



Articles



Beyond Reasonable Doubt at its Worst – But Also at its Potential Best: Dissecting *Ireland v the United Kingdom's* No-Torture Finding

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Abstract

Beyond reasonable doubt (BRD) is arguably the Strasbourg Court's default standard of proof. This favours the respondent state over the applicant, though less starkly so if inferences are allowed. In the foundational *Irish Case* of 1978, the Court accepted inferences – in theory. In practice, it drew no inference, even omitting to mention crucial facts. BRD emerged as a tool of *raison-d'état*-turned-*raison-de-Cour*, apparently used to avoid the politically sensitive finding that the United Kingdom had tortured IRA suspects during 'the Troubles'. In 2018, as the Court refused to revise the no-torture finding, 'disingenuous BRD' remained hovering: requiring direct, unattainable certainty, the Court illogically doubted the significance of declassified British documents indicating torture. BRD, however, exists also in a 'virtuous' form, already present in *Ireland's* original pronouncements. But for the Court's fear of upsetting states and concomitant reluctance to apply BRD according to its self-enunciated principles, BRD at Strasbourg could be normatively sound.

Keywords

beyond reasonable doubt – burden of proof – evidence – European Court of Human Rights – inference – *Ireland v the United Kingdom* – *prima facie* – *raison d'état* – *raison de Cour* – standard of proof

Prologue

Bombs keep being detonated by paramilitary terrorist groups. Men suspected of involvement are taken away by government security forces and transported to a secret military location specifically designed to receive them.

They are kept in isolation. Hooded. Deprived of food and of sleep. Forced to keep a stress position for hours – arms high above their head, fingers against the wall, feet back thus standing on their toes. Beaten if they abandon this spreadeagled position. A constant hissing noise completes their disorientation.

The men cannot think any longer. Their body and soul broken, they doubt they will ever come out of this place alive. One wants to die.

They are repeatedly interrogated.

The men know nothing about the actual membership and organisation of the group responsible for the terrorist activities and provide no useful information.

After a week, their 'deep interrogation' ceases.

They remain in detention for years before being eventually released without charges or conviction.

Scarred for life.

The above evokes a programme of torture which the British Government applied in Northern Ireland in 1971 during 'the Troubles' – the euphemism generally used to refer to the civil war-like conflict, often cast in simplistic sectarian terms, between republicans seeking Irish independence (mainly drawn from the Catholic community) and loyalists defending the Union under the British Crown (from a Protestant tradition).¹

¹ On the difficulties of defining this war, see, for example, J Whyte, *Interpreting Northern Ireland* (Oxford University Press 1990); J McGarry and B O'Leary, *Explaining Northern Ireland: Broken Images* (Blackwell 1995); J Tonge, *Northern Ireland* (Polity 2006).

If my description² reminds you of Guantanamo Bay or Abu Ghraib, so it should, because it was their inspiration.³ Many actors at the time, including the Irish Government,⁴ Amnesty International,⁵ the European Commission of Human Rights (Commission),⁶ and even (though less transparently so) the United Kingdom⁷ had all considered it torture. Only the European Court of Human Rights (Court, European Court, or Strasbourg Court) came to a different conclusion. In 1978, the Court's judgment in *Ireland v the United Kingdom* (*Irish case*) characterised 'the five techniques' of hooding, wall-standing, deprivation of sleep, deprivation of water and food, and subjection to a continuous noise

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- 2 In a rendition that is more faithful to the BBC documentary, 'The Hooded Men: Britain's Torture Playbook' (BBC One, 23 January 2023): <<https://www.bbc.co.uk/programmes/m001hlj7>>, than to the Court's judgment in *Ireland v the United Kingdom* [Plenary Court] 5310/71 (ECtHR, 18 January 1978). My description differs from the one provided in the judgment in three ways. First, the judgment found ill-treatment (understand, beatings) to have accompanied the use of the five techniques only in the case of one individual (paras 170–171). Amnesty International had reported otherwise. See Amnesty International, 'A Report on Allegations of Ill-Treatment Made by Persons Arrested Under the Special Powers Act After 8 August, 1971' (30 October 1971): <<https://cain.ulster.ac.uk/events/intern/docs/amnesty71.htm>>. Second, the judgment acknowledges no more than 'acute psychiatric disturbances during interrogation' (para 167). Third, the judgment presents as an established fact that the operations 'led to the obtaining of a considerable quantity of intelligence information, including the identification of 700 members of both IRA factions and the discovery of individual responsibility for about 85 previously unexplained criminal incidents' (para 98). The BBC documentary includes footage of the Irish Republican Army (IRA)'s leaders deriding the British Government for not even having managed to identify key IRA figures. Politico states that the 14 men 'had been identified by police – in most cases wrongly – as IRA members'. S Pogatchnik, 'Irrational' Police Wrong to Stop Looking at UK Role in 1971 Torture' (Politico, 15 December 2021): <<https://www.politico.eu/article/irrational-police-wrong-to-stop-looking-at-uk-role-in-1971-torture/>>. For a vivid account of what the Hooded Men went through, see, for example, S McKay, 'Northern Ireland's "Hooded Men"' (The Irish Times, 25 July 2015): <<https://www.irishtimes.com/news/crime-and-law/the-torture-centre-northern-ireland-s-hooded-men-1.2296152>>.
- 3 R O'Reilly, 'Torture of Hooded Men Recognised Five Decades On' (RTE's Prime Time, 18 December 2021): <<https://www.rte.ie/news/investigations-unit/2021/12/18/1267382-hooded-men-torture-files-northern-ireland/>>; M O'Boyle, 'Revising the Verdict in Ireland v UK: Time for a Reality Check?' (EJIL: Talk!, 6 April 2018): <<https://www.ejiltalk.org/revising-the-verdict-in-ireland-v-uk-time-for-a-reality-check/>>.
- 4 Within days of the five techniques having started to be applied in July 1971, a letter from one of the 12 initial Hooded Men was smuggled out of the detention centre, which quickly ended up in the hands of Irish Taoiseach Jack Lynch, who protested the treatment to British Prime Minister Ted Heath; the treatment was brought to an immediate end, having lasted a week. It was applied again to two men in October 1971. BBC One (n 2).
- 5 Amnesty International (n 2).
- 6 *Ireland v the United Kingdom* 5310/71 (ECmHR, report, 25 January 1976).
- 7 See, for example, the Rees Memo, described below under section 4.2.

as ‘inhuman and degrading treatment’, on the grounds that the suffering the five techniques had inflicted was neither intense nor cruel enough to amount to torture.⁸

This finding had been reached by the Court sitting in its plenary formation, by 13 votes to four. It is generally recognised to have not stood the test of time well. The way the United States and British Governments have relied upon it in order to try to argue that waterboarding or prisoners’ inhumane treatment were not in breach of the prohibition of torture has been widely deplored.⁹ Perhaps partly as a result of these regrettable arguments, it has become almost accepted as read that, were the Court to face a case involving something like the five techniques today, it would now assess them to be torture.¹⁰ The assumption is that the Court’s understanding of torture has evolved. A broader, more enlightened and more appropriate conception would have replaced the one that presided in *Ireland*. Although not entirely incorrect, such a presentation of the evolution of the case law may not account for the real reason why the Court decided not to make a finding of torture.

‘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’,¹¹ wrote Judge Evrigenis, dissenting in *Ireland*. If it was not the Court’s definition of torture which led it not to find torture, what was it? Another dissenting opinion, expressed 30 years later in the context of the rejection by the Court of a request that the original no-torture finding be revised, offers an answer. Judge O’Leary bemoans the missed opportunity for the Court ‘to [have recognised] openly, in 2018, that the Court in 1978 had been *unwilling* to find the United Kingdom, a founding father of the Convention system, responsible for a violation to which a special stigma attached’.¹² Otherwise stated, the Court’s original reluctance to find torture would have had nothing to do with law and legal definitions, and everything to do with *real politik* considerations.

If this is correct, the no-torture finding would have been something of a foregone conclusion – not necessarily because the Judges would have been

8 *Ireland* (n 2) para 167.

9 O’Boyle (n 3).

10 *Re McQuillan’s Application for Judicial Review (Northern Ireland) (Nos 1, 2 and 3)* [2021] UKSC 55, [2022] AC 1063, para 186; O’Boyle (n 3).

11 *Ireland* (n 2) Dissenting Opinion of Judge Evrigenis, para (a) (ii) (emphasis added).

12 *Ireland v the United Kingdom* (revision) 5310/71 (ECtHR, 10 September 2018) Dissenting Opinion of Judge O’Leary, para 70 (emphasis added).

clear right from the first of their many long deliberations¹³ that no other conclusion was conceivable, but perhaps due to a gradual dawning realisation that such had to be the outcome. The no-torture finding would have required justification. Whilst the adoption of a strict definition of torture would have been instrumental in this respect, it would have been insufficient on its own, given how much evidence was pointing to torture, so much so that not only had the Commission found torture established beyond reasonable doubt (BRD), but this was a unanimous opinion of its 14 members. The wealth of evidence gathered by the Commission (despite British obstruction) would therefore presumably have had to be downplayed by the Court in its judgment.

Ireland fails to mention that two medical experts appearing before the Commission had compared the long-term effects of the five techniques to long-term suffering experienced by victims of Nazi torture. It also fails to report how the United Kingdom had obstructed the Commission's investigation, an omission the most bewildering since *Ireland* had just pronounced that inferences must be drawn from a state's lack of cooperation.¹⁴

Thirty years later, thanks to archival declassification, it became clear that torture had been authorised at ministerial level. This incidentally explained why the British Government had been so keen not to cooperate in the Strasbourg proceedings, going as far as not contesting before the Court the Commission's findings. These discoveries triggered Ireland to ask the Court to revise its no-torture finding. The Court refused to do so in 2018.

Would the Court have twice, first in 1978 and then again in 2018, been so determined to avoid having to find the United Kingdom in violation of the prohibition of torture that it 'played' the rules of evidence at the same time as 'playing down' the facts? If the question seems irreverent or far-fetched, a remark by Judge O'Donoghue, dissenting to the 1978 judgment, nonetheless suggests its examination is apropos. To quote: 'Of course, the Court is not bound by the strict rules of evidence, but it should be careful not to abuse this privilege.'¹⁵

13 By adding the periods (minus Saturdays and Sundays) indicated in the first page of the judgment, I calculate 17 days of deliberations spread over ten months. This was for the whole case, which also included (rejected) complaints related, under Articles 15 and 5, to internment as a violation of the conditions necessary for a derogation to be permissible under the Convention and, under Articles 14 and 6, discriminatory treatment of the presumed terrorists belonging to the Catholic community by the British judicial and other authorities.

14 See section 3.2.2 and section 3.3.1, below.

15 *Ireland* (n 2) Dissenting Opinion of Judge O'Donoghue (no paragraph numbers indicated). See n 37 on the flexibility of evidence in international adjudication.

1 Introduction

When I started researching *Ireland*, it had never crossed my mind that the Court might at times be dishonest in its rendering of the facts of a case. My aim had simply been to better understand the origin and operation of the BRD standard of proof, arguably the cornerstone of the Court's evidentiary system. I decided to read *Ireland* only because it was in this case that the Court had first adopted BRD (in relation to the Article 3 complaints).¹⁶ The more I examined *Ireland* in its three iterations – the two judgments and the initial Commission's report – the more multi-layered BRD revealed itself to be. I had originally envisaged to write a rather straightforward critique of the Court's importation of BRD from the Common Law tradition, but the argument presented here has become more complicated. In short, it is that BRD exists at Strasbourg in both 'disingenuous' and 'virtuous' forms; as a concept that can serve either to torpedo or to enhance human rights protection, so that whether it is a fit or an unfit element of the Strasbourg evidentiary system therefore depends upon how the Court chooses to operate it.

BRD is an exacting standard of proof. In the Common Law from where it originates, it is applied in criminal proceedings (as opposed to civil proceedings, which attract lower standards, expressed in phrasings such as 'preponderance of evidence' or, even lower, 'balance of probabilities').¹⁷ Using BRD in human rights adjudication is controversial. Its use has been virulently denounced from inside the Court in dissenting opinions, as well as by commentators,¹⁸ who observe that transplanting BRD from domestic criminal proceedings, where it 'hinders' the prosecution and thus operates to the benefit of the accused who

16 Article 3 reads: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

17 P Kinsch, 'On the Uncertainties Surrounding the Standard of Proof in Proceedings Before International Courts and Tribunals', in *Diritti Individuali E Giustizia Internazionale, Liber Fausto Pocar*, G Venturini and S Bariatti (eds), (Giuffrè 2009) 430–431; CF Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers 2005) 242.

18 *Labita v Italy* [GC] 26772/95 (ECtHR, 6 April 2000) Joint Partly Dissenting Opinion of Judges Pastor Ridruego and Seven Others. For a critique expressed in even more virulent terms, see *Anguelova v Bulgaria* 38361/97 (ECtHR, 13 June 2002) Partly Dissenting Opinion of Judge Bonello. See also F Tulkens, 'Commentaire', in *La preuve devant les juridictions internationales*, HR Fabri and JM Sorel (eds), (Pedone 2007) 141, 146. For a summary of (a part of) the doctrine expressed in terms of 'disquiet' and observing that 'BRD seems a remarkably high threshold, especially in cases when the state attempts to undermine judicial process', see C Bicknell, 'Uncertain Certainty? Making Sense of the European Court of Human Rights' Standard of Proof' (2019) *International Human Rights Law Review* 155, 163.

must go free if the charge against them is not fully proven,¹⁹ to international human rights adjudication, where it hinders first and foremost the applicant who is alleging that a state has violated human rights, cannot but be inherently problematic.

In the great majority of Strasbourg cases, the applicant is a mere individual with minute resources compared to those available to the respondent state: the individual has no police service upon which to rely for conducting investigations and no access to government documents kept outside the public domain. Even in inter-state cases, the applicant state is at an evidentiary disadvantage, since the facts at the basis of their complaints will typically have taken place in the territory of the respondent state and with its knowledge. In the absence of any corrective ‘dressing’ it, ‘naked’ BRD leaves the evidentiary inequality of arms between the applicant and the respondent state at best unaddressed, and at worst reinforced.

