THE DECOLONIZATION OF NORTHERN IRELAND

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1. INTRODUCTION

Historically, the British government has been quite successful at defining the situation in Northern Ireland in accordance with its own national self-interests as it sees fit.¹ It has spent an enormous amount of resources on conveying to the world news media why its particular approach to the problem – whatever it might be at that particular moment in time – is the only correct approach.² I would submit, however, that there is certainly another way of looking at the situation in Northern Ireland. That other way of analyzing this conflict is from the perspective of international law, and in particular the United Nations Charter. Therefore, it is my task here to describe what I believe should be the appropriate policy of the world community of states toward the situation in Northern Ireland in accordance with the requirements of international law.

Article 1, paragraph 2 of the United Nations Charter provides that one of the ‘purposes’ of the United Nations Organization is to develop friendly

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¹ See generally G. BELL, *The Protestants of Ulster* (1976) 1-4.

² See WALKER, ‘Irish Republican Prisoners – Political Detainees, Prisoners of War or Common Criminals?’ 19 *The Irish Jurist* (1984) 189, 192-193, discussing the British government’s policy of criminalizing Irish Republican Army (IRA) paramilitary activity:

[A] policy of criminalisation [. . .] is more likely to maintain or increase public support for the State’s counter-measures by emphasizing the criminal and violent aspects of terrorism rather than its political motivation. As a result the public is coaxed into taking a perception of the terrorists which corresponds to that of the State. In other words, the terrorists are viewed simply as criminals, so their treatment as such is acceptable. Depicting the IRA in this light in turn reinforces the official policy of resisting the breaking of the Union. . . . Thus, criminalisation is an important conditioning factor to be applied to the minds of the British public, and it is equally aimed at channelling world opinion. Movements denounced as criminal plots rather than freedom fighters are much less likely to receive moral or material support from third States.

See also T. BALDY, *Battle for Ulster* (1987).

relations among nations based on respect for the principle of equal rights and self-determination of peoples.³ This fundamental principle of self-determination for peoples can also be found in the two seminal United Nations Human Rights Covenants of 1966: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.⁴ Both of these Covenants have been ratified by the British and Irish governments; and of course both states are parties to the United Nations Charter, as is true for most states of the world community.⁵ Thus, both states are in basic agreement upon the fundamentality of the principle of self-determination of peoples and its integral connection to the maintenance of international peace and security.⁶ The principle of self-determination of peoples has been a basic norm of international law and of world politics since it was first proclaimed by President WOODROW WILSON in his famous Fourteen Points Address of 1918.⁷

2. THE COLONIAL STATUS OF NORTHERN IRELAND

In 1960 the United Nations General Assembly took a monumental step toward implementing the right of self-determination of peoples throughout the world by means of adopting its Declaration on the Granting of Independence

³ UN Charter Art. 1, para. 2.

⁴ The International Covenant on Civil and Political Rights, GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN doc. A/6316 (1966). The International Covenant on Economic, Social, and Cultural Rights, GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 49, UN doc. A/6316 (1966). Part I, Article 1 of both Covenants is identical:

- (1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
- (3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

⁵ See *infra* notes 32-36 and accompanying text. See also UNYB (1955), UN Sales No. 1956.I.20 pp. 454-55.

⁶ See generally F. BOYLE, *Defending Civil Resistance Under International Law* (1987) 283-316.

⁷ The Fourteen Points Address by President WOODROW WILSON, January 8, 1918, reprinted in 56 *Cong. Rec.* 680 (1918). See HARVEY, 'The Right of the People of the Whole of Ireland to Self-Determination, Unity, Sovereignty and Independence', 11 *NYL Sch. JICL* (1990) 167.

to Colonial Countries and Territories, Resolution 1514(XV) of 14 December.⁸ I will not discuss all of its provisions here, but I would like to mention its most salient features. In the Preamble, the General Assembly “solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations.”⁹ It also declares in paragraph 1 that: “The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations, and is an impediment to the promotion of world peace and co-operation.”¹⁰ Likewise paragraph 4 provides that all armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territories shall be respected.¹¹

Next, paragraph 5 requires that immediate steps shall be taken in trust and non-self-governing territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories without any conditions or reservations, etc.¹² Nevertheless, paragraph 6 makes it clear that the implementation of paragraph 5 cannot be undertaken in a manner that would aim “at the partial or total disruption of the national unity and the territorial integrity of a country.”¹³ To quote from the exact language of paragraph 6: “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”¹⁴

In addition, this basic principle of international law mandating the equal rights and self-determination of peoples has likewise been enshrined in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, which was adopted by the UN General Assembly on 24 October 1970 as Resolution 2625 (XXV).¹⁵ In particular therein can be found the injunction: “Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country.”¹⁶ This Declaration was adopted by the General Assembly as a

⁸ GA Res. 1514, 15 UN GAOR Supp. No. 21 at 66, UN doc. A/4684 (1960).

⁹ *Ibid.* at 67.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ G.A. Res. 2625, 25 UN GAOR Supp. No. 28 at 121, UN doc. A/8082 (1970).

¹⁶ *Ibid.* at 124.

'consensus resolution', which means that the British government did not dissent from it.¹⁷ Finally, this particular resolution was also treated by the International Court of Justice as enunciating rules of customary international law in its 1986 Judgment on the merits in the case of *Nicaragua v. United States*.¹⁸

Pursuant to the aforementioned Decolonization Resolution and the Declaration of Principles Resolution, the continuing partition of Ireland constitutes an illegal partial disruption of the national unity and territorial integrity of the state of Ireland, which violates the terms of the United Nations Charter and, in particular, the aforementioned right of the Irish People to self-determination.¹⁹ From the perspective of international law, therefore, the entity which the British government calls 'Northern Ireland' is in fact and in law a 'colony' as that term has been classically defined.²⁰ I submit that this is precisely how the world community of states must proceed to think about the situation in Northern Ireland if it is to make any sense of what is going on over there, and more importantly, to determine what should be done to solve the problems of Northern Ireland.

