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THE RIGHT OF THE PEOPLE OF THE WHOLE OF IRELAND TO SELF-DETERMINATION, UNITY, SOVEREIGNTY AND INDEPENDENCE *

RICHARD J. HARVEY **

I. INTRODUCTION

The British army has been actively engaged in the Six Counties of Northern Ireland¹ for twenty-one years. This engagement, officially called "military aid to the civil power,"² has lasted longer than any war

* This Article was addressed to the 13th Congress of the International Association of Democratic Lawyers, Barcelona, Mar. 19-24, 1990. It is dedicated to the memories of Seán MacBride and Pat Finucane, both of whom devoted their lives to the protection of the human rights of others. They reviewed earlier drafts of this work and each offered his unequivocal support for its aims. In my last conversation with Seán MacBride, he agreed to sponsor this project to secure United Nations consideration for Ireland's right to self-determination. In my last conversation with Pat Finucane, shortly before his assassination, he agreed to research the substantial number of cases which had been referred to the European Commission of Human Rights, arising out of the armed conflict in the Six Counties, and to give me the benefit of his considerable experience in that forum. Although the one man was twice the age of the other, it safely may be said that each died before his time.

I particularly wish to acknowledge the generous help and guidance I have received directly from two heroic South African law teachers, Kader Asmal, senior lecturer in law at Trinity College in Dublin, and Raymond Suttner, lecturer in law, at the University of Witwatersrand in Johannesburg, who have made their own researches and suggestions available to me. I am most grateful for the painstaking assistance of the editorial staff of the *New York Law School Journal of International and Comparative Law*, especially Kerry Sullivan, Anthony DiNota and Brien Jacobson.

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1. A word on nomenclature: Northern Ireland comprises six counties of the ancient nine-county province of Ulster. Great Britain comprises England, Scotland, Wales and a number of small islands. The United Kingdom comprises Great Britain and Northern Ireland. The island of Ireland comprises 32 counties, 26 of which are under the effective jurisdiction of the Irish Republic. This Article argues that by international law and under the Constitution of the Irish Republic, Ireland has a claim of legal right to the six counties which are currently directly ruled and militarily occupied by Britain. Accordingly, the expression "Six Counties" will be used in recognition of this legal right.

2. SUNDAY TIMES OF LONDON INSIGHT TEAM, NORTHERN IRELAND: A REPORT ON THE CONFLICT 105-06 (1972); *see also* E. O'BALLANCE, TERROR IN IRELAND 122 (1981). This official British government definition of the constitutional role of its army in the Six Counties is anomalous since the British general officer commanding was given overall responsibility for all security operations. "This made a legal nonsense of the polite British

in modern British military history.³ The British government declared in 1969 that "troops will be withdrawn when law and order has been restored,"⁴ and emphasized that they "have been provided on a temporary basis."⁵ Since then, an entire generation has grown to adulthood in the Six Counties in an atmosphere of armed occupation, draconian "emergency" laws⁶ and increasing economic and social despair.

When the Irish government tried to raise this issue before the United Nations Security Council and General Assembly in 1969, British influence stalled the question.⁷ Twenty-one years later, over 2,700 people in the Six Counties have been killed⁸ and over 31,000 have been injured in "the

fiction that the British soldiers in Northern Ireland were simply acting in aid of civil power." *Id.*

3. See generally K. KELLEY, *THE LONGEST WAR* (2d ed. 1988).

4. Downing Street Declaration, Aug. 19, 1969, reprinted in 24 U.N. SCOR (1503d mtg.) at 6, U.N. Doc. S/Agenda/1503 (1969), and in *Seven-Point Declaration*, *The Times* (London), Aug. 20, 1969, at 1, col. 1. This declaration, issued by the British government on August 19, 1969, following talks with the Northern Ireland prime minister Major Chichester-Clark provides:

The United Kingdom Government have [sic] ultimate responsibility for the protection of those who live in Northern Ireland when, as in the past week, a breakdown of law and order has occurred.

In this spirit, the United Kingdom Government responded to the requests of the Northern Ireland Government for military assistance in Londonderry and Belfast in order to restore law and order. They emphasize again that troops will be withdrawn when law and order has been restored.