Going further, BRD in international human rights adjudication can be argued to work against the very purpose for which this type of adjudication has been created. In domestic criminal proceedings, BRD ‘expresses a social preference for wrongful acquittal over wrongful conviction.’²⁰ Transferred to human rights international adjudication, BRD expresses a preference for states’ escaping being found in violation of human rights over human rights violations being mistakenly declared. The latter equation is pernicious. As Christopher Roberts has argued, a mistaken declaration does not harm anyone; if anything, it forces/encourages the state to take further action pursuant to the defence of human rights. By contrast, a state that wrongly escapes human rights accountability negatively impacts not only the victim but also society at large.²¹

The more seriously a state violates human rights, the more likely it is that applying the BRD standard of proof will lead to the state escaping accountability. This is because in the case of a serious allegation, the facts tend to be disputed between the parties, with crucial evidence possibly in the hands of the

19 T Fisher, ‘Cost-Benefit Analysis of Evidence Law and Factfinding’, in *Philosophical Foundations of Evidence Law*, C Dahlman, A Stein, and G Tuzet (eds), (Oxford University Press 2021) 137, 141.

20 Ibid. For a similar but less altruistic perspective, see B Shapiro, ‘The Beyond Reasonable Doubt Doctrine: “Moral Comfort” or Standard of Proof’ (2008) 2(2) *Law and Humanities* 149, 155.

21 C Roberts, ‘Reversing the Burden of Proof Before Human Rights Bodies’ (2021) 25(10) *The International Journal of Human Rights* 1682. In the words of the Inter-American Court, failing to recognise violations generates impunity which ‘fosters the chronic repetition of human rights violations and the total defencelessness of the victims and their next of kin’. *Masacre de Pueblo Bello v Colombia*, Judgment, Inter-American Court of Human Rights Series C No 140 (31 January 2006) para 266.

respondent state, but out of reach of the applicant. In such a case, requiring the applicant to prove their allegations BRD leaves the respondent state in a position where it can sit back and go through the motions of the proceedings in confidence that the applicant's inability to prove their allegation BRD will lead to a non-violation judgment.

This is exactly the scenario which unfolded in *Ireland*: the United Kingdom failed to submit the relevant documents requested of it that would have shown that it had ordered torture, and the Court (though not the Commission) ended up not finding it in violation of the prohibition of torture. This outcome emerged even though the Court had appeared to have wanted to guard against it, by 'dressing' BRD with two correctives – namely, that (1) BRD could be met through inferences, in the context of which (2) the conduct of the state during the evidence-gathering phase was a relevant element.²² Even though the United Kingdom had put up a 'wall of silence',²³ the Court drew no inference. It also failed to mention particularly damning medical evidence. These omissions come across as manifestations of 'strategic ignorance'²⁴ and seem to point to a Court determined not to find the United Kingdom in violation of the prohibition of torture.

If this is correct, this exposes BRD as a gift by the Court to *raison d'état* (literally, 'reason of state'), with the additional twist that *raison d'état* morphs into *raison de Cour* (an expression of my own making, which literally translates as 'reason of Court'). In politically sensitive cases where the Court fears a backlash on the part of states if it were to find the latter in violation of the European Convention on Human Rights (Convention),²⁵ '*raison d'état*' and '*raison de Cour [de Strasbourg]*' may get intertwined to the point where the two phenomena become barely distinguishable from each other in their effect: at the same time as BRD helps the respondent state to achieve its aim of escaping being found in violation of the Convention, BRD concomitantly helps the Court avoid having to find that state in breach of the Convention. As the Court's mission is to protect human rights by holding states accountable for human rights violations, this is BRD at its worst.

This article qualifies this form of BRD as 'disingenuous', in contrast to 'virtuous' BRD, which also surfaced in *Ireland*, though unfortunately only in the jurisprudential theory of the Court rather than also in its practice.

22 See section 3.2.2.

23 *Ireland* (n 2) Dissenting Opinion of Judge Evrigenis.

24 L McGoe, *The Unknowers: How Strategic Ignorance Rules the World* (Zed 2019).

25 In a fast-developing literature, see, for example, Ø Stiansen and E Voeten, 'Backlash and Judicial Restraint: Evidence From the European Court of Human Rights' (2020) 64 *International Studies Quarterly* 770.

The rest of the article substantiates this argument. Section 2 introduces the notion of '*raison d'état/raison de Cour*'. Section 3 'dissects'²⁶ *Ireland*, concluding that the Court's adoption of a theoretically 'virtuous' form of BRD was in practice immediately strategically ignored for *raison d'état/raison de Cour*, thereby transforming BRD into an 'enemy of the facts'. Section 4 dissects *Ireland* (revision), the seven-Judge Chamber judgment which rejected Ireland's revision request, doing this without explicitly mentioning BRD, but with this standard nonetheless appearing to hover in its 'disingenuous' form: the Court not only invents doubts where logically there are none, but also, in a memorable phrase by the lone dissenting Judge, requires 'certainty where only probability can apply'.²⁷ Section 5 identifies the conditions under which BRD can act as a 'virtuous' standard in the Strasbourg jurisprudence.

This article refers to the victims of the five techniques as 'the Hooded Men'. This is how they call themselves, and it is also the term the United Kingdom Supreme Court uses when it does not specifically name them in a judgment of 2021, which opened the way for having domestic criminal investigations about the original authorisation of the five techniques restarted.²⁸ In striking contrast, the Strasbourg judgment of 2018 continues to refer to them by a letter and a number, such as 'TG'.²⁹

As usual in legal scholarship, the article refers to 'the Court', as if its members were always thinking and acting as one. This is appropriate since as a collegiate body, the Court seeks to present a united front, with the expression of separate opinions nonetheless permitted. Judges who have not appended a separate opinion should not be assumed to have endorsed every word of every judgment in which they have participated, however. In particular, if this article is correct that *raison d'état/raison de Cour* will have played a role in *Ireland* and in *Ireland* (revision), it should be understood that this will have worked in different ways and to a different extent for different Judges, with some possibly acutely aware of it and others not, or at least not very consciously so.

26 In a previous study, I compared my 'dissecting' approach to 'a piece of anthropological mini-fieldwork: a conversation between different voices (some of them submerged), framed in a fairly formal way, producing many expected results, but at the same time developing with unanticipated twists'. MB Dembour, *When Humans Become Migrants: Study of the European Convention with an Inter-American Counterpoint* (Oxford University Press 2015) 22.

27 *Ireland* (n 12) Dissenting Opinion of Judge O'Leary, para 74.

28 *Re McQuillan's Application for Judicial Review* (n 10) para 3, for example.

29 *Ireland* (n 2) para 169, for example. The medical doctors who appeared as expert witnesses in the original Strasbourg proceedings similarly remain anonymised (referred to by the first letter of their family name) in *Ireland* (n 12) but are named elsewhere, including in *Re McQuillan's Application for Judicial Review* (n 10).

2 *Raison d'état, Raison de Cour*

The concept of *raison d'état* goes back a long way. Although formulated as such for the first time only in the 16th century, its idea was already expressed in Roman maxims such as '*pro patria mori*' ('to die for the fatherland') and '*salus populi suprema lex esto*' ('may the salvation of the community rule supreme').³⁰ In political theory, *raison d'état* is understood to cover the situation where, facing an existential threat to its survival, the government resorts to extraordinary measures which momentarily contravene individual rights in order to ensure the state's continued existence.³¹ A good illustration of it is Ukrainian President Volodymyr Zelensky banning men between the ages of 18 and 60 from leaving the country in the wake of the Russian invasion of February 2022.³²

In the Convention, *raison d'état* is perfectly embodied in the carefully phrased Article 15, which, 'in time of war or other public emergency threatening the life of the nation', allows states to derogate from some (not all) Convention provisions.³³ It is also for *raison d'état*, though less explicitly so, that the Convention permits all kinds of exceptions and restrictions to the great majority of rights it guarantees, as already observed by Delmas-Marty 30 years ago in her edited volume *Raisonner la raison d'Etat: Vers une Europe des droits de l'homme* (which literally translates as '*To Reason Reason of State: Towards a Europe of Human Rights*').³⁴

This title was nicely ambiguous: it could signal that *raison d'état* must be either *rationalised* or *kept within reason*. The former sense would indicate that *raison d'état* must be accepted, however regrettable the putting aside of individual rights; the latter, that it must be resisted or at least limited, due to it being prone to being abused by states. *Raison d'état* indeed exists both in

30 L Catteeuw, 'Réalisme et Mythologie de la Raison d'Etat: Des Combats pour l'Histoire' (2009) 130 *Revue de Synthèse* 410.

31 Ibid 409.

32 See, for example, A Sangal and others, 'February 24, 2022 Russia – Ukraine News' (CNN, 25 February 2022): <https://edition.cnn.com/europe/live-news/ukraine-russia-news-02-24-22-intl/h_4309a4916d57670f85519210a07fb2c9>.

33 Para 1 of Article 15 states: 'Any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'. Para 2 excludes the application of Article 15 to some provisions (including Article 3). Para 3 addresses how the Council of Europe is to be kept informed of any derogation.

34 M Delmas-Marty, *Raisonner la raison d'état: vers une Europe des droits de l'homme* (PUF 1989).

‘virtuous’ and ‘vicious’ forms.³⁵ In theory, few would dispute that circumstances occasionally arise which call for governments to adopt exceptional measures in order to protect the general interest, even if this entails the disrespect of (some) individual rights. By contrast, whenever applied in concrete circumstances, *raison d'état* tends to become acutely controversial, with some inclined to argue/believe that the state has acted appropriately, and others deploring the trampling of individual rights for no good reason.

In Strasbourg cases that touch a state nerve – such as, to keep to issues addressed in this Special Issue, those concerning terrorism and counter-terrorism, the fight against irregular migration, racial discrimination and democratic backsliding – there is a risk that the Court may be driven to want to avoid finding a violation of the Convention, not out of pure legal considerations but so as to avoid a backlash from an aggrieved state. Whenever the Court gives in to the temptation, in politically sensitive cases, to ‘save the state in order to save itself’, *raison d'état* morphs into *raison de Cour*. This article argues that the way the Court used – or rather, *ignored* – evidence strongly suggests that this happened in *Ireland*.

3 *Ireland ‘Dissected’*

To show this, section 3 proceeds in four main steps: an analysis of the Court’s theoretical evidentiary pronouncements in *Ireland* (section 3.1); the same but with the focus moving specifically onto BRD (section 3.2); an examination of the way BRD was ignored in practice by the Court (section 3.3); and the conclusion that, having misused BRD as an ‘enemy’ of the facts,³⁶ the Court produced a factually mistaken judgment (section 3.4).

3.1 *Ireland’s Paragraphs 160 and 161: Balancing Between Two Legal Traditions, the Court Tries to Find its Evidentiary Feet*

Ireland contains a long passage entitled ‘Questions of Proof’, where the Court expressed its first ever principled pronouncements on evidence, and whose concluding paragraph remains regularly cited today. That the Court felt the

35 MB Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge University Press 2006) 40.

36 F Mégret, ‘Do Facts Exist, Can They be “Found,” and Does it Matter?’, in *The Transformation of Human Rights Fact-Finding*, P Alston and S Knuckey (eds), (Oxford University Press 2016) 27, 47.

need to fill in for the silence of the Convention on evidentiary matters³⁷ in this particular case makes sense: *Ireland* was the first inter-state application to come before the Court. The 18 previous cases upon which the Court had ruled had all consisted in individual applications. Due to having exhausted national remedies prior to turning to the Commission, they had arrived at Strasbourg with their facts (presumably) clarified by the domestic courts. In addition, like most inter-state applications, *Ireland* concerned a violent conflict, which always tends to translate into a complex situation where facts are disputed. In *Ireland*, evidentiary issues related inter alia to the standard and burden of proof could not but be addressed by the Court.³⁸

To quote the passage (with the addition of small Roman numbers in order to facilitate cross-references later in the text):

160. In order to satisfy itself as to the existence or not in Northern Ireland of practices contrary to Article 3 (art. 3), the Court will not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned. In the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material proprio motu.

161. [i.] The Commission based its own conclusions [regarding the five techniques but also ill-treatment outside of their context] mainly on the evidence of the one hundred witnesses heard in, and on the medical reports relating to [...] sixteen “illustrative” cases [...] The Commission also relied, but to a lesser extent, on [...] documents and written comments submitted in connection with [type and number of cases given] [reference]. As in the “Greek case” [reference], the standard of proof the Commission adopted when evaluating the material it obtained was proof “beyond reasonable doubt”.

[ii.] The Irish Government see this as an excessively rigid standard for the purposes of the present proceedings. They maintain that the system of enforcement would prove ineffectual if, where there was a prima facie case of violation of Article 3 (art. 3), the risk of a finding of such a

37 Except for the original Articles 28 and 31 tasking the Commission with the establishment of and the reporting of the facts of the cases it declared admissible, respectively, the Convention had (and still has) nothing to say about evidence. This was and is in keeping with the great flexibility which characterises evidence in international adjudication (except in respect of the fairly new development of international criminal jurisdiction). See G Niyungeko, *La preuve devant les juridictions internationales* (Bruylant 2005).

38 P Leach, ‘On Inter-State Litigation and Armed Conflict Cases in Strasbourg’ (2021) *European Convention on Human Rights Law Review* 27.

violation was not borne by a State which fails in its obligation to assist the Commission in establishing the truth [reference to Article 28]. In their submission, this is how the attitude taken by the United Kingdom should be described.

[iii.] The respondent Government dispute this contention and ask the Court to follow the same course as the Commission.