¹⁷ Ibid.

¹⁸ *Case concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. US), ICJ Rep. 1986, p. 14 (Judgment of June 27, 1986). The Court stated: "In determining the legal rule which applies to these latter forms, the court can draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) referred to above). As already observed, the adoption by the States of this text affords an indication of their *opinio juris* as to customary international law on the question." Ibid. at 101.

¹⁹ See *supra* notes 8-18 and accompanying text.

²⁰ See, e.g., *Black's Law Dictionary* (rev. 4th ed. 1968) p. 331:

COLONY. A dependent political community, consisting of a number of citizens of the same country who have emigrated therefrom to people another, and remain subject to the mother-country. *U.S. v. The Nancy*, 3 Wash. C.C. 287, Fed. Cas. No. 15,854.

A settlement in a foreign country possessed and cultivated, either wholly or partially, by immigrants and their descendants, who have a political connection with and subordination to the mother-country, whence they emigrated. In other words, it is a place peopled from some more ancient city or country. Wharton.

Irish Republican groups such as the IRA have justified their opposition to the union of Northern Ireland with Britain because of the right of the Irish People to self-determination and have called for the end to British colonial occupation. See WALKER, *supra* note 2, p. 189. See also, T. COOGAN, *The IRA* (3d. ed. 1987) at 685. See generally BELL, *The Irish Troubles* (1993).

3. THE UN DECOLONIZATION OF NORTHERN IRELAND

According to this UN Decolonization Resolution of 1960 and the two UN Human Rights Covenants of 1966, the British government is under an absolute international legal obligation to decolonize Northern Ireland in cooperation with the United Nations as expeditiously as possible and in the process to restore the territorial integrity of the whole state of Ireland.²¹ In other words, Britain must remove the last vestiges of the colonial occupation it had imposed upon Ireland as a result of its so-called Treaty of Partition of 1921.²² Here the United Nations Organization as a whole, including the Trusteeship Council, the Special Committee on Decolonization, as well as the United Nations General Assembly, have had an enormous amount of quite successful practice with respect to obtaining the peaceful decolonization of occupied territories by former colonial imperial powers – especially Great Britain – around the world.²³ It is to this wealth of experience, then, that the world community of states must look in order to obtain some useful precedents that could be applied to the peaceful resolution of the situation in Northern Ireland.

In this regard, when the British government sent troops to Northern Ireland in 1969 the Irish government sought to raise the question of “the six counties of Northern Ireland” before the United Nations Security Council, appealing for the “dispatch to the area of a United Nations peacekeeping force.”²⁴ Due to threat of a British veto, however, the Security Council adjourned without taking a decision on whether or not to adopt the agenda.²⁵ The Security Council never again considered the question.

Nevertheless, Irish Ambassador CREMIN submitted an Explanatory Memorandum on the situation in Northern Ireland to the General Committee of the UN General Assembly requesting that this topic be included on the Assembly’s agenda.²⁶ Following the proposal of Nigeria, the General Committee decided to defer a decision on whether or not to recommend the inclusion of this agenda item.²⁷ Since that time, however, representatives of successive Irish

²¹ See *supra* notes 8-14 and accompanying text.

²² Treaty between Great Britain and Ireland, December 6, 1921, 26 LNTS 9. See generally N. MANSERGH, *The Unresolved Question* (1991).

²³ *United Nations Action In the Field of Human Rights* at 44, UN doc. ST/HR/2/Rev. 1, UN Sales No. E.79.XIV.6 (1980). See B. URQUHART, *Decolonization and World Peace* (1989).

²⁴ 24 UN SCOR Supp. (July-Sep. 1969) at 159, UN doc. S/9394 (1969).

²⁵ 24 UN SCOR Res. & Dec. at 8, UN doc. S/INF/24/Rev. 1 (1969).

²⁶ UNYB (1969) at 181, UN Sales No. E.71.II.

²⁷ 24 UN GAOR (180th mtg.) at 4, UN doc. A/BUR/SR 180 (1969).

governments have reiterated the right to national reunification in addresses to the UN General Assembly.²⁸

The situation in Northern Ireland clearly constitutes a threat to the maintenance of international peace and security. Therefore the United Nations Security Council has all the authorization it needs to act in whatever manner it deems fit to deal with Northern Ireland since the Security Council has "primary responsibility for the maintenance of international peace and security" under Charter Article 24.²⁹ Hence, some day a majority of nine members of the Security Council could decide to send a UN peacekeeping force to Northern Ireland. In this fashion, the decolonization of Northern Ireland could be initiated by the withdrawal of British troops and the emplacement of a UN peacekeeping force in their stead on a transitional basis. Witness, for example, the recently successful decolonization of Namibia (formerly Southwest Africa) under the auspices of a United Nations peacekeeping force (i.e., the UN Transition Assistance Group) organized under the authority of the United Nations Security Council.

To be sure, it has always been the case in United Nations practice that a peacekeeping force has never been dispatched against the will of the government with military control over the territory involved, irrespective of whether that government was legally entitled to be there or not.³⁰ So implementation of this UN plan would ultimately depend upon the British and Irish governments reaching some prior agreement on the peaceful decolonization of Northern Ireland and the reunification of Ireland as required by international law. Therefore, it should be a primary goal of the world community of states to encourage the British government (1) to publicly endorse the principle of decolonization for Northern Ireland, as well as (2) to negotiate in good faith with the Irish government on a reunification treaty. Thereafter, both states

²⁸ See 7 *UN Monthly Chronicle* (1970) 69, where Irish Prime Minister JOHN M. LYNCH stated to the General Assembly: "Ireland has suffered much from war, and in the past two years there have been serious difficulties in the North of Ireland. Britain retained responsibility for that small part of Ireland when it retired from the rest. We believe that community will see that its future lies with Ireland." See also 8 *UN Monthly Chronicle* (1971) 165-6; 9 *UN Monthly Chronicle* (1977) 106; 15 *UN Monthly Chronicle* (1978) 93.