The Northern Ireland Government have [sic] been informed that troops have been provided on a temporary basis in accordance with the United Kingdom's ultimate responsibility.

Downing Street Declaration, supra.

5. *Id.*

6. Roy Jenkins, the home secretary who first introduced the Prevention of Terrorism (Temporary Provisions) bill to Parliament in 1974, himself described the new powers as "draconian" and "unprecedented in peacetime," but "fully justified to meet the clear and present dangers." 882 PARL. DEB., H.C. (5th ser.) 35 (1974).

7. See Letter from C.C. Cremin, Ireland's Permanent Representative to the United Nations, to the President of the Security Council (Aug. 17, 1969), 24 U.N. SCOR Supp. (July-Sept. 1969) at 159, U.N. Doc. S/9394 (1971) [hereinafter Cremin Letter], reprinted in IR. DEP'T OF EXTERNAL AFFAIRS, IRELAND AT THE UNITED NATIONS 1969, at 8 (1969) [hereinafter IRELAND AT THE UNITED NATIONS]; Address by Dr. Patrick J. Hillery, Ireland's Minister of External Affairs, United Nations Security Council Meeting (Aug. 20, 1969), 24 U.N. SCOR (1503d mtg.) at 2, U.N. Doc. S/Agenda/1503 (1969) [hereinafter Hillery Address], reprinted in IRELAND AT THE UNITED NATIONS, *supra*, at 14.

8. Information Service on N. Ir. Conflict & Anglo-Ir. Affairs, Ir. Information Partnership, Agenda: Summary Tables 1 (Aug. 11, 1989) (extracts from forthcoming edition) [hereinafter Ir. Information Partnership].

troubles."⁹ On the same scale, in Britain, the figures would amount to nearly 100,000 dead and over one million injured.¹⁰ In relative terms, "50 percent more Protestants have been killed in the security forces between 1969 and 1988 than the USA lost during the entire Vietnam War."¹¹

This Article aims to show that the problem in the Six Counties is rooted in the partition of Ireland in 1920, which was then, and remains today, a flagrant denial of the right of the Irish people to self-determination. We believe that this problem has undermined international peace and security and that the international community is under a binding legal obligation to examine the causes of decades of human rights violations which flow from Ireland's partition and to assist the peoples of Ireland and Britain, through appropriate organs of the United Nations, in finding a peaceful resolution of the question.

II. OVER TWENTY YEARS OF INACTION IN THE UNITED NATIONS SECURITY COUNCIL AND GENERAL ASSEMBLY

In August 1969, the Irish government requested an urgent meeting of the United Nations Security Council "in connexion with the situation in the six counties of Northern Ireland."¹² Nearly forty years earlier, when seventy percent of the Irish people demanded independence,¹³ Britain had partitioned Ireland and created an artificial governmental entity in the industrialized northeastern Six Counties, dominated by anti-Catholic sectarians, the "Protestant ascendancy."¹⁴ As Ireland's minister of external affairs, Dr. Patrick J. Hillery, told the Security Council in 1969,

9. *Id.*

10. See B. ROWTHORN & N. WAYNE, *NORTHERN IRELAND: THE POLITICAL ECONOMY OF CONFLICT* 61 (1988).

11. *Id.* at 61-62.

12. Cremin Letter, *supra* note 7, at 159.

13. The only occasion on which the people of all Ireland have been permitted to hold elections to determine their political future was in 1918. B. ROWTHORN & N. WAYNE, *supra* note 10, at 189. Sinn Féin, with a political program demanding complete independence for the unitary state of Ireland, won the election with 69.5% of the vote. *Id.*

14. On the "Protestant ascendancy," see K. BOYLE, T. HADDEN & P. HILLYARD, *LAW AND STATE: THE CASE OF NORTHERN IRELAND* 162-67 (1975). Religious sectarianism in Ireland has been essentially confined to the Six Counties, where anti-Catholic bigotry has been used to prevent working class unity and to preserve the economic power of those who saw their wealth linked inextricably with the British Empire and its markets. See K. KELLEY, *supra* note 3, at 62-66, 75, 93-94, 96, 100-01. See generally M. FARRELL, *NORTHERN IRELAND: THE ORANGE STATE* (2d ed. 1980).

