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STRASBOURG CASE

1. The report of the European Commission of Human Rights on the case taken by Ireland against Britain in December 1971 was made available to the Irish and British Governments and to the other member States of the Council of Europe on 9 February 1976.

2. The main conclusions of the report are as follows:

- 2.1. Articles 5 (personal liberty) and 6 (fair trial) of the Convention taken in conjunction with Article 15 (derogation in emergency) re internment - no violation of the Convention by the British Government as the measures, although contrary to Article 5, were permissible under Article 15 (unanimous decision).
- 2.2. Article 14 (discrimination on political grounds inter alia) re implementation of internment - no violation (unanimous decision).
- 2.3. Article 1 (obligation to secure the rights embodied in the Convention) - no violation as this Article does not impose a separate obligation from the rights Articles and cannot therefore be separately breached (12 votes against 1).
- 2.4. Article 3 (torture or inhuman or degrading treatment or punishment)
  - (i) Cases involving the five techniques - violation of the Convention by a practice of inhuman treatment and torture in breach of Article 3 (unanimous decision);
  - (ii) Other cases
    - A. - violation of the Convention in most of the 16 cases in which oral evidence was heard by inhuman treatment of the persons concerned at the hands of the security forces in breach of Article 3 (unanimous decision);
    - B. - violation of the Convention by a practice of inhuman treatment in breach of Article 3 by members of the RUC in connection with interrogation of prisoners at Palace Barracks in Autumn of 1971 (unanimous decision);
    - C. - no practice in breach of the Article was found arising out of other individual cases of treatment in breach, or the conditions in Girdwood Park in August 1971 (unanimous decision);
    - D. - no violation of the Article by the conditions at Ballykinlar in August 1971 (unanimous decision).

(Where a practice in breach of the Article is found the violation is that much more serious, the gravity depending on the level at which tolerance is found. Authorisation of the five techniques by the British Government was found to have been admitted and the Commission also found that the practice in Palace Barracks was tolerated at a high level.)

3. The report has been placed on the Agenda of the Committee of Ministers of the Council of Europe but will not be considered by the Committee of Ministers until three months have elapsed during which time the case may be referred for final adjudication to the European Court by either of the parties to the case or the European Commission of Human Rights.

4. The British Prime Minister, via the Secretary to the British Cabinet, made it known to us in December 1975, in the context of an approach on a friendly settlement, that recourse to the European Court could not but aggravate tensions to a dangerous degree. In reply, we took the line that we had always been willing to listen, through the offices of the European Commission, to any reasonable proposals which the British might make but that we regarded the onus as being on them - not on us - to make these proposals initially. In the light of the imminent finalisation of the Commission's report, we felt that there was no alternative now but to let the Commission report in the ordinary way.

5. On 12 February 1976 the British Government, in response to press speculation on the findings of the report, issued a press release stating that it would have no objection to the publication of the report since "this would demonstrate the speculative nature of the unofficial reports circulating in Dublin". The Government in turn issued a statement saying that it had no objection to the publication of the report and that it would explore the possibility of securing, consistent with the obligation of the two Governments under the Convention, the publication of the report at the earliest date. The report may not, however, be published until either it is referred to the Court of Human Rights or the Committee of Ministers decide to publish it.



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27 February, 1976

Re: Strasbourg Case

Dear Taoiseach

As it is probable that the Strasbourg case will be raised at the forthcoming London meetings I thought I would put in writing some views on it for your consideration:

1. The UK could, possibly, change its position and non-publication of the Report may be suggested. Even if this is not suggested a settlement is likely to be urged. This could take the form of a proposal:
  - (a) that the Report be sent to the Committee of Ministers
  - (b) that it be published by consent, the Committee noting its contents, and no further action or "decision" by the Committee be taken.

The UK attitude is likely to be that the continuation of the dispute is harmful to Anglo-Irish relations; that only the I.R.A. will get benefit from the further continuation of the proceedings.

2. It may be possible to avoid detailed discussion on the suggestion by stating that the Report has not been studied in detail by the Cabinet. It may not be necessary, therefore, to refer to any of the considerations which follow hereunder. In case more detailed discussion is required, the considerations which follow could be borne in mind.

3. Early publication of the Report is necessary to satisfy public opinion in Ireland. Early publication can only be assured by reference to the Court (see my opinion sent on the 18th ultimo).

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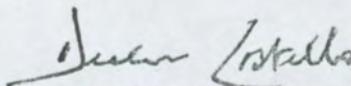
4.

Publication of the Report would facilitate a settlement of the proceedings, if a mutually satisfactory one can be reached. The act of publication and the fact of condemnation of the activities of the security forces by an international tribunal will help to satisfy public sentiments on the matter and to create a climate favourable to a settlement. When the Report is examined and considered it may be seen that no great advantage is to be obtained by another international body (be it the Committee of Ministers or the Court) further examining the facts and expressing an opinion on them. Publication should, therefore, precede any settlement.

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Whilst a favourable climate of opinion can be created by publication some further acts to facilitate a settlement by the British Government would be required. Thus the introduction of a Bill of Rights in Northern Ireland and an improved complaints procedure in relation to the police are possible actions which would enable a discontinuance of the proceedings to be effected. This could happen after an interval of time had elapsed from the date of publication.

Sincerely yours



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## OIFIG AN ARD-AIGHNE

"The Strasbourg Case"Future ProceduresOPINION

1. On the 9th February, 1976, the European Commission of Human Rights forwarded its Report on the claim made by Ireland that breaches of the European Convention on Human Rights had occurred in Northern Ireland. On the same day it forwarded the Report to the Committee of Ministers of the Council of Europe. In accordance with Article 31 of the Convention the Commission's Report states the facts which it has ascertained in relation to the complaint and its opinion as to whether or not the facts found disclosed a breach of the Convention.
  