[iv.] The Court agrees with the Commission's approach regarding the evidence on which to base the decision whether there has been violation of Article 3 (art. 3). To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the Parties when evidence is being obtained has to be taken into account.³⁹

Paragraph 160 pronounces two evidentiary principles as it were in one breadth and without additional comments. By contrast, the length of paragraph 161 makes it clear that the third principle was highly controversial. To list the three pronouncements:

- A) The Court will not rely on the concept of the burden of proof being borne by either party;⁴⁰
- B) The Court will consider all evidentiary material in its possession, whatever their source;⁴¹ and
- C) Like the Commission beforehand, the Court adopts the BRD standard of proof in its examination of Article 3 allegations.⁴²

A and B are best analysed as emanating from the evidentiary investigatory model of the Civil Law tradition, which puts a judicial figure in charge of investigating the matter at hand. C, by contrast, has its origin in the Common Law tradition, which, following an adversarial model, leaves it to the parties to bring the evidence to the judge and convince them of their case. The question arises: how well do these two sets of principles work together? Do they complement each other or, originating from different traditions, would they somewhat be at odds with each other? Addressing these questions requires a rather technical discussion.

³⁹ *Ireland* (n 2) paras 160 and 161.

⁴⁰ *Ibid* para 160 (first sentence).

⁴¹ *Ibid* (last sentence).

⁴² *Ibid* para 161 [iv].

Starting with the last pronouncement, the BRD standard is a concept developed in the Common Law, where it applies in criminal proceedings generally described as ‘adversarial’.⁴³ This latter label identifies the essence of the proceedings as having two parties who are pitted against each other: not only is each party responsible for proving their case, but in addition, evidentiary rules on the burden of proof come into play which serve to designate the party whose claim the judge *must* dismiss if the burden of persuasion ascribed to this party is not discharged to the legally applicable (e.g., BRD) standard. This is to say that in the Common Law system, the concepts of the burden and standard of proof get intertwined. The passage’s combination of propositions A (no strict allocation of the burden of proof) and C (BRD standard adopted) is therefore at first sight incongruous. As for proposition B (all materials examined), even though it is not a constitutive element of the adversarial Common Law evidentiary tradition, it does not offend its logic, and therefore can be brought into it without this provoking any marked conceptual tension.

Looking now at the assemblage from the perspective of the Civil Law tradition, proposition B (all material considered) clearly emanates from it, since its inquisitorial nature gives a judicial figure the task of making sense of the whole case – rather than of proving particular, partisan claims. In this model, the concept of the burden of proof falling on one or the other party therefore has no place, making the Court’s rejection of it in pronouncement A another nod to the Civil Law. The third pronouncement (BRD) is extraneous to the Civil Law, which prefers to speak in terms of ‘*intime conviction*’ (‘deeply felt belief’). Having said this, BRD is not offensive to this tradition, such that its co-option would need not appear problematic to those versed in it.

Given the make-up of the Court (each member state ‘sending’ one Judge to the Court),⁴⁴ it is not surprising that pronouncements traceable to distinct legal traditions would have found their way into the Strasbourg jurisprudence. The amalgamation can nonetheless produce anomalies. For example, the English and French texts of the opening phrase of paragraph 160 express slightly different ideas. The English version goes: ‘In order to satisfy itself as to the existence or not in Northern Ireland of practices contrary to Article 3, the Court examines all the material before it [whatever their source]’. In contrast, the French version states: ‘*Pour forger sa conviction sur le point de savoir si*

43 JQ Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press 2008).

44 Being independent, however, the Judges do not represent the state in respect to which they have been elected.

des pratiques contraires à l'article 3 ont régné en Irlande du Nord, la Cour [...] étudie l'ensemble des éléments en sa possession, [d'où] qu'ils proviennent [...]. The juxtaposition of the two texts makes it clear that each version emanates from the Common Law and the Civil Law respectively. The phrase 'to satisfy oneself as to the existence of a practice' evokes a rather clear-cut, almost black-and-white, conclusion being reached as to the existence or otherwise of the contested facts, thanks to the application of the BRD standard of proof. By contrast, '*forger sa conviction*' ('to forge one's conviction') appears to suggest a more impressionistic thought-process, one which may possibly result in a personally-held, rather intuitive, opinion – as opposed to factual certainty. The English version unmistakably expresses a Common Law sensitivity; the French version, a Civil Law one.

This incongruity is not just a curiosity. It highlights that it was never going to be easy for the Court to build a coherent evidentiary system. It also shows that choices had to be made, without the Court having the option of letting the evidentiary system just spring up 'naturally' from the application of common sense. Finally, it brings out the risk that the assemblage of composites originating from different legal horizons produces a certain ambiguity, including within the Court, as to the exact philosophy and content of the evidentiary system which is being developed and applied.

In the extract, even though the Court seems to incorporate the BRD standard, it does not refer to the distinction that the Common Law makes within it between the 'burden of production' and the 'burden of persuasion'.⁴⁵ In the Common Law, the concept of 'burden of production' refers to the obligation for a party to produce evidence in their possession; this burden need not encompass all the evidence which a party possesses. For example, an accused person is under no obligation to produce self-incriminating evidence in criminal proceedings directed against them.⁴⁶ By contrast, the 'burden of persuasion' indicates the party which *must* lose the case if they have not managed to prove their allegations before the judge to the required standard. For example, if the prosecution has not proven the guilt of the accused BRD, the criminal case collapses. In the Common Law, the distinction between burden of production and burden of persuasion is considered essential.

45 As, for example, noted by T Stirner, *The Procedural Law Governing Facts and Evidence in International Human Rights Proceedings: Developing a Contextualized Approach to Address Recurring Problems in the Context of Facts and Evidence* (Brill 2021).

46 RH Helmholz and others, *The Privilege Against Self-Incrimination: Its Origins and Development* (University of Chicago Press 1997).

Without referring to it, the European Court simply states that it ‘will not rely on the concept that the burden of proof is borne by one or the other of the two Governments concerned’.⁴⁷ The fact that it does not assign the burden of production to one single party makes sense: this burden is shared between the (state or individual) applicant and the respondent state, as well as possibly the Convention institutions, and the Court examines all the material which has come before it in its assessment of the facts. By contrast, the burden of persuasion inevitably falls on one or the other party. As an illustration, in *Ireland*, both parties had a burden of production, but the burden of persuasion fell on Ireland.

To realise that the Court works with a concept akin to the burden of persuasion (even though it has never used the phrase), one needs only to reflect upon who loses the case when they fail to prove their allegations BRD at Strasbourg. This is normally the applicant.⁴⁸ If the respondent state fails to prove its own allegations, generally nothing happens (even though the Court has progressively been developing exceptions to this norm in its jurisprudence). Another sure indication that the applicant has always been the party on which the burden of persuasion normally falls is that at a certain point in the development of its case law, the Court has started to speak of ‘shifting the burden of proof onto the state’.⁴⁹ Such a statement only makes sense in the background of a principle that has the burden of persuasion resting on the applicant.

To sum up, it is not clear what the Court means when it states that ‘the concept of the burden of proof is not relied upon’. If the statement addresses the burden of persuasion, it is incorrect since this burden falls on the applicant (with some limited exceptions). If it concerns the burden of production, perhaps it is meant to signal that the Court expects both parties to participate in the production of evidence. What is striking, then, is that in *Ireland*, the Court was not ready to sanction the respondent state who in practice had clearly failed to submit highly relevant evidence in its possession.

⁴⁷ *Ireland* (n 2) para 160.

⁴⁸ H Tigroudja, ‘La preuve devant la Cour européenne des droits de l’homme’, in *La preuve devant les juridictions internationales*, HR Fabri and JM Sorel (eds), (Pedone 2007) 115, 123, but for nuances see also 126.

⁴⁹ M O’Boyle, ‘Proof: European Court of Human Rights (ECtHR)’ (2018) in *Max Planck Encyclopedia of International Procedural Law* [MPEiPro] HR Fabri, R Wolfrum (eds), (online edn).

3.2 *Beyond Reasonable Doubt in Theory: The Court's Sound Principled Pronouncements*

The Court's evidentiary pronouncements having been introduced as it were holistically in the previous section, the discussion now zooms in onto BRD and how it can theoretically be expected to operate.

3.2.1 The Commission's Precedent: Beyond Reasonable Doubt in the *Greek Case*

Ireland's paragraph 161 [iv] suggests that the Court, when it adopted BRD, was merely following in the steps taken by the Commission in the *Greek Case*. This is not entirely correct: although the two institutions opted for BRD, they did not conceive of the standard in the same way, as will become clear as the article proceeds. However, it is first useful to briefly review how BRD was introduced into the Strasbourg case law by the Commission.

The *Greek Case*⁵⁰ had arisen out of the military coup which shook Greece in May 1967. Four states lodged an identical application at Strasbourg, alleging violations across more or less all the provisions of the Convention.⁵¹ Their complaints included many allegations of torture in individual cases, whose examination, the Commission said, required it to 'maintain a certain standard of proof'.⁵² In a phrasing which took a stricter turn, the Commission continued by stating that these cases 'must be proved beyond reasonable doubt'.⁵³ It added: 'A reasonable doubt means not a doubt based on a merely theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be given drawn from the facts presented'.⁵⁴

The Commission's report does not elaborate on the reasons why BRD was chosen over other standards of proof. We may speculate that the intention would have been to stress that the Commission was taking and doing its job of investigating and establishing the facts to the most exacting standard, rather than being easily persuaded by any account it was hearing from any source. The statements quoted above suggest an institution keen to strike a balance, thus reassuring everyone (including the respondent state and the general public) that it is looking for certainty in its ascertainment of the facts whilst

50 *Denmark, Norway, Sweden, and the Netherlands v Greece* 3321/67 and others (ECmHR, report, 5 November 1969) 196, para 30 (*Greek Case*).

51 For a summary of the case, see E Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010) 264–270.

52 *Denmark, Norway, Sweden, and the Netherlands* (n 50) para 30.

53 *Ibid.*

54 *Ibid.*

making it clear that it would not countenance any *unreasonable* doubt which the respondent state would submit in order to try to dissuade it from reaching warranted conclusions.

The Commission explains its overall evidentiary approach in a three-page-long passage entitled ‘Standard and Means of Proof’.⁵⁵ Full of nuances and insights, the passage highlights the difficulties of achieving corroboration when both sides, albeit for different reasons, may be unwilling to share the details of how torture took place;⁵⁶ the appropriateness in this context to normally disregard hearsay evidence (with carefully circumscribed exceptions);⁵⁷ the inadvisability to accept without further substantiation the presumption that allegations would simply be anti-government propaganda or an attempt by prisoners to redeem themselves with friends after betrayal;⁵⁸ as well as – in a statement of huge import for the *Irish case* – the need to take into consideration the refusal by the respondent Government to have Commission members visit certain detention places.⁵⁹

The above lines of reasoning led the Commission to find torture established BRD in 11 individual cases, plus ‘indications’, ‘*prima facie*’, and ‘strong indications’ of torture in, respectively, two, seven, and eight additional cases in the *Greek Case*. A failure by the Greek authorities to investigate, let alone remedy, numerous substantial further torture allegations was also found.⁶⁰

It bears repeating that, in *Ireland*, the Commission found torture established BRD. In conclusion, the Commission used the BRD standard in a way that lent authority to its findings of torture. This is the most remarkable since, at first sight, one could have expected BRD to have worked to the advantage of the respondent state, as explained in the introduction (section 1).

3.2.2 Proving a Violation Beyond Reasonable Doubt Through Inferences and Presumptions is Possible

The Court did not explain in *Ireland* what arguments convinced it to adopt the BRD standard.⁶¹ Had it sought to explain itself, it might have said that BRD, apart from being found in the law of both parties, was the best standard to ensure adherence to the facts rather than the slipping into more and more uncertain territory, which could undermine its authority and alienate states

55 Ibid paras 30–38.

56 Ibid para 31.

57 Ibid para 32.

58 Ibid paras 35–38.

59 Ibid para 34.

60 Bates (n 51) 266.

61 Nor anywhere else in its case law. See Bicknell (n 18) 170.

found in violation of the Convention on shaky grounds. Ireland objected, however, that BRD was too high ('excessively rigid') and would defeat the purpose of the Convention whenever a state would obstruct the establishment of the facts (as the United Kingdom was doing in the instant case).⁶² It may be because this result is so conspicuous that the Court felt compelled to add two principles which, on their face, tempered this striking effect. In paragraph 161 [iv], the Court stated, on the one hand, that 'sufficiently strong, clear and concordant inferences' can be drawn for meeting the BRD test and, on the other hand, that 'the conduct of the [respondent state] when evidence is being obtained has to be taken into account in this respect'.⁶³

3.2.2.1 *Inferences' Crucial Evidentiary Role*

Some commentators have sometimes suggested that these additions would contradict BRD's very nature.⁶⁴ Holding that BRD would by definition rule out inferences and presumptions would be to misunderstand how the latter work, however.

An inference is a mental operation which allows an unknown fact to be discovered through reasoning which has as point of departure one or more known facts.⁶⁵ For example, if returning to your house, you find your front door, which you knew perfectly well to be blue, is now green, provided that in all other respects the door remains the same, you will infer that it has been repainted, even though you have not witnessed the action of repainting.⁶⁶ A presumption is the result of the action of inferring. In our example, it is presumed that the door has been repainted. The presumption holds until it is proven to be mistaken – in legal language, rebutted.

62 *Ireland* (n 2) para 161 [ii].

63 *Ibid.*

64 For example, the Court's approach of resorting to factual presumptions and then declaring its conviction established BRD is qualified of 'ambiguous' by Tigroudja (n 48) 137, note 92 (concerning a case against Russia of 2006).

65 S El Badouhi, *L'élément factuel dans le contentieux international* (Bruylant 2013) 130–131; CF Amerasinghe, 'Presumptions and Inferences in Evidence in International Litigation' (2004) 3 *The Law and Practice of International Courts and Tribunals* 395.