Partition was accomplished by the British Government as a concession to an intransigent minority within the Irish nation. Ireland was divided as a result of an Act of the British Parliament in 1920, an Act in favour of which not one Irish vote, either North or South, was cast . . . an Act which explicitly contemplated the reunion of Ireland.¹⁵

In every decade since partition, the nationalist¹⁶ population in the province has been subject to repressive legislation envied by the *apartheid* regime of South Africa,¹⁷ including internment without charge or trial¹⁸ and a gross pattern and practice of discrimination in housing, employment and voting rights.¹⁹ In August 1969, the nationalists came under sustained and brutal attacks by riotous mobs, frequently led by armed police.²⁰ The Westminster government sent in the British army to restore order,²¹ but, in the view of the Irish government of the day, the intervention of British troops was not "acceptable [or] likely to restore peaceful conditions, and certainly not in the long term."²² Ireland had earlier

15. Hillery Address, *supra* note 7, at 4.

16. A further word on nomenclature: "nationalist" is used here to denote all who wish to see Ireland reunited as one nation. The term "republican" is frequently used by nationalists to express their ideological commitment to a united Republic of Ireland. While the majority of nationalists (but by no means all) are Catholics, the words "Catholic" and "Protestant" are only used here where relevant to describe sectarian discrimination. Likewise, the term "unionist" covers all who wish to see the Six Counties remain united with Britain. "Loyalist" is often used to indicate their ideological commitment to the British Crown. The majority of unionists are Protestants (largely Presbyterian).

17. See M. FARRELL, *supra* note 14, at 93 ("It was little wonder that Mr. Vorster, then South African Minister for Justice, introducing a new Coercion Bill in the South African Parliament in April 1963, commented that he 'would be willing to exchange all the legislation of that sort for one clause of the Northern Ireland Special Powers Act.'").

18. K. BOYLE, T. HADDEN & P. HILLYARD, *supra* note 14, at 55-77. Although the practice of indefinite internment was suspended in December 1975, the power to reintroduce it remains in the Northern Ireland (Emergency Provisions) Act, 1978, sched. 1. See G. HOGAN & C. WALKER, *POLITICAL VIOLENCE AND THE WAR IN IRELAND* 86-96 (1989).

19. DISTURBANCES IN NORTHERN IRELAND, REPORT OF THE COMMISSION APPOINTED BY THE GOVERNMENT OF NORTHERN IRELAND, 1969, CMND. 532, at 91-93 (the CAMERON REPORT). This report, commissioned by the Northern Ireland Parliament in the immediate aftermath of widespread disorder in Derry, Belfast and other towns, constituted a major indictment of civil rights in the Six Counties. See K. BOYLE, T. HADDEN & P. HILLYARD, *supra* note 14, at 8-9; see also K. KELLEY, *supra* note 3, at 47-48, 63-65, 82, 97-101, 171.

20. M. FARRELL, *supra* note 14, at 259-64.

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

22. Cremin Letter, *supra* note 7, at 159.

asked Britain to agree to the urgent dispatch of a United Nations peacekeeping force to the Six Counties, or, alternatively, to a joint force of British and Irish³ troops.²³

Faced with British opposition to these proposals,²⁴ the Irish government wrote to the Security Council that it "cannot stand by and see Irish men, women and children suffer injury or worse in the Six Counties of Northern Ireland, and cannot tolerate the tensions created along the border which separates part of Ireland from the area of our present effective jurisdiction."²⁵ Dr. Hillery disputed the claim of Britain's permanent representative to the United Nations, Lord Caradon, that the "domestic jurisdiction" exception under article 2(7) of the United Nations Charter prohibited discussion of the question,²⁶ asserting,

Although we in Ireland have lived for some time with the reality of British control of the North of our country, we do not in any way concede to them the right to exercise jurisdiction there. What happens there can never be a matter of indifference or unconcern to people living in the independent part of our national territory, particularly at a time when our compatriots in the North are driven to seek refuge with us, as many of them are now doing. What happens there can also vitally affect our relations with Great Britain.

