations were dominated by this case, as it wound its way slowly through the Commission to a final resolution in the European Court of Human Rights in January 1978. The 2 March statement by the Prime Minister had been in part designed to end these proceedings before they had got off the ground, but successive Irish governments proved themselves impervious to this and subsequent intimations of a British desire for a friendly settlement. The European Commission found that its investigation of the case was being hampered by the respondent Government, which "did not always afford it the assistance desirable", a fact to which the European Court later drew attention, saying explicitly that it regretted "this attitude on the part of that Government." The Commission also considered that "neither the witnesses from the security forces nor the case-witnesses put forward by the applicant Government had given accurate and complete accounts of what had happened." Nevertheless its conclusion, published on 2 September 1976, was that the five techniques did indeed amount to "torture" under article 3. The *Times* reported that the British Government "reacted with coldness and anger, unsoftened by any hint of an apology or repentance." It quoted a statement from the then Home Secretary Merlyn Rees, saying that the "only people who can derive any satisfaction from all this are the terrorists."126 The newspaper's leading article nevertheless declared the story a "shameful chapter" which had been "seriously damaging to the repute of the United Kingdom."

Two years later, the European Court agreed by sixteen votes to one that the five techniques "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" and that accordingly they "fell into the category of inhuman treatment within the meaning of Article 3." The Court also found that the techniques were "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 or moral resistance." It concluded that they amounted to "a practice of inhuman and degrading treatment, which practice was in breach of Article 3." The sole dissentient on this point, Judge Fitzmaurice, warned 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." The British member of the court went on to assert that 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." It may have been because it regarded such a point of view as partly credible that the Court went on to hold, this time by thirteen votes to four, that the five techniques "did not occasion suffering of the particular Intensity and cruelty implied by the word torture as so understood." This dilution of the Commission's original findings was particularly surprising because the United Kingdom Government had not sought to challenge the torture point before the Court. It was not surprising that the British attorney-general Sam Silkin felt able to view the decision, "taken as a whole" as "highly satisfactory". The press reaction was not dissimilar. The *Times* thought that "[t]orture' never was the right word for the treatment inflicted on fourteen IRA suspects" and the *New Law Journal* felt that "the long drawn out proceedings in Strasbourg" had at least had the "worthwhile purpose" of making the European Convention "a more effective instrument for the protection of the human rights and freedoms which the Convention declares."

Away from the grandeur of Strasbourg, it was the ordinary common law that secured tangible compensation for the ill-treated men, with the fourteen of them receiving sums ranging from

£10,000 to £25,000 by way of the settlement of their various civil actions Between August 1971 and the end of January 1975, compensation totally £302,043 was paid in settlement of 473 civil claims for wrongful arrest, false imprisonment, assault and battery." In an article published in the literary magazine *Granta* in 1992, the writer John Conroy described what had happened to some of the fourteen men who had been subjected to sensory deprivation.' After treatment for acute anxiety, Sean McKenna died in 1975 of a heart attack, aged 45. Pat Shivers suffered similar anxiety attacks until his death from stomach cancer in 1985, at the age of 54. Michael Montgomery's marriage ended in 1977 and he died of a heart attack in 1984, aged 49. Liam Shannon developed chronic diarrhoea after his interrogation and in 1975 was diagnosed as having Chrone's disease. In 1974, Gerard McKerr was found to have cancer of the lymph glands.