66 This is the example I use in MB Dembour, 'Do the Regional Courts of Human Rights Accept to Draw Negative Inferences When the Defendant State Fails to Produce a Piece of Evidence?', in *Evidence Before International Courts and Tribunals*, R Kolodkin, E Bulatov, and E Fedorov (eds), (International and Comparative Law Research Centre 2020) 174, 179–180: <https://iclr.ru/storage/publication_pdf/Evidence%20Before%20International%20Courts%20and%20Tribunals_1649173642.pdf>. For another example of the same kind, about finding that the grass in your garden is wet, see Y McDermott, 'Inferential Reasoning and Proof in International Criminal Trials: The Potentials of Wigmorean Analysis' (2015) 13(3) *Journal of International Criminal Justice* 507, 513.

There is a long-established philosophical current which holds inferences to be essential to knowledge.⁶⁷ Without entering a learned debate on the arguably various possible foundation(s) of knowledge, it is sufficient for the purpose of the present discussion simply to accept that the development of knowledge often relies on the making of inferences.⁶⁸ Any assertion that BRD logically excludes inferences is misguided in that it misunderstands how knowledge, including knowledge of facts, is constructed. The assertion is also counterproductive since its application limits the knowledge that can be gained and acted upon by rejecting as unproven factual elements which should actually be considered established (for example, that your front door has been repainted).

In short, BRD does not demand the elimination of inferences. It nonetheless requires that an inference (1) is based on properly ascertained facts and (2) is arrived at through logically solid reasoning. This has evidentiary implications. Returning to our example of the repainted front door, before a court accepts to draw this inference/work with this assumption, it should insist that a series of facts have been evidenced, including that the door used to be blue, that it is now green, and that it has not changed in any other respect.

3.2.2.2 *Presumptions and Burden of Proof*

When the Court draws the inference that a state has violated the Convention and finds the violation to have been proven BRD, this may happen through two different routes which should be distinguished. It can be (1) because the violation has been proven BRD through the presumptions that have arisen or (2) because the respondent state has failed to rebut the presumption of a violation. Only in the second of these two scenarios is it appropriate to speak of a shift in the burden of proof from the applicant to the respondent state.

Going back to the example of the presumably painted door, I may have proven so many things (that it was blue, that it is now green, and that it has not changed in any other imaginable respect whatsoever) that the evidence gathered makes it clear that it is reasonably impossible to doubt the door has been repainted. Transferring this to human rights adjudication: a violation by a state may be proven BRD through presumptions. In such a case, the presumption is by definition so strong that it eliminates the possibility that the wrong inference might have been made; by definition too, the respondent state

67 RM Borges, 'Knowledge From Knowledge: An Essay on Inferential Knowledge' (DPhil Thesis, State University of New Jersey 2015).

68 D Lagnado, *Explaining the Evidence: How the Mind Investigates the World* (Cambridge University Press 2021).

will have no evidence it can submit for successfully rebutting it. The violation has been proven without a shift in the burden of proof having been operated.

The second scenario, by contrast, involves a shift in the burden of proof. In such a case, the applicant is alleging that the state has violated their human rights, but they have not been able to prove so many things that a BRD presumption has arisen. A weaker presumption has arisen, however, and importantly in this scenario it is clear the state is (or should be) in an excellent position to provide evidence of what really happened. It is therefore fair to expect the state to do this. If the state does not discharge the burden of proof, which has fairly been 'shifted' onto its shoulders, the violation must be considered established. In this scenario, more questions arise, however, including: to which standard of proof (BRD or lower) must the state rebut the presumption for the latter to be considered rebutted? In case the state offers no rebuttal, to which standard (BRD or lower) is the violation established?

There is no space in this article to explore in-depth these additional questions. As a final word for this more theoretical section, it can just be added that, as experts in the Inter-American system of human rights protection may immediately see, BRD at Strasbourg, when 'dressed' with the permission and even injunction to make inferences, especially based on the respondent state's lack of cooperation in the evidence-gathering phase, can in practice act as a functional equivalent to the shift in the burden of proof which the Inter-American Court operated (without naming it) right from its first ruling on the merits of a case – which concerned forced disappearance, a complaint that the petitioners would never have been able to fully substantiate directly, since one of its characteristics is its lack of traceability.⁶⁹

3.3 *Beyond Reasonable Doubt in Practice: Out of the Judgment it Goes*

Never mentioning BRD again after paragraph 161[iv], the Court does not go into the possible interconnections between presumption and burden of proof in *Ireland*. In fact, very strangely, it refrains from making any inference in the case. To substantiate this claim, this section starts by clarifying which evidentiary material was before the Court before discussing how one may interpret the absence of inferences in the judgment.

69 See *Velásquez Rodríguez v Honduras*, Judgment, Inter-American Court of Human Rights Series C No 4 (29 July 1988) paras 122–138.

3.3.1 A British Defence Full of Holes and Obfuscation That Hid Torture The United Kingdom had fiercely defended itself against the Irish torture complaint before the Commission (but not before the Court, see below), repeatedly stressing the following points:

1. The British Government was not a Nazi or undemocratic regime.⁷⁰
2. It would never encourage nor condone ill-treatment by its officers.⁷¹
3. When ill-treatment would nonetheless come to light, which would occasionally happen, it immediately proceeded with investigating with a view to sanctioning and eradicating any abuse.⁷²
4. Such had indeed been the case with the five techniques, which had been the object of two national enquiries and had seen the Prime Minister stating in Parliament in unequivocal terms that the treatment was unacceptable and would never be applied again.⁷³
5. If officers guilty of abuse escaped criminal prosecution and conviction, this was due to lack of evidence, required to be to the exacting BRD criminal standard, rather than any faltering of determination on the part of the Government.⁷⁴
6. The Government would never have resorted to a policy of brutality, which could only backfire: '[resulting] in bitterness and hatred against the security forces when people [came to be] released'.⁷⁵
7. Terrorists should not be too quickly believed: for obvious reasons, including their wish to destabilise the government, they are prone to invent incidents and/or exaggerate the seriousness of their complaints.⁷⁶

Whilst the Government verbally assured the Commission of its good intentions, it nonetheless refused to collaborate with the investigation. Its attitude in this regard was nothing short of startling. It recommended to its security staff to refuse to testify before the Commission. Testifying might put their life in danger, it warned.⁷⁷ This provoked the Norwegian member of the Commission, Torkel Opshal, to ask his government to provide the Commission with a safe place, as a result of which 23 persons were heard at the Norwegian military airbase of

⁷⁰ *Ireland* (n 6) 339 and 359, for example.

⁷¹ *Ibid* 340–341, for example.

⁷² *Ibid* 343–344, 358, 365, and 384, for example.

⁷³ *Ireland* (n 2) para 101. The Attorney General repeated this undertaking to the Court at a hearing held in Strasbourg on 8 February 1977. See *Ireland* (n 2) para 102. See also *Ireland* (n 6) 275 and 365, for example.

⁷⁴ *Ireland* (n 6) 261 and 265.

⁷⁵ *Ibid* 346.

⁷⁶ *Ibid* 273, 339, 364, and 383.

⁷⁷ *Ibid* 357.

Sola.⁷⁸ In any case, the United Kingdom added, an enquiry was unnecessary since the five techniques had been discontinued.⁷⁹ This argument, transferred to domestic proceedings, would have a criminal suspect claiming prosecution should not go ahead whenever reoffending is unlikely.

Government witnesses willing – despite all this – to appear before the Commission were instructed not to respond to *any* question concerning the five techniques. The ‘embargo’ (as the Commission labelled it) extended to a training event where the techniques had been taught.⁸⁰ As per the conditions imposed by the British Government, any hearing was to take place far from where the techniques had been applied,⁸¹ as well as in the absence of the applicant state, thereby preventing any cross-examination.⁸²

The British Government’s obstruction extended further. It refused to inform the Commission of the exact level at which the five techniques had been authorised and of who had decided to impose the ban on witnesses.⁸³ It failed to transfer to the Commission the Hooded Men’s Special Branch files and interrogation records.⁸⁴ It also refrained from transmitting the evidence that had been submitted in the civil domestic proceedings that had later examined the Hooded Men’s compensation claims, which had resulted in each man being granted an award ranging between the huge sums (at the time) of £10,000 and £25,000.⁸⁵

While all the above was in itself suspicious, in time, facts transpired that gave the lie to the British submissions. For example, ten years ago, an academic study reported that the objectionability of the five techniques had been so striking to members of the Royal Ulster Constabulary (RUC) that they had refused to proceed with their application until after having received a guarantee of immunity against prosecution.⁸⁶ Equally, if not even more damningly, it also became clear that the five techniques had been authorised

78 D Bonner, ‘Of Outrage and Misunderstanding: *Ireland v United Kingdom* – Governmental Perspectives on an Inter-State Application Under the European Convention on Human Rights’ (2014) 34 (1) *Legal Studies* 47, 59; *Ireland* (n 6) 235.

79 *Ireland* (n 6) 261, 275, and 357, for example.

80 Thereby leaving open questions about what exactly had been taught. *Ireland* (n 6) 278.

81 A condition described by Judge O’Donoghue as ‘an effort to raise a smoke-screen to hamper [the Commission’s] investigation’. *Ireland* (n 2) Dissenting Opinion of Judge O’Donoghue.

82 Ibid.

83 *Ireland* (n 6) 337.

84 Ibid 337, 370, and 407.

85 Ibid 333–334. *Ireland* (n 2) Separate Opinion of Judge Zekia, Part C. For the applicant Government’s submissions regarding this point, see *Ireland* (n 6) 273 and 279.

86 Bonner (n 78) 69.

at ministerial level, in perfect understanding they were torture.⁸⁷ So much for the British assurances that the Government had never intended to encourage ill-treatment ...

Should the Court have thought the ‘astonishing’⁸⁸ lack of contestation by the United Kingdom of the Commission’s findings confirmed its gentlemanly reputation,⁸⁹ it could not have been more mistaken. The strategy had mainly been adopted in order to avoid the Government having to explain itself before the Court, potentially causing great embarrassment to the ministers involved.⁹⁰ It was also calculated to offer the advantage of being susceptible to make Ireland appear gratuitously vindictive,⁹¹ in support of a line of argument developed by the United Kingdom before the Commission, according to which, for example, ‘[t]he applicant Government had sought to establish [an official policy of ill-treatment] not by fair and necessary inference from the facts but by a cloud of suspicion which was easily invoked in such a situation.’⁹²

3.3.2 Judicial Discretion and its Limits

There was plenty of material from which the Commission and the Court could draw inferences in *Ireland*. In fact, both parties had anticipated this might be done. To quote the Irish submissions before the Commission: ‘When difficulties arose in reaching conclusions and these had been created by the respondent Government, the issues should be decided in favour of the applicant Government’s contentions and the witnesses proposed by them.’⁹³ In effect, Ireland was calling for the burden of proof (of persuasion) to be shifted. To this, the United Kingdom had replied:

[T]he Applicant had to prove beyond reasonable doubt the administrative practice of a treatment contrary to Article 3 [...] The respondent

⁸⁷ See section 4.2.

⁸⁸ *Ireland* (n 2) Separate Opinion of Judge Sir Gerald Fitzmaurice, para 3. The British Judge is the only one who voted against the finding that the five techniques constituted a practice of inhuman and degrading treatment.

⁸⁹ 20 years before, in the *Cyprus Cases*, the United Kingdom had supported the Commission’s investigation to the point of even passing a law providing its delegates with diplomatic immunity during their on-site enquiries in Cyprus. See Bates (n 51) 196. In pre-Brexit times, the United Kingdom had acquired the reputation in the European (Economic) Community of being an entirely loyal and trustworthy partner, however difficult the negotiations leading to an agreement might previously have been: personal observations made by the author in Brussels over the years.

⁹⁰ Bonner (n 78) 68.

⁹¹ *Ibid* 64–65.

⁹² *Ireland* (n 6) 365. See also 386.

⁹³ *Ibid* 338. See also 333.

Government did not have to, and could not, establish how people came by their injuries [such as beatings during the application of the five techniques]. They [the respondent Government] could point to circumstances tending to indicate that another explanation was more likely but this was not a burden of proof upon them. [...] They did not propose to address the Commission on whether the [now abandoned] use of the five techniques [had] constituted a breach of Article 3, although it was not admitted that they did.⁹⁴

The Court would understandably have been reluctant to declare a state responsible for serious human rights violations simply based on *weak* evidence, here taking the form of a presumption which, although not rebutted, would not on its own be entirely persuasive. The applicant state's case was, however, considerably stronger than the phrasing of its submission quoted above might suggest. On the one hand, it was clear that the United Kingdom was in possession of evidence that it could submit to rebut the presumption that had arisen, provided of course that no torture had actually taken place (as per scenario 2 under section 3.2.2.2, above). On the other hand, the inferences and presumptions that were arising were so strong and concordant in this case that no doubt should arguably have been considered to subsist as to the reality of torture (as per scenario 1). In other words, torture should have been considered proven BRD.

The objection that the last argument annihilates the discretion of the Court does not (necessarily) hold. The Court is assuredly free to give facts the legal qualification which it deems fit, but judicial discretion only goes so far: it does not extend to qualifying facts in a way that is unreasonable, as this would be arbitrary.

Proper qualification of course requires proper understanding of the facts, which in turn requires proper evidence. Admittedly, it could be argued that in *Ireland*, evidence was to a great extent missing. The Court would not have known, for example, for how many hours in one go the Hooded Men were made to stand against the wall or when, if at any time, they were allowed to take their hood off, even in their cell. By the end of the proceedings, the Court does not even seem to have known where the five techniques had been applied: the judgment refers to 'unidentified interrogation centre or centres.'⁹⁵ (In July 1971, this was the military Ballykelly airbase near Derry, which had been redesigned for its new interrogation-in-depth purpose and fitted with an

94 Ibid 345 and 356. The Commission rejected this approach. *Ireland* (n 6) 405.

95 *Ireland* (n 2) para 165.