The Six Counties, after all, do not constitute a geographically isolated area, but are an integral part of the island of Ireland and an important part of a country which throughout history has been universally regarded as one unit. This historic unity of Ireland is so self-evident as not to require argument. The claim of the Irish nation to control the totality of Ireland has been asserted over centuries by successive generations of Irish men and women, and it is one which no spokesman for the Irish nation could ever renounce. The representative of Great Britain is certainly aware that that claim has been asserted and sustained without interrup-

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* Article 2(7) of the United Nations Charter provides:

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.

U.N. CHARTER art. 2, para. 7.

tion up to the present day, and it has never been conceded that a unilateral action on the part of the British Government could sunder an entity which nature and history have made one.²⁷

The Irish Constitution reinforces this position.²⁸ The Irish nation has always denied the legality of the Anglo-Irish Treaty of 1922,²⁹ which was imposed upon them by the British threat of "immediate and terrible war."³⁰ Moreover, the Vienna Convention on the Law of Treaties (the "Vienna Convention"),³¹ which entered into force in 1980, explicitly denies validity to treaties which violate a subsequently emerging norm of customary international law.³² As will be discussed, self-determination has emerged as a peremptory norm of customary international law, *ius*

27. Hillery Address, *supra* note 7, at 2-3.

28. Article 2 of the Irish Constitution provides: "[t]he national territory shall consist of the whole island of Ireland, its islands and the territorial seas." IR. CONST. art. 2.

Article 3 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.

Id. art. 3.

29. See generally F.S.L. LYONS, IRELAND SINCE THE FAMINE 511-23 (2d ed. 1973). The British Commonwealth's highest appeal court, the Judicial Committee of the Privy Council, held in 1935 that the Statute of Westminster (1931) empowered the Irish Free State to repudiate the treaty. *Moore and Ors. v. Attorney General for the Irish Free State*, [1935] App. Cas. 434. The Privy Council ruled that, since the Statute of Westminster, the Irish Free State Act (1922) and the treaty itself were all acts of the British Parliament, and since the Statute of Westminster gave the legislature of the Irish Free State power to amend acts of the British Parliament, then the Dáil Éireann could amend the treaty at will. The Dáil was thus free to determine the extent of the territory, jurisdiction and citizenship of Ireland which it did in enacting the Irish Constitution of 1937, and particularly articles 2 and 3. J.M. KELLY, THE IRISH CONSTITUTION 9-17 (1980).

30. B. ROWTHORN & N. WAYNE, *supra* note 10, at 190. Some sources claim that the threat, made by British Prime Minister Lloyd George, was "war, and war in three days." See F.S.L. LYONS, *supra* note 29, at 437-38; D. MACARDLE, THE IRISH REPUBLIC 586-88 (4th ed. 1951); F. PAKENHAM, PEACE BY ORDEAL 206-302 (1935); R. TAYLOR, MICHAEL COLLINS 247-52 (1952).

31. *In force* Jan. 27, 1980, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969) [hereinafter Vienna Convention], and in BASIC DOCUMENTS IN INTERNATIONAL LAW 349 (I. Brownlie 3d ed. 1983).

32. Article 64 of the Vienna Convention provides: "*Emergence of a new peremptory norm of general international law (ius cogens)*: If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." Vienna Convention, *supra* note 31, art. 64.

cogens,³³ and both by operation of the Vienna Convention and under the doctrine of intertemporal law,³⁴ Britain's claim of sovereignty over the Six Counties is based on an invalid application of outmoded concepts of international law.

Dr. Hillery noted the inconsistency between Britain's position on the Six Counties and its earlier willingness, in 1964, to ask the Security Council to deal with tension in the sovereign State of Cyprus.³⁵ He also noted that the United Nations had repeatedly discussed *apartheid* in South Africa over the objections of that country's regime.³⁶

C.C. Cremin, Ireland's permanent representative to the United Nations in 1969, invoked the United Nations Charter, the Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples (the "Decolonisation Declaration"),³⁷ paragraph 6 of which reads: "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."³⁸

33. See *infra* note 44 and accompanying text.

34. For the origins of this doctrine, see the exposition of Judge Max Huber in *Island of Palmas (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 831 (1928). For a detailed analysis of the present status of this principle, see Elias, *The Doctrine of Intertemporal Law*, 74 AM. J. INT'L L. 285, 292-93 (1980) ("While the issue is vital in the determination of title to territory *simpliciter*, it is not necessary to fix a precise date in determining whether or not a change has taken place in the evolution of a rule of general international law. All that is necessary is that the older law, whatever it was, be conclusively proved to have yielded place to the new law, as claimed, and this is most clearly established by general state practice or by an international treaty laying down the specific change in customary international law.").