2. The parties to the proceedings are not at liberty to publish the Commission's Report (Article 31). If within three months from the date of the transmission of the Report to the Committee of Ministers the question is not referred to the European Court of Human Rights then the Committee of Ministers is required to decide as to whether or not a violation of the Convention has occurred. If the matter is referred to the Court under Article 48 then the Court (and not the Committee of Ministers) decides whether a violation of the Convention has occurred. Thus, the Convention contemplates an opinion being expressed by the Commission, and a Decision.

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3. Both Ireland and the United Kingdom are subject to the compulsory jurisdiction of the Court and accordingly the matter can be referred to the Court either by the Commission or by the United Kingdom or by Ireland. The Commission has acknowledged the failure of efforts for a friendly settlement (see Annexe III p. 14 of the Report) and as the Commission's Report has been transmitted, the basis for the Courts jurisdiction now exists (see Article 47). As the Commission has transmitted its Report without any indication of an intention to refer the matter to the Court, it is considered most unlikely that a reference to the Court will be made by the Commission. It is a matter now for the Government to decide whether or not the case should be referred to the Court for its decision. Whilst it is not possible to anticipate with certainty what the British Government is likely to do it is probable that it would prefer to leave the matter with the Committee of Ministers. Accordingly, a decision by the Government not to refer the matter to the Court is likely to result in the case being retained for decision by the Committee of Ministers.

4. In reaching a decision the following considerations are relevant:

- (a) The Committee of Ministers' decision has to be taken by a two-thirds majority of members entitled to sit on the Committee. In the absence of such a majority no decision as to

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whether or not a breach of the Convention occurred could be taken (as has recently happened (see the decision of the Committee in the "Huber Case"- where the Commission's Report found the Austrian Government in breach of the Convention was merely "noted"). A decision by the Court is taken by the majority of judges present (Rule 20). Experiences shows that in arriving at a decision the members of the Committee of Ministers can be unduly influenced by political considerations. On the other hand, the Court is a judicial tribunal composed of eminent jurists who are required to act judicially and independently of the Governments who appointed them.

- (b) The Committee of Ministers could decide not to publish the Commission's Report. When a case is referred to the Court the oral proceedings are heard in public and the Commission's Report has, invariably, been published by the Court. (This consideration may not be of very much significance in view of the statements by the British Government that it had "no objection" to the publication of the Report. However, the possibility of a change in its attitude is not to be ruled out).

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(c) The proceedings before the Committee of Ministers and the discussion on the Report are in private. Oral pleadings before the Court are in public. The Commission is represented in the proceedings before the Court, but not when the matter is to be determined by the Committee of Ministers. The judgment of the Court must set out the facts of the case (Rule 50 of the Rules of Court); the decision of the Committee of Ministers need not. In practice, the Courts judgment is a long and comprehensive one, whilst the decision of the Ministers is contained in a brief resolution.

(d) Experiences shows that considerable delays can occur before a decision of the Committee of Ministers may be taken. Even with the agreement of the parties to the proceeding that the Report be published, the Committee of Ministers could take as long as two years before reaching a decision to publish the Report, or, alternatively, having allowed publication, before its decision on the Report is given. Publication of the Commission's Report in proceedings by the Court can be more expeditious. When a case is brought before the Court steps are taken forthwith to constitute a Chamber of seven judges. By virtue of a recent amendment to Rule 29 the Commission's Report may be made public on the constitution of the Chamber. In practice, this would happen very shortly after the case has been referred to the Court. If this procedure was not adopted (and it is presumed that, on consent, it is most

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likely that it would be adopted) then the Report of the Commission may be made public at the time of the fixing of the date for the opening of the oral proceedings (Rule 36).

5. If a decision to refer the case to the Court is taken then an "application" under Rule 31 is filed. A Chamber of seven judges is then constituted but that Chamber may relinquish jurisdiction in favour of the full court when a case raises a serious question affecting the interpretation of the Convention (Rule 48). It is considered likely that a relinquishment in favour of the full Court would be made if the present case was brought before the Court. After ascertaining the views of the agents of the parties the President of the Chamber directs what written procedures are to be followed. It is to be anticipated that written memorials would be required in the present case. When the pleadings have been completed and the case is ready for hearing oral proceedings are held (Rule 36). After these the Court deliberates in private and then issues its judgment in public, giving reasons for it (Article 51 of the Convention). Whilst it is not possible accurately to assess the time which will elapse before the proceedings before the Court are terminated it is reasonable to suppose that approximately 12 months will elapse before the oral proceedings are heard and that several months will elapse from that date until final judgment.

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6. It is possible that a settlement which the Government considers favourable may be negotiated. Whilst the Convention and Rules are not explicit as to the procedures to be adopted in such an event it is clear that effect could be given to the terms of a settlement whether or not the case was pending before the Committee of Ministers or the Court. It is highly improbable that the Committee of Ministers would not give effect to the wishes of the two Governments. If the matter is pending before the Court it can be discontinued (Rule 47) after the opinion of the Commission has been obtained. Whilst consideration of the case can be proceeded with notwithstanding a notice of discontinuance (Rule 47, paragraph 2) the terms of any settlement arrived at are not likely to lead to such an eventuality. Accordingly, the possibility that a settlement of the case may occur need not affect a decision as to the advisability of a reference of the case to the Court.

*Dulam Costello*

*18<sup>th</sup> February 1976*