²⁹ UN Charter Art. 24, para. 1 states: "In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

³⁰ I. RIKHYE, M. HARBOTTLE & B. EYGE, *The Thin Blue Line: International Peacekeeping And Its Future 3* (1974). See, e.g., MYERS, 'A New Remedy for Northern Ireland: The Case for United Nations Peacekeeping Intervention in an Internal Conflict', 11 *NYL Sch. JICL* 1 (1990).

should work in cooperation with the UN Security Council, the UN Secretary General, and a UN peacekeeping force to accomplish these objectives.

4. THE PROTECTION OF HUMAN RIGHTS IN NORTHERN IRELAND

At this preliminary point in the analysis, no point would be served by speculating about what type of United Irish State might ultimately emerge from these reunification talks. It could be a confederal state organized along the lines of Switzerland, or a federal state consisting of two parts, or a unitary state, etc.³¹ The selection of any one of these alternatives (or some other) would be for all of the people living on the Island of Ireland – whether Protestant or Catholic – to determine, subject to the final approval of the United Nations Organization.

From an international law perspective, however, the most important part of these reunification negotiations to be considered would be the protection of the basic fundamental human rights of Protestants living in Northern Ireland and the firm establishment of their right to continue to live and practice their religion as they see fit. The ability to do this has been made immeasurably easier by the fact that both the British government and the Irish government are parties to the two aforementioned United Nations Human Rights Covenants of 1966.³² The British government signed both UN Covenants in 1968 and ratified them in 1976.³³ The Irish government signed both in 1973 and has recently ratified them.³⁴ Moreover, Ireland has also become a party to the 1966 Optional Protocol to the International Covenant on Civil and Political Rights giving competence to the United Nations Human Rights Committee to receive and consider communications from individuals claiming to be victims of a violation by that state party of any of the rights set forth in the Covenant.³⁵

³¹ D. DOUMITT, *Conflict In Northern Ireland* (1985) 189. A number of solutions to the problem in Northern Ireland have been suggested. For example, Dr. GARRET FITZGERALD, former leader of the Fine Gael Party in the Republic suggested making Northern Ireland and the Republic a confederation. Ibid. See also *Report of the New Ireland Forum* (2 May 1984).

³² See *supra* notes 4-5 and accompanying text.

³³ 1977 *Great Britain Treaty Series* No. 6 (Cmd. 6702).

³⁴ See POWER & QUINN, 'Ireland's Accession to the United Nations' Human Rights Covenants', 7 Ir. L.T.R. (1989) 36.

³⁵ GA Res. 2200, 21 UN GAOR Supp. (No. 116) at 59, UN doc. A16316 (1966).

In addition, both Britain and Ireland are parties to the European Convention on Human Rights.³⁶ And it would be necessary for a United Ireland to adopt domestic implementing legislation for all three of these seminal international human rights treaties as well.³⁷ In this manner, any Protestant residing in a United Ireland who believed that his or her rights had been abridged on grounds of religion or nationality would have direct and immediate access to a court of law on the basis of any one or more of these three treaties and their respective implementing legislation.

In all fairness, I should point out that this is not the case today for Irish Catholics living in Northern Ireland who allege discrimination against them on the grounds of religion or nationality. The British government has been quite clever at signing various human rights treaties, but then derogating from their provisions by proclaiming a public emergency with respect to Northern Ireland.³⁸ In addition, the British government has not adopted domestic implementing legislation for these three human rights conventions.³⁹ This then

³⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 UNTS 221. The Convention was drafted by the member states of the Council of Europe and was opened for ratification on November 4, 1950. It entered into force in September 1953 after the deposit of ten instruments of ratification with the Secretary General of the Council of Europe. *Ibid.* at 222.

³⁷ Ireland has not adopted domestic implementing legislation for any one of these three treaties. Under Irish domestic law, following the British model, treaties are not deemed to be self-executing, and therefore cannot be relied upon to state a cause of action in domestic court without domestic implementation by Parliament. *McGimpsey v. Ireland*, 1988 I.R. 567, 581.

³⁸ See generally Amnesty International, *Human Rights Concerns in the United Kingdom* (June 1991) 56-60; BISHOP, 'The Right To Be Arrested', 11 NYL Sch. JICL (1990) 207, 208-11; Note, 'Terrorists and Special Status: The British Experience in Northern Ireland', 9 Hastings ICLR (1986) 481, 500. Furthermore, throughout the history of Northern Ireland, Britain has enacted special legislation to deal with so-called 'terrorist activity' there. The first was the Civil Authorities (Special Powers) Acts of 1922-23, 12 & 13 Geo. 5, ch. 5. These were replaced with the Northern Ireland (Emergency Provisions) Act, 1973, ch. 53, reprinted in 43 *Halsbury's Statutes of England* (3d ed. 1970) 1235. This was re-enacted without significant changes in 1978 and amended in 1987.