'operations room, noise generators, amplifiers, noise decibel specifications and standing orders'.⁹⁶)

Whilst a lot of information was definitely not in the hands of the Court in 1978, it nonetheless simply does not make sense that, having pronounced paragraph 160 [iv], the Court would then have proceeded not to discuss in its judgment the nature of the British obstruction to the Commission's investigation. This omission goes beyond the reasonable limits of judicial discretion, and needs to be discussed in detail.

3.3.3 *Raison de Cour* in Apparent Action: The Court Omits to Mention the Facts Which Could Have Given Rise to Inferences

The Commission had been able to see through the lies of the British submissions. Why not the Court? One charitable explanation for the difference in the outcome reached by the two institutions is that the Judges had not been as close to the evidence: they had not heard directly the Hooded Men, for example, and thus could not have felt in their bones the suffering inflicted when the latter was being recounted. Another possibility, however, is that the Court would have blinded itself to the evidence that the Commission had painstakingly collected, despite the difficult circumstances of its investigatory work. The way the judgment is written (or rather strategically not written) seems to support this hypothesis.

That the British Government had obstructed the investigation of the Commission is indisputable. It can only be because of this that paragraph 161 [iv] had pronounced that 'the conduct of the Parties when evidence is being obtained *has to be* taken into account'.⁹⁷ Despite this clear instruction to itself, the Court drew no inference, as already noted.⁹⁸ Instead, as this section will now document, it ignored the British conduct to the point of not even describing it in the judgment. It also left another crucial piece of evidence unreported.

The judgment alludes to the conduct of the United Kingdom in two places (and two places only). The first is paragraph 161 [iii], which summarises the Irish objection to the BRD standard – but without explaining why the Irish Government had been so critical of the conduct of the United Kingdom. The second place is a sentence that appears in the part of the judgment devoted

96 O'Reilly (n 3). In October 1971, this has been reported to have been Holywood Military Barracks. See Fr D Faul and Fr R Murray, *The Hooded Men: British Torture in Ireland August, October 1971* (Dungannon 1974).

97 *Ireland* (n 2) para 161 (emphasis added).

98 In line with the difficulty of proving a negative fact, this absence cannot be substantiated by referring to a particular paragraph in the judgment.

to the facts, which reads: ‘The Commission came to the view that neither the witnesses from the security forces nor the case-witnesses put by the applicant Government had given accurate and complete accounts of what had happened.’⁹⁹ This formulation captures neither the nature nor the extent of the British lack of co-operation. In other words, the British obstruction is omitted from (not reported in) the judgment.

The judgment fails to report a second crucial fact, namely, that two doctors had appeared for the Irish Government before the Commission, who had compared the long-term effects of the five techniques to those resulting from Nazi persecution.¹⁰⁰ Given the centrality of the Nazi experience to the way in which human rights violations are conceived in the Convention,¹⁰¹ this medical evidence, if accurate, could only have been very powerful. If the Court did not find it persuasive, it should have explained why. Leaving it out of the judgment raises the suspicion that the Court might have failed to mention it simply to avoid the wisdom of its no-torture finding being doubted.

That the Court might inadvertently have failed to report the details of the British obstruction is even more difficult to imagine. This conduct was an element which Ireland, the Commission, and the minority Judges had all considered crucial to the case, so much so that it is in connection to the absence in the judgment of anything ‘even approaching disapproval by the Court of the non-cooperative attitude of the respondent Government’¹⁰² that Judge O’Donoghue, dissenting, had warned the Court against abusing its privilege of assessing evidence freely, as quoted in the introduction (section 1) of this article.¹⁰³

The fact that the judgment ‘contains’ two crucial factual omissions is not immediately obvious: seeing them requires not only a close reading of *Ireland* but also knowledge of other material. Their difficult traceability makes them particularly effective as acts of strategic ignorance, however, that is acts of ‘non-disclosure [...] tactically deployed to avoid the repercussions of inconvenient evidence’.¹⁰⁴ The impression lodges itself that the Court filtered evidence and took leave of the truth so as not to find the United Kingdom in breach of the prohibition of torture.

99 *Ireland* (n 2) para 93.

100 *Ireland* (n 6) 398.

101 R Rubio-Marín and M Möschel, ‘Anti-Discrimination Exceptionalism: Racist Violence Before the ECtHR and the Holocaust Prism’ (2015) 26(4) *European Journal of International Law* 881.

102 See n 15.

103 *Ibid.*

104 McGoey (n 24) 2.

Good practice, however, requires one not to jump to conclusions too quickly. The next section will therefore examine whether the no-torture finding may be explained by legally valid reasons, rather than by *raison d'état/raison de Cour*.

3.3.4 'Definitely Not Torture': A Factually Mistaken Judgment

The Court adopted the judgment it did because the five techniques were not falling within the concept of torture as understood at the time, I have sometimes been told when presenting the paper that became this article.¹⁰⁵ I readily accept that some Judges may have voted for the no-torture finding because they genuinely believed the five techniques did not inflict suffering sufficiently intense to come under the ambit of the concept of torture they were using. It is regrettable, however, that they then did not elect to explain the basis upon which they were reaching this conclusion. Given their finding contradicted the Commission's extensively justified torture finding, a proper motivation would have been particularly apposite. Instead, paragraphs 165–168 of the judgment provide, in little more than one page, the whole reasoning of the Court regarding the distinction between 'torture' and 'inhuman or degrading treatment', and it is not convincing.

According to the Court, 'although [the five techniques] were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood'.¹⁰⁶ The four paragraphs describe neither the five techniques nor the level of suffering they had occasioned, however. They do not explain what the Court knew (or thought it knew) about the five techniques to reach its conclusion. Not one piece of evidence is discussed. One might have expected, for example, for the Court to have explained why it was unpersuaded to give weight to the medical expertise for the Irish Government – but this expertise is not mentioned, let alone discussed. In short, there is no effort whatsoever to substantiate why the no-torture finding is called for in the circumstances of the case, as the latter were known by the Court at the time.

Importantly, the judgment does not say that it has not been proven BRD that the suffering had reached the intensity and cruelty implied by the term torture. This would have left the possibility that this level might actually have been reached, but without it having been proven (yet). What the judgment says, and

¹⁰⁵ Including by Michael O'Boyle, former Deputy-Registrar of the Court. Judge Matscher's dissenting opinion to *Ireland* (n 2) stresses that 'modern methods of torture which in their outward aspects differ markedly from the primitive, brutal methods employed in former times are well known', indirectly indicating that the majority of the Court was not yet convinced of this.

¹⁰⁶ *Ireland* (n 2) para 167.

says categorically, is that the suffering has *not* reached the level of intensity and cruelty understood to constitute torture. With all due respect, this is a *factually mistaken* assessment: had the Judges known *all* that is to be known about the five techniques, they could not but have come to the conclusion that the techniques amounted to torture, even defined as involving intense suffering. If this is not accepted, this would mean that, however strong the evidence showing torture, the belief is that the Court would still have maintained its no-torture finding.

As it is, the Court already had to disregard, or consider of little weight, the little evidence that was available. To the four dissenting Judges of the 17-strong plenary Court, the rejection of the finding of the Commission was incomprehensible.¹⁰⁷ To quote three of them:

It must be emphasized that this finding by the Commission was a unanimous one arrived at after hearing many witnesses. The Court did not have the advantage of hearing any evidence from witnesses.¹⁰⁸

I am sure that [the techniques fell under] 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 the victims [...] confirms this conclusion.¹⁰⁹

Adopting the [BRD] test submitted by the Counsel of the respondent Government, not only can I not find compelling reason or circumstance to go against the finding of the Commission, but I am not even in possession of adequate reason to suspect the soundness of the Commission's finding.¹¹⁰

The dissenting Judges were clear. For them, there was *no doubt* that the application of the five techniques had constituted torture.

3.4 *Conclusion: With Beyond Reasonable Doubt Acting as 'Enemy of the Facts', Ireland Could Not Offer Closure*

When the Court reached its no-torture finding, it did so without respecting its own principled pronouncements regarding the need to take into account

¹⁰⁷ Also in this sense, E Deirdre, 'Human Rights in Northern Ireland. *Ireland v United Kingdom*' (1980) 3 *Boston College International and Comparative Law Review* 377, 414 and 432.

¹⁰⁸ *Ireland* (n 2) Dissenting Opinion of Judge O'Donoghue, 96.

¹⁰⁹ *Ibid* Dissenting Opinion of Judge Evrigenis.

¹¹⁰ *Ibid* Separate Opinion of Judge Zekia, Part C.

the conduct of the parties during the evidence-gathering phase. It also failed to engage with, and explain why it was dismissing, material evidence strongly indicating torture. Whilst BRD and evidence were initially ‘played up’ (presented as essential in paragraphs 160 and 161), they were subsequently ‘played down’ (ignored). Why would the Court have put BRD at the core of its evidentiary system if this standard was so detrimental to its own purposes that it had to be immediately ignored in practice? There were assuredly excellent, ‘virtuous’, reasons for adopting BRD (see section 3.2.1. and section 3.2.2). Could BRD nonetheless have ultimately acted as a smokescreen whereby the Court projected itself as attached to the truth whilst in fact detaching itself from the reality before its eyes?

Frédéric Mégret has observed that fact-deniers often pretend to champion the facts, but are their very enemy, for example by requiring unattainably solid evidence or insisting that the slightest doubt must lead to rejection of the whole account.¹¹¹ Applying this insight to *Ireland* raises the question of whether the Court might have brought in BRD central stage of the judgment, so to speak, but then refrained from applying it concretely to the case,¹¹² in awareness that BRD’s simple evocation would create the vague impression that torture had not been proven to the legally required standard, thereby making it easier for the Court to deny its reality.

Whatever the response to this question, it is the hypothesis of this article that the *Ireland* judgment delivered the Court what it wanted, namely, leaving the United Kingdom off the hook and avoiding a backlash. The respondent government got even more than it wanted: having strategically decided not to contest the findings of the Commission and having presumably braced itself for the Court to confirm these,¹¹³ it must not have believed how wonderfully well its strategy had played out when it took cognizance of the judgment. Ireland must have been equally bewildered, though with feelings of dejection rather than elation.

As for the Hooded Men themselves, the lack of justice they had met meant that the history of their treatment could not and would not become a closed chapter. Both the five techniques specifically and all the Government’s actions during the Troubles remain live issues to this day not only in Northern Ireland

¹¹¹ Mégret (n 36) 42–43.

¹¹² The United Kingdom’s submissions before the Commission also did not raise specific doubts about specific factual allegations, with one exception of ill-treatment that would have been additional to the five techniques. See *Ireland* (n 6) 291.

¹¹³ Bonner (n 78).

but also in the United Kingdom.¹¹⁴ This could have been expected. What is more extraordinary is that even proceedings at Strasbourg were reopened.

4 Dissecting *Ireland* (Revision)

In June 2014, a programme entitled 'The Torture Files' was broadcasted on the Irish television network.¹¹⁵ Making use of documents from the British archives which had recently been released under the so-called 30-year rule, it revisited the story of the Hooded Men's torture by the British Army. Its revelations spurred lawyers to convince the Irish Government to look into requesting that the Court revise *Ireland's* non-torture ruling. Rule 80 of the Rules of the Court states:

A party may, in the event of the *discovery* of a fact which might by its nature have a *decisive influence* and which, when a judgment was delivered, was *unknown* to the Court and could not reasonably have been known to that party, request the Court, within a period of six months after that party acquired knowledge of the fact, to revise that judgment.¹¹⁶

As per this Rule, the success of the request would thus have required the Court to be persuaded that *newly discovered* facts, which in 1978 had been *unknown* to both the Irish Government and the Court, had surfaced which might have had a *decisive influence* on the original judgment, had they been known at the time.

Following multiple searches in the British archives, the Irish Government eventually assessed that two facts had come to light upon which a revision request could be based. Echoing the omissions in the judgment identified above,¹¹⁷ the first concerned knowledge the respondent Government had possessed about the long-term effects of the five techniques, which had not been disclosed to the Court at the time (medical evidence limb); the second was that the five techniques/torture had been personally authorised at

¹¹⁴ The way in which 'the Troubles' are not something of the past comes in different ways. On the day I was revising this section, the following article made the front page of *The Guardian*: 'Dissident Republicans Have Data From PSNI [Police Service of Northern Ireland] Leak, Says Police Chief – Thousands of Officers' Details Thought to be in Hands of Paramilitaries' (*The Guardian*, 15 August 2023).

¹¹⁵ 'RTE Investigates: The Torture Files' (RTE Player, 4 June 2014): <<https://www.rte.ie/player/series/rte-investigates-the-torture-files/SI0000012594?epguid=IH000305748>>.

¹¹⁶ Rule 80 Rules of the Court (emphasis added).

¹¹⁷ See section 3.3.3.

ministerial level, an embarrassing fact which had triggered the British policy of non-cooperation with the Strasbourg institutions (non-disclosure limb).

The revision request was rejected in 2018 by six votes to one.¹¹⁸ Illogically, the Court said it had ‘doubts’ about the first limb due to ‘insufficient’ evidence. About the second limb, it expressed the certainty that no material had been submitted to it that would not have already been known by the Court of 1978. Nowhere did the judgment refer to the BRD standard of proof explicitly; ‘disingenuous’ BRD nonetheless seems to have been hovering.

The dissection of *Ireland* (revision) will proceed in four steps, with the analysis examining in turn: the rejection of the first limb (section 4.1); the rejection of the second limb (section 4.2); strategic deployments by the Court of ignorance, doubts, and certainty (section 4.3); and (briefly) the judgment’s damaging effects (section 4.4).