Thus, the Friendly Relations Declaration of 1970, see *infra* notes 59-62 and accompanying text, provides proof of contemporary general state practice in relation to the right to self-determination. The international covenants which entered into force in 1976, see *infra* notes 50-53 and accompanying text, constitute an international treaty. Separately and together, these developments conclusively prove that the older law, under which Britain imposed its will on Ireland by coercion, has yielded place to new law under which the people of the whole island of Ireland have the right freely to pursue their political, economic and cultural self-determination.

35. Hillery Address, *supra* note 7, at 3.

36. *Id.*

37. Explanatory Memorandum from C.C. Cremin to the Secretary-General of the United Nations (Sept. 5, 1969), 24 U.N. GAOR at 4, U.N. Doc. A/7651 (1969) [hereinafter Cremin Memo], reprinted in IRELAND AT THE UNITED NATIONS, *supra* note 7, at 22.

38. G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961), reprinted in BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 31, at 300 [hereinafter Decolonisation Declaration].

Lord Caradon conceded that there existed a breakdown in law and order in the Six Counties,³⁹ and he assured the Security Council that British troops would be withdrawn when order was restored, that the greater part of the civil rights demands were accepted and that reform was under way.⁴⁰

Despite expressions of sympathy and concern by many Security Council members, further consideration of the item was suspended and never resumed.⁴¹ Similarly, when Dr. Hillery asked the General Assembly to place the same item on its agenda, the responsible committee deferred its decision and no further action was taken.⁴² Thus, while there have been numerous submissions to the United Nations Commission on Human Rights over the past two decades concerning human rights in the Six Counties,⁴³ the Security Council and the General Assembly have yet to conduct any investigation relating to the status of the Six Counties of "Northern Ireland."

III. THE RIGHT OF THE PEOPLE OF IRELAND TO SELF-DETERMINATION

A. *Self-Determination as Customary International Law (Jus Cogens)*

International law has developed since 1969 to the point where it can no longer be seriously disputed today that the right of peoples to self-determination is part of customary international law.⁴⁴ Those developments are amply summarized in the International Court of Justice's 1971

39. Address by Lord Caradon, United Nations Security Council meeting (Aug. 20, 1969), 24 U.N. SCOR (1503d mtg.) at 6, U.N. Doc. S/Agenda/1503 (1969) [hereinafter Caradon Address] (quoting Downing Street Declaration, *supra* note 4).

40. *Id.*

41. IRELAND AT THE UNITED NATIONS, *supra* note 7, at 20.

42. *Id.* at 32.

43. See, e.g., Int'l Ass'n of Democratic Lawyers, Submission to the United Nations Commission on Human Rights (Feb. 16, 1990) (on the "Birmingham Six") [hereinafter IADL Submission].

44. See, e.g., Gross-Espiell, *Self-Determination and Jus Cogens* in UN LAW/FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW 167, 167 (A. Cassese ed. 1979) ("[T]oday the principle has been held to constitute an example of *jus cogens*, that is, a 'peremptory norm of general international law' . . . the Friendly Relations [Declaration of 1970] clearly affirms this principle."); see also Lachs, *The Law in and of the United Nations (Some Reflections on the Principle of Self-Determination)*, 1 INDIAN J. INT'L LAW 421, 429-42 (1961) ("By the time the Charter of the United Nations was being drafted the principle [of self-determination] had already become part of the general principles of international law.").

Namibia Opinion, specifically in the separate opinion of Judge Ammoun, vice-president of the court:⁴⁵

As for the "general practice" of States to which one traditionally refers when seeking to ascertain the emergency of customary law, it has, in the case of the right of peoples to self-determination, become so widespread as to be not merely "general" but universal, since it has been enshrined in the Charter of the United Nations (Art. 1, para. 2, and Art. 55) and confirmed by . . . pacts, declarations and resolutions, which, taken as a whole, epitomize the unanimity of States in favour of the imperative right of peoples to self-determination. There is not one State, it should be emphasized, which has not, at least once, appended its signature to one or other of these texts, or which has not supported it by its vote.⁴⁶

This "universal practice" of States, therefore, favors review of the situation in the Six Counties of Northern Ireland by the United Nations Security Council, pursuant to articles 34 and 35 of the Charter,⁴⁷ or by the General Assembly, under articles 10 and 11,⁴⁸ or by both.