³⁹ According to British law, treaties are not deemed to be self-executing. See MCNAIR, *The Law of Treaties* (1961) 81, stating: "In the United Kingdom, as we shall see, with a very limited class of exception, no treaty is self-executing; no treaty requiring municipal action to give effect to it can receive that effect without the cooperation of Parliament, either in the form of a statute or in some other way." The British government has not ratified the Optional Protocol to the ICCPR. LEVIN & EDWARDS, 'The UK Human Rights Network', in *Human Rights in the United Kingdom* (1988) 138. It has not incorporated the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, BOYLE, 'Freedom of Expression', *ibid.* at 86; and neither has it incorporated the European Convention on Human Rights. SHAW, 'Prisoner's Rights', *ibid.* at 41. And the ICCPR has not been made part of UK domestic law. *R. v. Secretary of State for the Home Department, ex parte Weeks*, Q.B. (Crown Office List) CO/1338/87 (1988).

prevents Irish Catholics living in Northern Ireland from going into court and pleading a cause of action directly under these treaties in order to strike down the widespread discriminatory practices against Irish Catholics currently existing there. Moreover, even large segments of the British People themselves continue to lament the fact that they do not have a domestic constitutional equivalent of a Bill of Rights.

But just because the British government has tolerated and condoned widespread discrimination against Irish Catholics in Northern Ireland would provide absolutely no good reason for the Irish government to do the same against Protestants in a decolonized state of United Ireland.⁴⁰ Indeed, it has been the gross violation of the fundamental human rights of Irish Catholics in Northern Ireland – despite these solemn international treaty commitments to the contrary – that has produced the violent response by the Provisional Irish Republican Army (IRA) to the British occupation army, regime, and practices.⁴¹ Hence, the world community of states must understand that the violence committed by the Irish paramilitary parties to this international conflict can be directly attributed to the continuation of the illegal British colony on the Island of Ireland, as well as to the concomitant gross violation of fundamental human rights perpetrated by the British occupation forces upon Irish Catholics.⁴² For this reason, then, the Provisional IRA must be fit within the broader political, economic and legal context of an anti-colonial war.⁴³

These phenomena are similar to those found in most other anti-colonial wars around the world where the indigenous people have risen up to throw off their colonial oppressors. In such cases, it has proven to be standard operating procedure for the colonial occupation power to play off one group of indigenous people against another, or settlers against the indigenous people; and then for the colonial power to attempt to portray itself as the ‘peacekeeper’ between the contending factions in order to justify the continuation of its colonial

⁴⁰ See DOUMITT, *supra* note 31, at 71-94.

⁴¹ *Ibid.* See also ABRAMOVSKY, ‘The Political Offense Exception and the Extradition Process: The Enhancement of the Role of the US Judiciary’, 13 Hastings ICLR (1989) 1 and 3. One of the most infamous events in Northern Ireland’s history was ‘bloody Sunday’ when British armed forces in Londonderry killed thirteen Catholic demonstrators engaged in peaceful civil resistance activities on 30 January 1972. *Ibid.*

⁴² See BELL, *supra* note 1, at 1. See also DOUMITT, *supra* note 31, at 152-57.

⁴³ *Accord* The Norwegian Helsinki Committee, *Irish Terrorism or British Colonialism? The Violation of Human Rights in Northern Ireland* (July 1990). See also Amnesty International, *United Kingdom: Political Killings in Northern Ireland* (February, 1994). Indeed the IRA has always claimed to be waging a war of national liberation on behalf of the Irish People against alien (British) rule. CONNELLY, ‘Political Violence and International Law: The Case of Northern Ireland’, 16 Den. JILP (1987) 79. See generally T. COOGAN, *The IRA: A History* (1993).

occupation.⁴⁴ This is precisely what has happened in Northern Ireland.⁴⁵ Despite pro-British news media accounts to the contrary, it is the continued presence of the British colonial army, occupation regime, and their military practices in Northern Ireland that have always been the primary source of bloodshed and violence there.⁴⁶

5. CITIZENSHIP, NATIONALITY AND RESIDENCE

Another protection that could be afforded to Protestants in Northern Ireland would be for them to be able to retain their British citizenship while living in a United Ireland. They would also retain their British passports and could have the British Parliament guarantee as a matter of domestic law their right (and that of their descendants) to reside in Britain forever. Moreover, the British Parliament could enact legislation to permit British citizens living in a United Ireland to vote in British elections by means of an absentee ballot.

Protestants living in Northern Ireland should be entitled to claim citizenship in a United Ireland and thus become dual nationals if they so desire. On the other hand, Northern Ireland Protestants (and their descendants) should not be forced to accept Irish citizenship or nationality in a United Ireland if they do not want to. Nevertheless, such individuals (and their descendants) should still retain their right of permanent residence in a United Irish State.

To be sure, if such individuals choose to remain living in United Ireland as exclusively British citizens, then they would be bound to obey the laws of a United Ireland – just as is true for permanent resident aliens in any other country. Nevertheless, they would still be entitled to invoke all the protections of the international and domestic human rights regime outlined above. Moreover, since they are currently residents on the Island of Ireland, such individuals should have the basic right to participate in the drafting of a new Constitution for a United Irish State that would contain within itself a Bill of Rights protecting all the people who live in Ireland irrespective of citizenship and nationality, let alone religion.

⁴⁴ J. HATCH, *The History of Britain in Africa* (1969) 197. See also, DOUMITT, *supra* note 31, at 208, stating: "The practice of dividing the conquered was a long established method of British rule."

⁴⁵ *Ibid.*

⁴⁶ See K. BOYLE, T. HADDEN, & P. HILLYARD, *Law and State - The Case of Northern Ireland* (1975) 29-36. See also DOUMITT, *supra* note 31, at 152-163.

Furthermore, under that new Constitution, such individuals should be permitted to vote in whatever type of Irish elections they so desire on the basis of their qualifications as permanent residents in United Ireland. In this way, communities in today's Northern Ireland that consist of a majority of Protestants could continue to maintain majority political control over local, municipal, and county-wide political bodies in United Ireland, subject to the non-discrimination regime mentioned above. Indeed, the new Irish Constitution should accord such permanent residents of a United Ireland all of the legal, political, and constitutional rights of Irish citizens without any distinction. These rights should include those of full and equal participation in voting, law-making, governance, administration, adjudication, public office-holding, education, etc. Of course such individuals would remain free to exercise or not exercise any one or more of these rights guaranteed to them by the new Irish Constitution. But for all functional purposes, there should be no constitutional or legal distinctions whatsoever drawn between these Protestant permanent resident aliens and citizens in a United State of Ireland.