4.1 *Faulty Reasoning, Unfounded Doubts: The Rejection of the Medical Evidence Limb*

The expert testimony that Dr L (named as Dr Denis Leigh in the United Kingdom Supreme Court’s judgment)¹¹⁹ had given in the original proceedings was at the core of the Irish Government’s submissions regarding the medical evidence limb. Dr L had appeared at the behest of the respondent Government. Although he had acknowledged the ‘acute psychiatric symptoms [suffered by the Hooded Men] during interrogation’,¹²⁰ he had denied the likelihood of long-term effects, even affirming to the Commission that problems experienced by some men were attributable to conditions of life in Northern Ireland, including the drain of commuting. Three decades later, it transpired from documents released in the archives that Dr L had become aware of the techniques’ long-term effects on some of the Hooded Men he had personally examined, about which he had reported in the context of domestic proceedings tasked with fixing the level of compensation the men were to be awarded.¹²¹ This had not been disclosed either to the Commission or to the Court.

The Court decided that the alleged new fact of Dr L having misled the Commission was not established. It accepted a number of things, including that Dr L had examined three of the Hooded Men in April 1974, shortly before

118 *Ireland* (n 12) Operative Conclusion.

119 *Re McQuillan’s Application for Judicial Review* (n 10) para 82. See also n 30.

120 *Ireland* (n 12) Dissenting Opinion of Judge O’Leary, para 22.

121 Dr L’s views expressed in April 1974 in the context of domestic proceedings and a few months later before the Commission are described by the applicant Government as ‘radically different’. *Ireland* (n 12) para 75.

he was heard for the first time by the Commission in June 1974.¹²² It also granted that '[i]t is true that [...] Dr L. had observed serious long-term mental effects in these men after a considerable lapse of time' (being two and a half years after the five techniques had been applied on them).¹²³ For the Court, however, this was not sufficient to conclude that the Commission had been misled.

Only one passage of the judgment will be quoted to convey the gist of the reasoning the Court adopts to reject the evidentiary value of the various documents the Irish Government had submitted in support of the medical evidence limb. Each of the clauses of this passage will then be explained and analysed in a three-section discussion which will demonstrate that none of the arguments presented by the Court are logically sound. A fourth section examines further reasoning added by the Court later in the judgment.

To quote the passage selected for analysis:

Again, none of the men referred to [in the document submitted by the applicant Government in support of the revision request] had been among the illustrative cases [investigated in-depth by the Commission], and the Court has doubts whether the document contains sufficient prima facie evidence that Dr L. gave misleading evidence on the question of whether the five techniques generally produced serious and long-term effects. It attaches importance to the indication contained in another document submitted by the applicant Government, namely that at the material time there was no consolidated scientific knowledge on the question.¹²⁴

As Judge O'Leary would say, this 'does not hold water'.¹²⁵ No less than four fallacies plague the reasoning.

4.1.1 The Illogical Dismissal of the Relevance of the Non-Illustrative Cases

The first thing the Court does in the quoted text is to suggest that the document under discussion would have little or even no probative value because the observations of Dr L did not specifically relate to the two illustrative cases which the Commission had investigated in-depth. This is a faulty argument. For procedural economy, the Commission had indeed refrained from a full

¹²² *Ireland* (n 12) para 110. Dr L was also heard in January 1975 when he was questioned again about the general effects of the five techniques. *Ireland* (n 12) para 107.

¹²³ *Ibid* para 110.

¹²⁴ *Ibid* para 110.

¹²⁵ The expression appears in her dissenting opinion. *Ireland* (n 12) Dissenting Opinion of Judge O'Leary, para 57.

examination of the cases of all 14 Hooded Men; it had focused on two. This, however, was obviously never meant to signify that the unexamined cases of the other 12 victims had become utterly irrelevant to the case, never to be considered again, whatever important facts might have emerged in their respect. This is a point Judge O'Leary makes a number of times in her dissenting opinion.¹²⁶ It appears so unassailable that one wonders how the Court could even have thought this could be a serious argument.

4.1.2 The Incorrect Use of the *Prima Facie* Label

The second thing the Court says in the quoted passage is that '[it] has doubts whether the document contains sufficient prima facie evidence [of the alleged new fact] that Dr L. gave misleading evidence'.¹²⁷ This is another mystifying statement for the Court to make: if the document under discussion (alongside others that were also submitted by the applicant Government) is not considered *prima facie* evidence of the misleading of the Commission by Dr L, one wonders what would be so considered. Alternatively, the Court could be using the expression '*prima facie* evidence' in a sense other than its usual acceptation, but this would also be problematic.

The Latin expression '*prima facie*' can be translated into English as 'at first sight'. It has long been used in law to qualify evidence that is superficial, i.e., merely indicative, remaining to be confirmed by stronger evidence.¹²⁸ The label designates the lowest standard of proof legally recognised.¹²⁹ In the Strasbourg system, it has been associated with what the French call '*un commencement de preuve*' ('a beginning of proof').

Prima facie evidence is by definition of the weakest kind. This is why it is so strange that the Court would have denied this qualification to the document(s)¹³⁰ that indicated Dr L had been aware of the long-term effects of the five techniques when he was heard by the Commission. Admittedly, the Court does not quite refuse the status of *prima facie* evidence to the documents; what it says is that it has doubts that they contain '*sufficient* prima facie evidence' of the alleged new fact that Dr L gave misleading evidence. The addition of the qualificative '*sufficient*' merits attention. In view of other case

126 Ibid Dissenting Opinion of Judge O'Leary, paras 7, 20 and 54.

127 Ibid para 110, with the phrasing in square brackets, added for clarity, borrowed from para 113.

128 JA Green, 'Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice' (2009) 58 *International and Comparative Law Quarterly* 163, 166–167.

129 Ibid.

130 Written in the singular in *Ireland* (n 12) para 110, but in the plural at para 113.

law, it appears to signal that the Court is expecting evidence that meets a higher standard of proof than is commonly understood by '*prima facie* evidence'.

To explain how such an evolution may have come about, it is necessary not only to talk of standards of proof but also to bring into the discussion issues related to the burden of proof, and especially its shifting. Despite initial reluctance, the European Court eventually became persuaded to follow the lead of its Inter-American counterpart and to shift the burden of proof onto the respondent state, notably when contentious events lie wholly or partly within the exclusive knowledge of the authorities. First applied at Strasbourg in a case of forced disappearance, the mechanism has become relatively common in case law related to injuries sustained by a person whilst in custody of the state. It has also occasionally been operated in racial discrimination complaints, as well as in one extra-rendition case.¹³¹ For the Court to accept to shift the burden of proof onto the respondent state, the applicant must first bring *prima facie* evidence of the violation alleged. What counts as '*prima facie*' evidence thus becomes a crucial question.

Two contributors to this Special Issue argue that in their respective field of study, namely, the racial discrimination and the pushback Strasbourg case law, before operating the shift, the Court in practice requires evidence that meets a standard of proof much higher than the *prima facie* label suggests.¹³² The discrepancy to which they point between the designated standard and actual practice can be observed in other case law too. A striking example is the extra-rendition case of *El-Masri*, where the Court declared it was shifting the burden of proof onto the state on the basis of *prima facie* evidence.¹³³ Strictly speaking, the latter evidence was merely 'indirect and circumstantial', as noted by former Deputy-Registrar of the Court Michael O'Boyle. However, it was also 'multi-layered'.¹³⁴ In fact, this was so much so, with the layers so numerous and interconnected that, according to Bicknell, 'the case [left] almost no room for doubt'.¹³⁵ For the Court to continue to refer to the evidence gathered in such a case as '*prima facie*' is thus a misnomer.

Its principled pronouncements in *Ireland* notwithstanding, the Court is reluctant to attribute the BRD label to inferences and presumptions, even when the latter are, to cite *Ireland*, 'strong, clear and concordant'.¹³⁶ Even in

131 O'Boyle (n 49) and the sources cited therein.

132 See K Henrard and G Baranowska in this Special Issue.

133 *El-Masri v The Former Yugoslav Republic of Macedonia* [GC] 39630/09 (ECtHR, 13 December 2012) para 165.

134 O'Boyle (n 49) point 54.

135 Bicknell (n 18) 181.

136 *Ireland* (n 12) para 161 [iv].

such a scenario, the Court prefers to qualify the evidence of *prima facie*, and to shift the burden of proof (of persuasion) onto the state. The result is that the Court grounds the Convention breach on the failure by the respondent state to rebut in a plausible and convincing manner the presumptions that have arisen, rather than on the applicant having demonstrated the allegations BRD.¹³⁷ This is theoretically unsound, as observed above (section 3.2.2.2).

When presumptions are so ‘strong, clear and concordant’ that they leave no doubt as to what has happened, the state is obviously in no position to rebut them. Any shift operated by the Court in such a case is thus purely rhetorical, rather than offering a real opportunity for the state to defend itself. Does it matter? One might think that when a violation is found when facts are in dispute, it does not matter whether this is the outcome of the Court considering that the applicant has managed to prove them BRD (despite the contestations of the respondent Government) or due to the presumptions which have arisen out of those (few) facts which were established, having been left unrebutted by the respondent state. Whatever the route followed (BRD proof or unrebutted presumptions), the result is the same. The reasoning matters, however, including because it is likely to impact the way the Court handles future cases.

A rhetorical shift in the burden of proof is problematic because it labels evidence which was really BRD as having been merely *prima facie*. In future cases, the bar may have been raised, so to speak, with the Court expecting evidence of the same calibre as in the previous case to be presented again – even though, strictly speaking, only *prima facie* evidence is legally required. To make this more concrete, in the wake of *El-Masri*, the Court, remembering the level of evidence that was submitted in this case, may be tempted to dismiss (real) *prima facie* evidence submitted by applicants as being ‘insufficient’ to trigger a shift in the burden of proof. In a case like *El-Masri*, it would be wrong for the Court to suggest that the burden of proof has shifted: the facts have been proven, there is no shift to be had. This is a crucial point as otherwise applicants who are in no position to submit evidence that is stronger than *prima facie* may see the Court refusing to shift the burden of proof onto the respondent state, even though the very purpose of having a shifting mechanism is precisely to help applicants to get their legitimate but otherwise unrecognisable complaints recognised by the Court. The misnaming of strong evidence as merely *prima facie* is therefore another evidentiary gift to *raison d'état, raison de Cour*.

¹³⁷ Bicknell (n 18) 181.

Returning to the medical evidence limb of Ireland's revision request, the slipping in the Court's understanding of what constitutes *prima facie* evidence may have led it astray when it stated that 'the Court has doubts whether the document contains sufficient *prima facie* evidence that Dr L. gave misleading evidence on the question of whether the five techniques generally produced serious and long-term effects'.¹³⁸ What the judgment itself says about the document makes it clear that the *prima facie* status of the misleading nature of the evidence of Dr L could hardly be denied. Admittedly the Court does not deny this status outright; rather it says that the document would not in its view contain 'sufficient *prima facie* evidence'. The question becomes: sufficient for what?

Surely, the aim here would not have been to shift the burden of proof onto the respondent state. The point was to assess whether a new fact (Dr L's misleading of the Commission) had been established. So, which standard of proof did the Court apply in order to decide whether the new alleged fact was established?

The judgment does not discuss this issue. My own view is that, in its respect, *prima facie* would have been too low a standard, and BRD too high. A standard located between these two extremes was thus called for. Doctrinal studies of evidence in international adjudication suggest two possible candidates in this regard: 'the balance of probabilities' standard or, slightly more demanding, the 'clear and convincing' standard.¹³⁹ The Court does not use these labels. Would it nonetheless be possible that when referring to 'sufficient *prima facie* evidence' it was trying to capture the idea that it was expecting evidence to be above the lowest '*prima facie*' standard but below BRD?¹⁴⁰ Were this to have been its intention, the recommendation should be that in the future it avoids the confusing lexicon of 'sufficient *prima facie*' and opts for another label.

In terms of our instant case and the alleged fact of Dr L having misled the Commission, what result does the application of an 'in-between' standard produce? My view is that the indications are that the misleading should have

138 *Ireland* (n 12) para 110.

139 See, for example, *Green* (n 128).

140 If so, this is not a well-established practice. A search conducted on 14 April 2023 in the HUDOC database of the Court's case law for the words 'sufficient *prima facie* evidence' returned 14 cases. Other phrasing may convey the idea of the Court expecting evidence higher than *prima facie* but below BRD. In *Mamatkulov and Askarov v Turkey*, for example, Judges Bratza, Hedigan, and Bonello wondered 'what further corroborative evidence [in addition to the submitted *prima facie* evidence] could reasonably be expected of the applicants', and responded none. *Mamatkulov and Askarov v Turkey* 46827/1999 and 46951/1999 (ECtHR, 4 February 2005) Joint Partly Dissenting Opinion of Judges Bratza, Hedigan, and Bonello, Point 8.

been considered established in a clear and convincing manner. Indeed, it is the rejection of this fact by the Court which appears illogical and unconvincing. This has already been argued in respect of the dismissal of the evidence on the grounds that it was not related to the illustrative cases examined by the Commission. Attention now needs to turn to a further argument that the Court was advancing to reject the evidence.

4.1.3 The Incomprehensible Privileging of the Absence of a Scientific Consensus Over Dr L's Dishonest Report

Having doubted the evidentiary value of the document submitted in support of the alleged new fact that Dr L had misled the Commission, the Court adds that it 'attaches importance to the indication [...] that at the material time there was no consolidated scientific knowledge on the question [of the five techniques' long-term effects]'.¹⁴¹ Is the Court insinuating that the absence of scientific consensus would have justified Dr L not sharing with the Commission the knowledge he had derived from his own direct professional observations of some of the Hooded Men? If so, this defies belief, since it is presumably the very knowledge acquired during these observations which contributed to qualify Dr L as an expert witness in the first place. It is difficult to understand how the Court could think of attaching more importance to the lack of scientific consensus than to Dr L's failure to report what he had learned from his observations of the very men who had been subjected to the five techniques.

This is the more so since these observations, if shared widely, could have contributed to the building of the scientific consensus which the Court rightly observed had been lacking, and the reason why the Commission's Report, dated January 1976, had been unable to be categorical about the impact of the five techniques was nothing else than Dr L's evidence. To quote Judge O'Leary: 'There was a conflict of evidence on the long-term effects of the five techniques simply because, as we now know, not all evidence was disclosed'.¹⁴²

4.1.4 The Unwarranted Expectation of the Direct Proof of the Would-Have-Been Judgment

The Court concludes the part of the judgment dealing with the medical evidence limb by saying that it 'has doubts as to whether [there exists] sufficient prima facie evidence of the alleged new fact, namely that

¹⁴¹ *Ireland* (n 12) para 110.