45. Legal Consequences for States on the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 74 (Advisory Opinion).

46. *Id.* at 74-75. Among the "pacts, declarations and resolutions" to which Judge Ammoun referred were the Atlantic Charter, the United Nations Charter, the Charter of the Organisation of African Unity, the Decolonisation Declaration, *supra* note 38 and accompanying text, and the Friendly Relations Declaration, *infra* note 59 and accompanying text.

47. Article 34 of the United Nations Charter provides: "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." U.N. CHARTER art. 34.

Article 35(1) provides: "Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly." *Id.* art. 35, para. 1.

48. Article 10 of the United Nations Charter provides:

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter and, except as provided in Article 12, [matters under consideration by Security Council] may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Id. art. 10.

Professor Raymond Suttner, a leading anti-apartheid jurist at the University of Witwatersrand in Johannesburg, writes,

Without self-determination of a people there can be no human rights for individuals. Self-determination is the key human right which is the precondition for the realization of all other rights. A nation must be 'master of its own house' before it can provide opportunities for its citizens to realize themselves fully as human beings.⁴⁹

Further support for this approach is found in a major development in international treaty law since 1969: the entry into force in 1976 of the two international human rights covenants. The International Covenant on Economic, Social and Cultural Rights⁵⁰ and the International Covenant on Civil and Political Rights⁵¹ have been signed and ratified by both the British and Irish Governments.⁵² Common article 1 of each covenant provides:

- 1) All peoples have the right to self-determination. By virtue of that right they freely determine 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 obliga-

Article 11(2) provides:

The General Assembly may discuss any questions relating to the maintenance of international peace and security, . . . and, except as provided in Article 12, may make recommendations to the State or States concerned or to the Security Council or to both. Any such question, on which action is necessary, shall be referred to the Security Council by the General Assembly either before or after discussion.

Id. art. 11, para. 2.

Article 11(3) provides: "The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security." *Id.* art. 11, para. 3.

49. R. Suttner, *The Internationalization of the Apartheid Question* (1990) (unpublished doctoral thesis).

50. *In force* Jan. 3, 1976, 993 U.N.T.S. 3, *reprinted in* 6 I.L.M. 360 (1967), *and in* BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 31, at 257.

51. *In force* Mar. 23, 1976, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967), *and in* BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 31, at 270.

52. The British government signed both covenants in 1968 and ratified them in 1976. The Irish government signed both in 1973 and ratified them in 1989. 45 U.N. GAOR at 5, 10, U.N. Doc. A/45/403 (1990).

tions 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 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.⁵³

In view of these more recent developments in international law, the British government today could not legitimately raise the objection of article 2(7) of the United Nations Charter which it urged in 1969.⁵⁴ Furthermore, Britain's position on self-determination in the subsequent context of the Falklands-Malvinas Islands dispute appears totally at variance with its former position over the Six Counties. In 1982, British foreign secretary Francis Pym addressed the General Assembly, laying heavy emphasis on his government's commitment to the right to self-determination and speaking of it as "not just a principle, but a fundamental right."⁵⁵ He asserted,

Thanks to our recognition of this right in regard to our own dependencies, nearly 50 Members of this Assembly have taken their places here. . . . The achievements of the British in decolonisation since the last war have been our expression and application of the principle that we have long supported in other parts of the world.⁵⁶

This assertion ignores the fact that the regiments sent to the South Atlantic under the banner of self-determination of peoples were the same regiments which had received their training on the streets of the Six Counties. Further, as the European Commission of Human Rights noted in its report on the allegations of torture, inhuman and degrading treatment

53. Compare International Covenant on Economic, Social and Cultural Rights, *supra* note 50, art. 1 with International Covenant on Civil and Political Rights, *supra* note 51, art. 1. On those covenants, Professor Ian Brownlie notes: "The nature of the subject matter is such that even for non-parties the content of the Covenants represents authoritative evidence of the content of the concept of human rights as it appears in the Charter of the United Nations." BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 31, at 257.