No point would be served by continuing to spell out the multifarious constitutional, legal, political, and human rights protections that could be designed for Protestants – with their active participation – who would be living in a United Irish State. Suffice it to say here that enormous progress can be made in this direction by breaking down and distinguishing the rights pertaining to (1) citizenship; (2) nationality; (3) residence; (4) voting; and (5) governance in a United Ireland. Fortunately, all these questions will be made incredibly easy to handle and therefore quite flexible to negotiate because both Great Britain and Ireland are members of the European Union (EU) – formerly the European Economic Community (EEC) – and thus bound by the various protections and privileges afforded citizens of EU member states without discrimination.⁴⁷

Admittedly, there might be a few hard-line Unionists in Northern Ireland who would refuse to live in a United Ireland even with exclusive British citizenship; a British passport; the rights to vote in both British and Irish elections; the right to hold any public office in a United Ireland; and the ultimate right of permanent residence for themselves and their descendants in Great Britain, etc. But I suspect that number would be very small. Such a small number of individuals should not be enabled to stand in the way of

⁴⁷ Treaty Establishing the European Economic Community, March 25, 1957, 298 UNTS 11 (entered into force January 1, 1958). The original signatories were Belgium, France, Germany, Italy, Luxembourg and the Netherlands. Ibid. Denmark, Ireland, and the United Kingdom became members on January 1, 1973. See TOEPKE, 'The European Economic Community - A Profile', 3 *Northwestern Journal of International Law and Business* (1981) 640 and 643.

finally establishing a definitive peace between the British People and the Irish People. Such irreconcilable Unionists should be given the option of emigration to Britain if they so desire, with relocation assistance provided and full compensation to be paid for any property interests they might decide to relinquish in Northern Ireland. I suspect that number would be even smaller.

6. SELF-DETERMINATION FOR THE PEOPLES OF IRELAND AND BRITAIN

This observation brings the analysis to the heart of the British government's claim that it is really in Northern Ireland to protect the right of such irreconcilable Unionists to self-determination.⁴⁸ I find that argument to strain credulity. At one time or another, the British government has invaded, occupied and exploited over one-quarter of the known world community of states and peoples during the course of modern history, including substantial sections of Asia, Africa, the Middle East, and North America.⁴⁹ Yet now it is portraying itself as the upholder of the principle of national self-determination in Northern Ireland in order to justify its control over one of its last remaining colonial enclaves around the world. Yet, by comparison, in Hong Kong the world community of states saw the British government turn over five and one-half million people to the Communist government in Beijing with the stroke of a pen – against their wishes and without even bothering to consult

⁴⁸ See WALKER, *supra* note 2, at 190, stating: "In reply to Republican apologists the official line likewise calls in the internationally hallowed principle of self-determination but this time on behalf of the separatist Loyalist 'people'." See also COOPER, 'Humanitarian Intervention: A Possibility for Northern Ireland', 12 Den. JILP (1983) 297 and 298, stating:

The British Government also justifies its actions as a means of fulfilling a formal promise not to abandon Northern Ireland's one million Protestants. The pledge, 'the guarantee', as it is called, is a section of the 1973 Constitution Act, which reads: "It is hereby affirmed that in no way will Northern Ireland or any part of it cease to be part of Her Majesty's dominion and of the United Kingdom without the consent of the majority of people in Northern Ireland, voting in a poll.

⁴⁹ At its height during the late 19th and early 20th centuries, the British empire comprised about one quarter of the world's area and population. Over 600 million people were ruled from London. 4 *Oxford Illustrated Encyclopaedia World History From 1800 to the Present Day* (1988) 51. See also 19 *The New Encyclopaedia Britannica* (15th ed. 1988) 521; *The Times Atlas of World History, European Colonial Empires 1815-1914* (1979) at 244-55.

them.⁵⁰ So much for the British government's reputed concern for the principle of national self-determination.

With respect to Northern Ireland, under international law the principle of self-determination of *peoples* appropriately applies to the entire British People, not a small group of irreconcilable Unionists. In this regard, public opinion polls have repeatedly shown that only 25% of the British People want to remain in Northern Ireland.⁵¹ It seems to me that the wishes of this substantial majority of the British People should – and ultimately will – be respected. For reasons explained more fully below, it is only a question of time before the British government will as a matter of fact and of law decolonize Northern Ireland.

As for those irreconcilable Unionists who are unwilling to live as Britons in a United Ireland under any circumstance, then of course they should be free to emigrate to Britain. If they do not want to remain British in a United Ireland, then by all means they should be permitted to be British in Britain. This option would fully implement whatever their self-proclaimed right of self-determination means, as well as the rights to peace and self-determination for everyone else involved in this conflict – the entirety of the British People and the entirety of the Irish People. The UN principle of equal rights and self-determination of *peoples* requires one and only one state for the British People (i.e., Great Britain) and one and only one state for the Irish People (i.e., Ireland). It does not sanction the continuation of an illegal British colony on the Island of Ireland.

7. THE ANGLO-IRISH AGREEMENT OF 1985

These latter observations bring the analysis directly to the Anglo-Irish Agreement of 1985.⁵² It used to be the case that the British government had

⁵⁰ Hong Kong's population at the time the treaty was signed was 5.5 million. See *New York Times*, 27 Sept. 1984, *pap.* 1, at 1, col. 3. Draft Agreement Between the United Kingdom of Great Britain and Northern Ireland, and the Government of the People's Republic of China on the Future of Hong Kong, White Paper (26 Sept. 1984), reprinted in 23 ILM 1366 (1984). See also MUSHKAT, 'The Transition from British to Chinese Rule in Hong Kong: A Discussion of Salient International Legal Issues', 14 Den. JILP (1986) 171.