¹⁴² *Ibid* Dissenting Opinion of Judge O'Leary, para 63.

Dr L. misled the Commission'.¹⁴³ No new fact having accordingly been found to have been presented by the applicant Government, the medical evidence revision ground falls. The Court seems to have been aware, however, that its conclusion might not come across as entirely persuasive. Be it as it may, it returns to the medical evidence limb later in the judgment. It now adds that, were it to be assumed that the documents demonstrated the new fact alleged, then 'the Court considers that it cannot be said that it might have had a decisive influence on the Court's finding in the original judgment'.¹⁴⁴

This statement is rather tortuous. To start understanding it, it is useful to note that part of it is borrowed from Rule 80 of the Rules of the Court which, to recall, requires 'the discovery of a fact which *might* by its nature have a decisive influence'.¹⁴⁵ What the Court does in the quoted sentence is thus to deny that the new fact of Dr L having misled the Commission *might* have had a decisive influence on the original judgment. Such a denial is difficult to sustain. What is at stake here is merely the plausibility of an event which would have happened in the past – but has not happened. That it would have happened can never be established with absolute certainty. The Court ends up denying the possibility that it might have happened. This is going too far; in other words, the Court overstates its case.

To justify its conclusion that Rule 80 does not apply, it had previously explained that the Commission:

did not exclude the possibility that [the five techniques] might produce some after-effects and, in any case, the uncertainty in this respect did not prevent the Commission from concluding that the use of the five techniques amounted to torture within the meaning of Article 3 of the Convention.¹⁴⁶

This would-be justification relies on the fact that the Court of 1978 had not specifically discussed the issue of possible long-term effects in its assessment of the legal qualification of the five techniques as either torture or inhuman and degrading treatment. According to the Court of 2018, as the long-term effects had not been explicitly mentioned in this discussion, it meant that they could not have been the decisive element which had persuaded the original Court to reach a different conclusion than the Commission.¹⁴⁷ The outcome

143 Ibid Dissenting Opinion of Judge O'Leary, para 113.

144 Ibid Dissenting Opinion of Judge O'Leary, para 137.

145 For the full text of Rule 80, see the introduction to section 4 (emphasis added).

146 *Ireland* (n 12) para 128.

147 Ibid para 134.

of this convoluted reasoning is that the Court opines that it ‘cannot conclude that the alleged new fact might have had a decisive influence on the original judgment’.¹⁴⁸

This is not an easy sentence to read. Without changing its sense, it can be rephrased as follows: ‘the Court of 2018 cannot conclude that additional evidence regarding the five techniques’ long-term effects might have had a decisive influence on the Court of 1978’. Any remaining oddness in the new phrasing can be eliminated by replacing the conditional in the subordinate clause with a subjunctive. This gives: ‘the Court of 2018 cannot conclude that additional evidence regarding the five techniques long-term effects *would* have led the Court of 1978 to find the five techniques to be torture’. In this latest phrasing, understand ‘conclude’ to mean ‘consider established with certainty’, and ‘would’ to connote something ‘definite’. The sentence becomes: ‘the Court of 2018 cannot consider it to be established *with certainty* that additional evidence regarding the five techniques long-term effects *would definitely* have led the Court of 1978 to find the five techniques to be torture’.¹⁴⁹ This is undoubtedly correct but beside the point.

The reason why the sentence we have ended up with is beside the point is that Rule 80 of the Rules of the Court is written in the conditional (‘might’) rather than the subjunctive (‘would’) mode. As Judge O’Leary observes, the Court of 2018 ‘proceeded on the basis that only absolute certainty as to the alternative outcome sought – a finding of torture given the new material disclosed – would suffice to overturn the original judgment. It is never made clear from whence this standard proceeds’.¹⁵⁰

The sense which emerges from the reconstructed sentence is that the Court would not have accepted the revision request except for incontrovertible evidence having been submitted by the applicant Government proving that the Court of 1978 would *definitely* have found the five techniques to be torture if it had been in a position to consider the recently discovered documents at the time it gave its judgment. Needless to say, per force, a direct proof of this occurrence could never have been brought. Only inferences and presumptions could have been offered.

¹⁴⁸ Ibid para 135.

¹⁴⁹ The last phrasing leaves it open that the long-term effects’ confirmation *might* have had this impact. This is how it should be: there was nothing in the file which could have allowed the Court of 2018 to suggest that the additional evidence would definitely *not* have impacted/could *not* possibly have impacted the decision of the Court of 1978. It might have done.

¹⁵⁰ *Ireland* (n 12) Dissenting Opinion of Judge O’Leary, para 74.

As per *Ireland's* own evidentiary theoretical pronouncements on inferences and presumptions being able to constitute BRD proof, this should not necessarily have been fatal to the applicant's case. The problem seems to have laid elsewhere, namely, in the Court's own determination not to let the revision request succeed – whatever the logical difficulties this produced in terms of making the rejection outcome 'stick'.

4.2 *'It Was All Known By the Court of 1978': The Rejection of the Non-Disclosure Limb*

As has already been mentioned, there was a second limb to the revision request. Its central piece of evidence consisted in a memorandum which the then Secretary of State for Northern Ireland (named Rees) had sent to the United Kingdom Prime Minister in March 1977. This memo stated:

It is my view [...] that the decision to use methods of torture in Northern Ireland in 1971/72 was taken by ministers, in particular [the] then Secretary of State for Defence.

If at any time methods of torture are used in Northern Ireland contrary to the view of the Government of the day I would agree that individual policemen or soldiers should be prosecuted or disciplined, but in the particular circumstances of 1971/72, a political decision was taken.¹⁵¹

Ireland argued before the Court that the memo showed that the British Government had prevented the Court of 1978 'from accessing the full truth about the five techniques', including that the techniques had been authorised at the highest, ministerial level (as opposed to the 'high level' conceded by the British Government from the start of the Strasbourg proceedings); that the authorising ministers had known the techniques were torture; and that the respondent Government had navigated the original Strasbourg proceedings so as to ensure that this embarrassing fact for the ministers concerned and for the United Kingdom would not end up having to be disclosed.¹⁵²

The Rees memo, as it became known, constituted rather direct evidence of ministerial authorisation. It has been considered so in British courts, including by the Supreme Court.¹⁵³ By contrast, in *Ireland* (revision), the Strasbourg Court

151 Quoted in *Ireland* (n 12) para 43. The same paragraph notes that the Secretary of State for Defence had objected to the phrasing used by Rees, so that the latter had corrected himself in a later memorandum acknowledging it would have been better to refer to the decision to use 'interrogation in depth' rather than 'methods of torture'.

152 Ibid para 44.

153 *Re McQuillan's Application for Judicial Review* (n 10) paras 248–252.

treats it as a rather insignificant document which adds nothing to what has been known all along. Far from looking at it as a bombshell for the respondent Government, the Court reasons that, since it had always been known that the authorisation had taken place at 'high level'¹⁵⁴ and the uncooperative attitude of the British Government had been clear and noted during the original proceedings,¹⁵⁵ no new fact has been discovered,¹⁵⁶ as a result of which the second limb of the revision request fell.

As Judge O'Leary observes, 'it is difficult to understand how this Court *knew* as established facts in 1978 what others suspected but were previously unable to prove until the archive material had been declassified, found and compiled'.¹⁵⁷ The point is so basic that one wonders how the Court dared to present the reasoning it did. To put it in my own words, in 1978 the Court failed to draw inferences from a policy of non-cooperation of which only the general outline was known, and whose precise reason and purpose were not known with certainty. In 2018, it refuses to act upon this acquired knowledge on the grounds that the Court of 1978 could have done so if it had wanted. We could say that the Court of 2018 ignores what the Court of 1978 had not known.

There are many other things which the Court *chose* to ignore in *Ireland* (revision). One is the principle according to which the higher the authority authorising a practice contrary to Article 3, the more serious the breach. As noted by Judge O'Leary, as per the *Greek Case*, this principle would have had to be part of the assessment made by the Court in 1978, had it been aware that the authorisation had been ministerial.¹⁵⁸ Another principle which Judge O'Leary identifies could have been expected to be a key consideration for the Court of 1978, had it understood the extent of what the British Government had concealed, is the duty to disclose inscribed at the core of the Convention system.¹⁵⁹

Going further than even she goes, one might observe that the problem with the British original submissions was not only that information had been withheld, but that affirmations were made which were positively false: reading the Rees memo in the light of the repeated assurances given by the British Government to the Commission, according to which there was no tolerance whatsoever of practices contrary to Article 3 and an absolute determination to

154 *Ireland* (n 12) para 115.

155 *Ibid* para 116.

156 *Ibid* para 118.

157 *Ibid* Dissenting Opinion of Judge O'Leary, para 69. See also paras 66 and 68.

158 *Ibid* Dissenting Opinion of Judge O'Leary, para 67.

159 *Ibid* Dissenting Opinion of Judge O'Leary, paras 72 and 73.

pursue any such breach of the Convention,¹⁶⁰ is a sobering experience, to say the least. The Court of 2018 ignored this, and many things beside.

4.3 *The Court's Strategic Deployments of Ignorance, Doubts, and Certainty*

To reject the revision request, the Court needed to make abstraction of several facts and principles, thus exercising strategic ignorance. It was also strategic in its deployment of doubts on the one hand and certainty on the other.

4.3.1 Strategic Ignorance

Although the concept of 'strategic ignorance' is not specifically referred to by Judge O'Leary, it is clearly at the heart of what her meticulous and perceptive critique of the judgment captures. The verb 'to ignore'¹⁶¹ appears no less than seven times in her dissenting opinion. According to her, the Court ignored the following elements:

- The thrust and details in the revision request, and the nature and scope of the original proceedings and original judgment;¹⁶²
- Pre-1971 case law on Article 3;¹⁶³
- Case law relevant to key legal questions;¹⁶⁴
- The fundamental importance of the duty to disclose;¹⁶⁵
- The path of key paragraphs of the original judgment on torture;¹⁶⁶
- The extensive material now available to the Court;¹⁶⁷
- The bigger picture available today.¹⁶⁸

This list could be lengthened if vocabulary different from 'ignore' but conveying the same sense were taken into consideration.¹⁶⁹ There is also all that Judge O'Leary could have said but did not address, for example, to remain within

160 See section 3.3.1, above.

161 In various grammatical forms: 'to ignore'/'ignores'/'ignored'/'ignoring'.

162 *Ireland* (n 12) Dissenting Opinion of Judge O'Leary, para 7.

163 *Ibid* Dissenting Opinion of Judge O'Leary, para 11.

164 *Ibid* Dissenting Opinion of Judge O'Leary, para 37.

165 Which Judge O'Leary convincingly argues would not have been affected by the respondent state not having contested before the Court the Commission's finding of torture. *Ireland* (n 12) Dissenting Opinion of Judge O'Leary para 49.

166 *Ibid* Dissenting Opinion of Judge O'Leary, para 61.

167 *Ibid* Dissenting Opinion of Judge O'Leary, para 69.

168 *Ibid* Dissenting Opinion of Judge O'Leary, para 76.

169 Non-exhaustive examples include the difference in presentation of the long-term effects of the five techniques in the domestic and the Strasbourg proceedings (*Ireland* (n 12) para 57) or the determination of the respondent Government to protect Her Majesty's Government, or individual members of it, interpreted by the Court of 2018 as no more than a 'litigation strategy' (*Ireland* (n 12) paras 67 and 128).

issues discussed in this article, the common understanding of what the *prima facie* standard stands for, Rule 80's conditional mode ('might' rather than 'would'), or the expectation that an expert would share their recently acquired knowledge in good faith.

The list could go on. *Ireland* (revision)'s treatment of both law and facts appears very selective. This selection cannot not have been purposefully drawn.

4.3.2 Strategic Doubting

The medical evidence limb was rejected by the Court purportedly due to it *doubting* that Dr L had misled the Commission or, if this fact was accepted, that evidence submitted about the long-term effects of the five techniques might have led to the original judgment adopting a different decision. Judge O'Leary qualifies the Court's doubts of 'both unfounded and surprising'.¹⁷⁰ This qualification is no exaggeration. What the discussion above (section 4.1) indicated is that the Court *chose* to be full of doubts. The matter was rather clear. It is the doubts of the Court that appear unconvincing. Presumably the Court invented them so as to help the medical evidence limb to fall.

4.3.3 Strategic Demand for Certainty

Interestingly, the Court's rejection of the non-disclosure limb suffers from the opposite problem, namely, an exaggerated confidence in facts that are doubtful. The Court of 2018 assumes it can ascertain what the Court of 1978 would have known, even though this knowledge derives from documents that became accessible only 30 years later. In sum, the Court of 2018 shows itself certain of facts that are by nature doubtful.

A contestable notion of certainty imbibes its judgment in other ways too. One, already discussed, is that the Court changes the sense of Rule 80 by implicitly requiring the (impossible) proof that an alternative outcome would *definitely* have been reached, had more truthful medical evidence been before the Court of 1978. Another relates to the fact that if only five additional Judges had voted for the finding of torture in 1978, *Ireland* would have gone in the other direction. Judge O'Leary pertinently remarks that 'in sensitive cases in particular the Plenary or Grand Chamber is often divided'.¹⁷¹ The Court of 2018 ignores this, producing a judgment which suffers from 'an underlying supposition that the absolute certainty [regarding the influence the medical evidence would have had on the outcome] would also have had

170 Ibid Dissenting Opinion of Judge O'Leary, para 58.

171 Ibid Dissenting Opinion of Judge O'Leary, para 74.

to be accompanied by a (near) unanimous finding of torture'.¹⁷² Judge O'Leary continues: 'The question, in reality, was whether the material now disclosed would, if known at the relevant time, have led five of the 13 majority judges to cross the floor'.¹⁷³ The problem is that '[t]he majority [...] sought certainty where only probability can apply'.¹⁷⁴

The latter phrase is eminently quotable. Strikingly, it applies not only to the voting issue in relation to which it appeared, but also to the general, continual refusal by the Court to draw inferences and presumptions. The attitude of the Court throughout the proceedings is the more puzzling since it itself signified in *Ireland* that inferences are important – and this in a passage that it continues regularly to quote in its case law.