⁵¹ See DOUMITT, *supra* note 31, at 222.

⁵² Agreement between the Government of the United Kingdom and the Government of Ireland, signed 15 November 1985, reprinted in 24 ILM (1985) 1582. The agreement was subject to ratification and was to enter into force on the date on which the two governments exchanged notifications of their acceptance. The Irish Parliament approved the agreement on November 21, 1985 and the British Parliament approved it on 27 November 1985. Notifications of acceptance

always argued that the situation in Northern Ireland was a 'domestic affair' or a matter of 'internal concern' invoking article 2, paragraph 7 of the United Nations Charter prohibiting UN intervention "in matters which are essentially within the domestic jurisdiction of any state."⁵³ This is similar to claims that have always been made by imperial colonial powers trying to keep the international community from dealing with a colonial situation in order to better hold onto the colony. Witness, for example, France's outlandish claim that the colonial situation in Algeria was part of the domestic affairs of France because France had annexed Algeria and treated it as an integral part of Metropolitan France, just like Paris.⁵⁴

Illegal fictions to the contrary, however, Algeria was never part of France. And Northern Ireland has never been part of Great Britain. Northern Ireland has always been an integral part of Ireland.

Note, however, that after the signature of the Anglo-Irish Agreement at Hillsborough on 15 November 1985, the British government can no longer make that specious type of claim.⁵⁵ This recent Anglo-Irish Agreement giving the Irish government a voice in all matters relating to Northern Ireland represents the ultimate and definitive British capitulation on this point.⁵⁶ Whatever the situation was before the Anglo-Irish Agreement of 1985, thereafter, from the perspective of international law, any British claim that the ultimate legal status of, as well as the entire domestic situation in, Northern Ireland are merely matters of 'internal concern' would be completely groundless.⁵⁷

This is because of the famous holding of the Permanent Court of International Justice in the *Tunis-Morocco Nationality Decrees Case* of 1923 to the effect that the moment a state concludes an international agreement on any subject, that subject is no longer a matter of exclusively internal concern but becomes a matter of international concern.⁵⁸ By signing the Anglo-Irish

were exchanged on 29 November 1985. See 24 ILM (1985) 1579.

⁵³ UN Charter Art. 2, para. 7, stating: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

⁵⁴ See 19 *The New Encyclopaedia Britannica* (15th ed. 1988) 521.

⁵⁵ See *supra* note 51 and accompanying text.

⁵⁶ See Anglo-Irish Treaty, *supra* note 52, at 1583-84. The treaty gives Ireland a formal role in governing Northern Ireland for the first time since Ireland's partition in 1921.

⁵⁷ See also Note, 'Bridging The Irish Sea: The Anglo-Irish Treaty of 1985', 12 *Syracuse Journal of International Law and Commerce* (1986) 585 and 588.

⁵⁸ *Nationality Decrees In Tunis and Morocco*, 1923 PCIJ (ser. E) No. 1, at 195 (February 7).

Agreement with respect to Northern Ireland in 1985, the British government knowingly removed the entire legal status of, as well as the internal affairs in, Northern Ireland from its so-called domestic jurisdiction to become a matter of international law and world politics. Indeed, the Anglo-Irish Agreement of 1985 has been duly registered with the United Nations Organization in accordance with UN Charter Article 102.⁵⁹ For this reason alone, that aforementioned UN Charter Article 2, paragraph 7 prohibition can no longer be applied with respect to Northern Ireland.

8. SOVEREIGNTY OVER NORTHERN IRELAND

Quite obviously, no point would be served by attempting to engage in a detailed technical analysis of the 1985 Anglo-Irish Agreement on an article-by-article basis. Suffice it to say here that this interpretation of the Agreement can be substantiated simply by reference to Section A thereof:⁶⁰

A

STATUS OF NORTHERN IRELAND

Article 1

The two Governments

- (a) affirm that any change in the status of Northern Ireland would only come about with the consent of a majority of the people of Northern Ireland;
- (b) recognize that the present wish of a majority of the people of Northern Ireland is for no change in the status of Northern Ireland;
- (c) declare that, if in the future a majority of the people of Northern Ireland clearly wish for and formally consent to the establishment of a united Ireland, they will introduce and support in the respective Parliaments legislation to give effect to that wish.

In other words, this international treaty specifically purports to deal with the sovereign legal status of Northern Ireland. Hence, according to the *Tunis-Morocco Nationality Decrees Case*, the sovereign legal status of Northern

⁵⁹ UN Charter Art. 102 states: "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it."

⁶⁰ See *supra* note 52, at 1583.

Ireland is no longer a matter of exclusive domestic concern with respect to Great Britain alone, but is now also officially and legally proclaimed to be the concern of Ireland as well. For that reason, Northern Ireland also becomes the concern of the entire world community of states, including the United Nations Organization and the European Union, *inter alia*.

Furthermore, by means of this treaty provision alone, the British government has effectively abandoned its claim to exercise exclusive sovereign control over Northern Ireland. The claim that a matter falls within the 'domestic affairs' of a state is another way of saying that the matter involves a question of that state's 'sovereignty'. By definition, 'domestic affairs' are a question of 'state sovereignty', and 'state sovereignty' means (in part) a state's exclusive control over its 'domestic affairs'. Under basic principles of international law, one state's conclusion of an international treaty on a matter of its alleged 'domestic affairs' with another state formally removes that subject matter from the exclusive sovereign control of the first state and endows the second state with the right to act upon that subject matter. In this case, the Anglo-Irish Agreement dealt explicitly with the sovereign "STATUS OF NORTHERN IRELAND" as both a juridical and a territorial entity, respectively.

9. NORTHERN IRELAND V. NEW MEXICO

If the British government truly believed that Northern Ireland was subject to its exclusive sovereign control, then it never would have concluded a treaty with Ireland over the sovereign legal status of Northern Ireland. Here a good historical analogy would be to the United States government signing a treaty with Mexico giving Mexico a consultative role with respect to both the legal status of, and the domestic affairs in, the North American state of New Mexico. The United States government would never sign such an agreement if it really believed that the legal status and domestic concerns of the state of New Mexico were subject to its exclusive sovereign control.

Moreover, I doubt very seriously that the United States government would ever sign a treaty with Mexico to the effect that if a majority of the people of New Mexico want to join Mexico, then of course the United States Congress would be prepared to pass domestic implementing legislation that cedes New Mexico to Mexico. Quite frankly, I could not envision any set of circumstances under which the United States of America would countenance the return of New Mexico to Mexico. Of course, if American citizens living in New Mexico want to be Mexicans, then they would have the perfect right under international law and the United States Constitution to go to Mexico and

expatriate themselves. To be sure, it might also be possible for many individuals who have dual Mexican-American nationalities to live in New Mexico. But even if someday the vast majority of people living in New Mexico were to become dual Mexican-American nationals, I doubt very seriously that the United States Congress would honor any vote by them for the retrocession of New Mexico to Mexico.

Conversely, if the United States government were to sign such a treaty with Mexico over New Mexico, then it would be a pretty good sign that at some particular point in time in the future, the United States would be prepared to countenance the reversion of New Mexico to Mexico. In any event, the conclusion of such a treaty would mean *ipso facto* that both the legal status of, as well as the domestic affairs in, its subject matter (i.e., New Mexico) were matters of international concern and jurisdiction that were no longer subject to the exclusive sovereign control of the United States of America, but henceforth involved Mexico as well as the entire international community, including the United Nations Organization. Today, whatever the legal situation was before 1985, these same principles of international law and world politics now hold true for Northern Ireland.

10. THE UNIONISTS ARE RIGHT

I submit that the British government knew full well that it was doing this when it signed the Anglo-Irish Agreement in 1985. In other words, the British government purposely, knowingly, willingly, and voluntarily surrendered its long-standing claim that Northern Ireland was a matter of purely internal concern subject to its exclusive sovereign control alone. I also believe that the British government did this for the express purpose of sending a signal to hard-line Unionists in Northern Ireland of its eventual intention to withdraw from (that is, to decolonize) Northern Ireland.

Thus, I believe that hard-line Unionists in Northern Ireland have performed the appropriate interpretation of the significance of the Anglo-Irish Agreement. This interpretation does not mean that the British government is going to leave Northern Ireland tomorrow. But it seems pretty clear from both the mere existence, as well as the actual contents, of the Anglo-Irish Agreement that the British government will eventually withdraw from Northern Ireland. This interpretation of the Agreement is also consistent with several public statements

made by British government officials to the effect that there is no way the Provisional IRA can be defeated militarily.⁶¹

Hence, the Hillsborough Agreement cannot properly be interpreted as a capitulation by the Irish government to the continued presence of a British colony in Northern Ireland. Even if the FITZGERALD government had attempted to do so in 1985, it had no authority to conclude such a treaty that would have expressly violated article 2 of the Irish Constitution: "The national territory consists of the whole island of Ireland, its islands and the territorial seas."⁶² And under international law, the British government was charged with knowledge of this constitutional provision.

As a party to the Vienna Convention on the Law of Treaties, the British government realized full well that the Irish government had no authority to conclude an international agreement that contradicted Ireland's constitutional claim to Northern Ireland without obtaining a constitutional amendment to that effect, which obviously never occurred.⁶³ So according to this Vienna Convention provision, the Anglo-Irish Agreement can only be interpreted in a manner consistent with the Irish Constitution and its claim to sovereignty over Northern Ireland. From the perspective of international law, therefore, the Hillsborough Agreement cannot be interpreted as a surrender of the Irish claim to sovereignty over Northern Ireland, but rather, to the contrary, as an implicit British acceptance of that claim.⁶⁴

⁶¹ See COOGAN, *supra* note 20, at 472. See also M. FARRELL, *Northern Ireland: The Orange State* (1976) 332.

⁶² The Republic of Ireland Constitution Art. II. In this regard, Article 3 further provides: "Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstát Éireann and the like extra-territorial effect."

⁶³ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (came into force January 27, 1980). Part V, section 2 (dealing with invalidity of treaties), Article 46 provides as follows:

Article 46. Provisions of Internal Law Regarding Competence to Conclude Treaties

- (1) A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
- (2) A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

See also I. SINCLAIR, *The Vienna Convention on the Law of Treaties* (2d. ed. 1984) 159-97.

⁶⁴ But compare A. COUGHLAN, *Fooled Again?* (1986).

11. CONCLUSION

Commenting upon the reunification of Ireland, the Irish Nobel Peace Prize Winner and former IRA Chief-of-Staff SEAN MACBRIDE wrote an *Introduction* to BOBBY SANDS' autobiography *One Day In My Life* (1983). ROBERT SANDS, M.P., spent the last four and one-half years of his life in the H-Blocks of Long Kesh concentration camp near Belfast. He started a hunger strike on March 8, 1981 in order to protest the THATCHER government's refusal to extend prisoner of war status to captured members of the Irish Republican Army, and eventually died on May 5, 1981.