Also relevant to our analysis is the principle of legal certainty, which may be felt to have 'conveniently' driven the whole judgment. Embodying a key value in law, its discussion is left for the next section.

4.4 *Legal Certainty as Raison de Cour, and its Consequences*

Legal certainty is the prime value proclaimed by the Court in *Ireland* (revision). To quote:

The Court reiterates that legal certainty constitutes one of the fundamental elements of the rule of law which requires, *inter alia*, that where a court has finally determined an issue, its ruling should not be called into question [reference omitted]. Subjecting requests for revision to strict scrutiny, the Court will only proceed to the revision of a judgment where it can be demonstrated that a particular statement or conclusion was the result of a factual error. In such a situation, the interest in correcting an evidently wrong or erroneous finding exceptionally outweighs the interest in legal certainty underlying the finality of the judgment. In contrast, where doubts remain as to whether or not a new fact actually did have a decisive influence on the original judgment, legal certainty must prevail and the final judgment must stand.¹⁷⁵

Outside the context of the facts of the case, this reasoning appears rock-solid. The problem is that it was applied to the non-torture finding of 1978, which is

¹⁷² Ibid Dissenting Opinion of Judge O'Leary, para 63.

¹⁷³ Ibid Dissenting Opinion of Judge O'Leary, para 74. To her, it is clear the outcome would have changed. For her arguments, see *Ireland* (n 12) Dissenting Opinion of Judge O'Leary, para 75.

¹⁷⁴ Ibid Dissenting Opinion of Judge O'Leary, para 74.

¹⁷⁵ Ibid para 122.

best described as having rested on a *factual error* made by the Court regarding the severity and intensity of the suffering the five techniques inflicted, as well as the level of their authorisation. The Court of 2018 did not want to recognise this. Two questions arise: why did the Court recoil from acknowledging the truth of the matter and does it matter that it rejected the revision request?

As for the first question, the acceptance of the revision request would have entailed that the Court of 2018 lay bare the deceit orchestrated by the British Government in the original proceedings. One assumes the Court may have considered such a step too much of a political risk, on at least two fronts. First, the acceptance of the Irish request was likely to rekindle the United Kingdom's ire towards the Court.¹⁷⁶ Second, it would have made clear not only that the United Kingdom had deceived the Court of 1978, but also that the latter had lacked the wisdom and/or courage to draw the appropriate inferences; this could have been expected generally to undermine the Court's aura. In this context, one understands it will have been tempting for the Court of 2018 to convince itself that, *Ireland* being a 40-year-old judgment which all honest legal authorities know no longer to consider good law,¹⁷⁷ the Court could afford not to put the record right.

Such a conclusion, however, does not hold. It was crucial for the Court of 2018 to acknowledge that the judgment of 1978 had been a mistake, and this, on at least three different fronts. First, it would have made crystal clear that the five techniques (and equivalent) are torture in international human rights law. In a world where sound learned opinion does not carry the same weight as a legally binding judgment, revising the original finding would have helped to prevent the repetition of the practice.

Second, a revised finding would have played in the legal process currently under way in the United Kingdom, concerning the reparation of abuses committed by the British authorities in Northern Ireland during 'the Troubles'. A judgment granting revision would have exercised a positive influence as the 'Legacy and Reconciliation' Bill initiated by former Prime Minister Boris Johnson, aiming at sheltering veterans from prosecution for illegal acts during the Troubles, was going through the British Parliament.¹⁷⁸ It would be wrong to suggest that the result of the adopted judgment is that the Court has condemned itself to be a completely irrelevant actor in this respect: in the civil

¹⁷⁶ On the United Kingdom's fraught relationship with the Court, see, for example, E Bates, 'Principled Resistance to the European Court of Human Rights in the United Kingdom?', in *Principled Resistance Against ECtHR Judgments – A New Paradigm?*, M Breuer (ed), (Springer 2019) 193.

¹⁷⁷ A point emphasised by O'Boyle (n 3).

¹⁷⁸ Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, which came into force on 18 September 2023.

society's fight against immunity, the so-called *McKerr* 'group of cases' is often relied upon.¹⁷⁹ Still, *Ireland* (revision) goes unmentioned instead of making the waves it would have made, had the revision proceeded.

Third, the revision would in my opinion have enhanced, rather than weakened, the authority of the Court. It most likely would have refuelled the acrimony of the British Government towards the Court. Surely, however, this regrettable outcome is not to be avoided at all costs. What is the point of the Court if not to assess allegations of human rights violations with integrity? Politically, as David Bonner's study has made very clear, Ireland's position was hardly more comfortable than the Court's;¹⁸⁰ Ireland nonetheless assessed that the stakes were important enough to warrant that it would risk its relationship with the United Kingdom by going to Strasbourg. It did this not once, but twice.¹⁸¹ The least one can say is that the Court did not respond in kind.

By failing to make a stand, the Court now looks very much out of step with other judicial bodies, especially the United Kingdom Supreme Court, which recognised in 2021 that the United Kingdom had practiced torture, thereby opening the way for investigations and prosecutions to be restarted.¹⁸² Admittedly, the Strasbourg Court could not have predicted in 2018 the United Kingdom Supreme Court's judgment of 2021. The differences in approach between the two courts nevertheless puts into relief the lack of insights and courage of the Strasbourg Court. In the last analysis, as Judge O'Leary said, 'it is difficult to avoid the 'impression that [...] the Court [simply] sought to shelter itself behind [the] principle [of legal certainty]'.¹⁸³

5 A 'Virtuous' Beyond Reasonable Doubt Standard of Proof: Part of the Way Forward But Insufficient on its Own

As the introduction to this article has noted, BRD may at first sight appear to be unsuited for international human rights adjudication, given the way it

179 The United Kingdom Parliament's Joint Committee on Human Rights has also warned that '[t]he Bill's approach to dealing with legacy cases risks the UK failing to comply with the outstanding [*McKerr*] judgments of the ECtHR, which is a breach of the UK's obligation [...] to comply with adverse judgments'. Joint Committee on Human Rights, *Legislative Scrutiny: Northern Ireland Troubles (Legacy and Reconciliation) Bill* (2022–23, HL 79, HC 311) para 97.

180 Bonner (n 78).

181 Ireland would not have taken the decision to return to Strasbourg any more lightly in 2016 than in 1971. *Ireland* (n 12) Dissenting Opinion of Judge O'Leary, para 13.

182 *Re McQuillan's Application for Judicial Review* (n 10).

183 *Ireland* (n 12) Dissenting Opinion of Judge O'Leary, para 77.

evidentiarily advantages the respondent state. BRD was nonetheless adopted first by the Commission and then by the Court, and has since become a central element of the Strasbourg jurisprudence. There were good reasons for its adoption, including that as an apparent ‘champion of the facts’, BRD should lend confidence to the Strasbourg Court’s findings. Strikingly, BRD did not prevent the Commission from finding torture fully established in the *Irish* case.

This article has argued that the problem with BRD at Strasbourg has arisen from the Court’s misuse of it. In the *Ireland* judgment of 1978, BRD appeared to be enunciated in a ‘virtuous’ form that was considerate of, and fitting for, human rights adjudication. The Court, however, failed to apply its own pronouncements. BRD ended up ‘hovering’ in practice, rather than being precisely applied. Acting as an ‘enemy of the facts’, it provided the Court with a route (albeit not a very convincing one once analysed in-depth) for avoiding finding as politically important a state as the United Kingdom in breach of the prohibition of torture.

That *raison d’état/raison de Cour* will have played a role in 1978 seems incontrovertible: why would the judgment otherwise have omitted to report some crucial facts? And *raison d’état/raison de Cour* appears to have remained central to the rejection, 40 years later, of the revision request which Ireland lodged after damning documents had been found in the recently declassified British archives.

According to the Court of 2018, these documents showed nothing – nothing significant or nothing new. This is not persuasive. The Court should have recognised that the judgment of 1978 rested on a factually mistaken basis and, because of this, had been unable to provide a proper legal qualification of the five techniques. Due to a combination of the lies the British proffered during the original proceedings at Strasbourg and the Court’s own long-lasting fear of state backlash, the judgment of 1978 stands, with all the negative consequences that this error entails.

This article has focused on showing that, to arrive at its conclusions, the Court, both in 1978 and again in 2018, *had to* play down the evidence which was before it, as well as to ignore its own, wise, principled evidentiary pronouncements. Accordingly, it is not BRD’s intrinsic nature that makes it unsuitable for use at Strasbourg, which is why this article does not conclude by advocating BRD’s disappearance from the Strasbourg jurisprudence. What it recommends is that the Court use it in its ‘virtuous’ form.

This entails a number of precepts to be not only recognised but also applied. There is no space to explain them here in detail, but they include the following points:

1. BRD must be approached as a Strasbourg *sui generis*, autonomous concept, which need not, and indeed should not, be tied to whatever concept of it exists in any other jurisdiction.¹⁸⁴
2. At its heart must lay the acceptance that it can be met through inferences.
3. Inferences must be drawn in practice, when this is evidentially called for.¹⁸⁵
4. When the presumption that a violation has taken place has become so strong that this reality must be taken to have been established BRD (possibly thanks to huge investigatory efforts, such as had been dispensed by the Commission in *Ireland*), there can be no hint that a shift of the burden of proof onto the state would have been operated.
5. In circumstances where a shift is called for (e.g., injuries sustained whilst in custody of the state),¹⁸⁶ this shift must be declared on the basis of proof that is not BRD, including *prima facie* evidence properly understood as *commencement de preuve*; if the state does not rebut the presumption of violation that has arisen, the Court must decide whether the violation has been proven BRD (e.g., because the state has failed to produce documents clearly in its possession that would have proven the absence of violation BRD, had there been no violation)¹⁸⁷ or on the balance of probabilities (because there remains a *reasonable* doubt as to whether a violation has taken place).
6. The Court must think carefully of the reasons for and feasibility of imposing the BRD standard onto the applicant,¹⁸⁸ and explain its decisions in

184 As Bicknell (n 18) 157 also argues. Although the Court already does this (for example, *Nachova and Others v Bulgaria* [GC] 43577/98 and 43579/98 (ECtHR, 6 July 2005) para 147), it could do it more.

185 *PH v Slovakia* 37574/19 (ECtHR, 8 September 2022) is a recent case where the Court has bewilderingly drawn no inference. See MB Dembour 'The Escape of the State: No Shift in the Burden of Proof and No Anti-Roma Discrimination by the Police in *PH v Slovakia*' (DISSECT Blog, 31 November 2022): <<https://dissect.ugent.be/the-escape-of-the-state-no-shift-in-the-burden-of-the-proof-and-no-anti-roma-discrimination-by-the-police-in-p-h-v-slovakia/>>.

186 For a clear exposition of when the burden of proof should be shifted, see Roberts (n 21).

187 As should arguably have been decided in *Ireland*. This will not always be the case, however. In this respect, the complaints currently pending against Russia will be particularly difficult for the Court to decide. See AK Speck, 'Russia and the Strasbourg Court: Evidentiary Challenges Arising from Russia's Expulsion From the Council of Europe' (DISSECT Blog, 29 April 2022): <<https://dissect.ugent.be/russia-and-the-strasbourg-court/>>.

188 For a case where the Court rightly rejected the imposition of BRD onto the applicant, see *A and Others v Iceland* 25133/20 and 31856/20 (ECtHR, 15 November 2022) para 87, concerning the proof of negligence of children taken into care.

this respect, so as to defuse the enormous confusion and inconsistency that currently exists as to the type of complaints and/or circumstances in which BRD applies.¹⁸⁹

7. It must do the same in regard to the respondent state, to whom the BRD standard must also be applied, when appropriate.¹⁹⁰
 8. It must dispel the impression that BRD might be ‘the’ Strasbourg standard of proof,¹⁹¹ and stress that BRD co-exists with other standards (including *prima facie*, balance of probabilities, and preponderance of standards) from which it must be clearly distinguished.
 9. In all it does, including in particular its evidentiary reasoning and assessment of the facts, the Court’s unique inspiration and intention must be the protection of human rights.
 10. This includes not letting itself be driven by *raison d’état/raison de Cour*.
- In conclusion, wisely conceptualised and consistently applied, nothing prevents BRD from playing an important and positive role in the Strasbourg jurisprudence. The ball is in the Court’s hands, so to speak. May the Court play it wisely, honestly, and fairly.

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¹⁸⁹ As Bicknell (n 18) has noted, the doctrine is unclear as to whether BRD applies in respect to Articles 2 and 3 of the Convention or throughout the whole case law, and some have argued it has altogether been abandoned (161).

¹⁹⁰ There are cases where the state should be asked to prove BRD that it has not violated human rights. The Court occasionally recognises this. For example, in *Yengibaryan and Simonyan v Armenia* 2186/12 (ECtHR, 20 June 2023), the Court stated that the state had to prove BRD that the use of lethal force had been no more than absolutely necessary (paras 136 and 138). Too often, however, the Court is satisfied with the state providing just a ‘plausible and convincing’ explanation for an incident, including but not only in cases where the burden of proof is shifted. Assuming the ‘plausibility’ criterion is appropriate in theory, the Court would still have to check the plausibility of the explanation offered by the state in practice. As a counter-example, in *PH* (n 185), the Court accepted the version of the state according to which a young Roma woman would have tried to escape from a police station by jumping from a 7.7 metre high window.

¹⁹¹ As potentially suggested by the title of Bicknell’s article. Bicknell (n 18).

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