At the conclusion of his *Introduction*, SEAN MACBRIDE wrote approvingly:

In the early stages of the last decade, Paul Johnson, one of Great Britain's most distinguished journalists, editor of the *Spectator*, and one of Prime Minister Margaret Thatcher's most ardent supporters, wrote in *The New Statesman*:

In Ireland over the centuries, we have tried every possible formula: direct rule, indirect rule, genocide, apartheid, puppet parliaments, real parliaments, martial law, civil law, colonisation, land reform, partition. Nothing has worked. The only solution we have not tried is absolute and unconditional withdrawal. Why not try it now? It will happen in any event!

With public opinion polls consistently demonstrating that only 25% of the British People want to remain in Northern Ireland, this author is fully convinced that he will live to see the termination of British colonial occupation in Northern Ireland and the reunification of the Irish State. It is most tragic and unfortunate that SEAN MACBRIDE could not live to see that glorious day for whose realization he had worked an entire lifetime to achieve. But he died fully convinced of inevitable victory for the Irish People.

It is my opinion that over time the vast majority of the British People will manifest their intention to decolonize Northern Ireland. Hence my conclusion that the world community of states should be working now to encourage the British government to publicly adopt the position that it will decolonize Northern Ireland in cooperation with the United Nations Organization and the European Union, and with full and effective guarantees for the Protestants of Northern Ireland under the aforementioned treaties and implementing legislation, as well as under a Bill of Rights incorporated into a new Irish Constitution. Whenever that becomes the official position of the British government, I submit that most of the violence perpetrated by the IRA will terminate, the Irish economy could be reintegrated, and the United States

government (together with the EU) would then proceed to provide substantial economic assistance to a United Ireland in order to help it get upon its feet.

Pursuant to the proposals outlined above, every person living in a United Ireland – whether Protestant or Catholic, citizen, or resident alien – would have recourse to a domestic court of law and ultimately, to the European Court of Human Rights or the United Nations Human Rights Committee, to assert his or her rights recognized by three seminal international human rights treaties as well as by a constitutionally protected Bill of Rights. Indeed, these substantive and procedural protections would constitute a dramatic step forward toward the progressive liberalization of the human rights situation for the people living in today's Republic of Ireland as well. In other words, under the aforementioned proposals, everyone currently living on the Island of Ireland – whether Protestant or Catholic – would have significantly more substantive and procedural rights in a United Ireland than they possess today in either Northern Ireland or the Republic of Ireland.

In this fashion, a United Ireland could become a 'win-win' solution for everyone living there. The concretization of that prospect could provide a substantial incentive for all people currently living on the Island of Ireland to work toward the reunification of the Irish State. There is an enormous amount of work toward progressive reunification that can be done by people of good faith on all sides of this dispute irrespective of the feeble steps toward peace that have been taken by the two governments involved.

The Irish People (whether Protestant or Catholic) living on both sides of this artificial border must no longer allow themselves to remain captives to their respective governments' shortsighted policies. The problems of Northern Ireland have been created and perpetuated by both governments – though, to be sure, to different degrees and in different ways. For the most part, the two governments are the problem, not the solution, to the so-called 'troubles' that have plagued Northern Ireland for the past seventy years.

It is time for all the people living on the Island of Ireland to stop looking toward the two governments to produce a solution to the problems of Northern Ireland. Rather, they must look to each other. They must reach out to each other in fraternal solidarity with the full realization that they share more in common with each other than they do with either one of the two governments involved. They must transcend these two governments in order to work toward peaceful reunification on the basis of the 'functional-integration' of their inescapably interconnected lives.⁶⁵ As the arch-realist himself, HANS MORGENTHAU once said: "Thus the future of the civilized world is intimately

⁶⁵ See, e.g., D. MITRANY, *The Functional Theory of Politics* (1975).

tied to the functional approach to international organization.”⁶⁶ The same can be said for the Island of Ireland.⁶⁷

12. POSTSCRIPT

On 15 December 1993 British Prime Minister JOHN MAJOR and Irish Prime Minister ALBERT REYNOLDS concluded the so-called Downing Street Declaration on Northern Ireland. Once again, no point would be served here by analyzing this lengthy document on a line-by-line basis. Suffice it to say that from the perspective of international law and politics, the primary significance of this Declaration was that for the first time ever the British government formally and publicly acknowledged the right of the Irish People to self-determination on the Island of Ireland. The critical passage from the Declaration is as follows:

. . .

The British Government agree that it is for the people of the island of Ireland alone, by agreement between the two parts respectively, to exercise their right of self-determination on the basis of consent, freely and concurrently given, north and south, to bring about a united Ireland, if that is their wish.

They reaffirm as a binding obligation that they will, for their part, introduce the necessary legislation to give effect to this, or equally to any measure of agreement on future relationships in Ireland which the people living in Ireland may themselves freely so determine without external impediment.

. . .

To be sure, the Downing Street Declaration built upon the Anglo-Irish Agreement of 1985. Nevertheless, putting aside its ambiguities and obfuscations, the Downing Street Declaration represented a major conceptual breakthrough for the British government: after 800 years of colonial occupation in Ireland, the British government finally recognized the right of the Irish People to self-determination over the Island of Ireland.

Of course, this basic concession on a matter of fundamental principle by the British government was long overdue. But at least and at last it was finally made. This fundamental concession by the British government paved the way

⁶⁶ See MORGENTHAU, ‘Introduction’ to D. MITRANY, *A Working Peace System* 7 (1966) at 11.

⁶⁷ See e.g., HOUSE, ‘The Border That Wouldn’t Go Away: Irish Integration in the EC’, 11 NYL Sch. JICL (1990) 229.

for the decision by the Irish Republican Army to announce “a complete cessation of military operations” as of midnight, Wednesday, 31 August 1993. It is hoped that these developments will gradually lead to the creation of a free and United Ireland where Protestants and Catholics can live and work together with peace, harmony, justice, equality, and prosperity for all.