54. See *supra* note 26 and accompanying text.

55. 37 U.N. GAOR (9th mtg.) at 63, U.N. Doc. A/37/PV.9 (1982).

56. *Id.*

brought in *Ireland v. United Kingdom*,⁵⁷ those same regiments received their grounding in "counter insurgency operations in Palestine, Malaya, Kenya and Cyprus and more recently in the British Cameroons (1960-61), Brunei (1963), British Guiana (1964), Aden (1964-67), Borneo/Malaysia (1965-66), the Persian Gulf (1970-71) [and] Northern Ireland (1971)."⁵⁸ The peoples of former British colonies do not all remember their path to independence as being as peaceful as Mr. Pym's statement implies.

B. Member States as Guarantors of the Right to Self-Determination

The year after the Irish government had tried to persuade the international community to address the situation in the Six Counties, a major milestone was passed in international law, with the unanimous adoption of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (the "Friendly Relations Declaration").⁵⁹ The consensus status of this declaration gave it enormous force and it has since been recognized by the International Court of Justice as a declaration of customary international law.⁶⁰ On the rights of peoples to self-determination, the views of member states are clearly spelled out in the preamble to the declaration:

Convinced that the subjection of peoples to alien subjugation,

57. 1976 Y.B. EUR. CONV. ON HUM. RTS. 512 (Eur. Comm'n on Hum. Rts.).

58. *Id.* at 776 (citing MAJORITY REPORT OF THE COMMITTEE OF PRIVY COUNSELLORS APPOINTED TO CONSIDER AUTHORISED PROCEDURES FOR THE INTERROGATION OF PERSONS SUSPECTED OF TERRORISM, 1972, CMND. NO. 4901, at 3 (1972) (the PARKER REPORT)).

59. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1971) [hereinafter Friendly Relations Declaration], reprinted in BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 31, at 35.

60. See, e.g., *Nicaragua v. United States*, 1986 I.C.J. 14, 99-101. The court held that the question whether there exists in customary international law an *opinio juris*:

[M]ay though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) The effect of consent to such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it must be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.

Id.

Prof. Brownlie writes: "The legal significance of the Declaration lies in the fact that it provides evidence of the consensus among Member States of the United Nations on the meaning and elaboration of the principles of the Charter." BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 31, at 35.

domination and exploitation constitutes a major obstacle to the promotion of international peace and security,

Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality,

Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of any State or country or at its political independence is incompatible with the purposes and principles of the Charter⁶¹

The Member States then set forth their collective duties in no uncertain terms:

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

- (a) to promote friendly relations and co-operation among States; and
- (b) to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter

Every State has the duty to refrain from any forcible action which deprives people . . . of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.⁶²

61. Friendly Relations Declaration, *supra* note 59, preamble.

62. *Id.*

The position of the Irish government in 1969 was that the British army and other aspects of British control of the Six Counties amounted, in effect, to "alien subjugation, domination and exploitation" and constituted a violation of international law, particularly as set forth in article 6 of the Decolonisation Declaration.⁶³ In citing that article, C.C. Cremin emphasized to the Security Council that the Irish nation had consistently asserted its right to control the totality of Ireland.⁶⁴

Had the Friendly Relations Declaration been passed a year earlier, the Irish government could have invoked its right to "seek and receive support" from member states in condemning the forcible action taken by the British government in sending in an army which, as C.C. Cremin accurately predicted, would not be likely to restore peaceful conditions.⁶⁵ Pursuant to the Friendly Relations Declaration, the Irish government could reasonably argue that every member state of the United Nations had a duty to act jointly and separately to assist in promoting the right of the Irish people to self-determination and to call upon the British government to withdraw its army and join in creating the conditions for the people of all of Ireland to determine freely their future political, economic and cultural status.

The situation of Puerto Rico demonstrates how the international community can monitor the process of decolonization through the United Nations Decolonisation Committee.⁶⁶ Annual hearings are held by the committee at which member states, non-governmental organizations and representatives of all shades of political opinion in Puerto Rico are provided an opportunity to present petitions.⁶⁷ This process has helped to produce a consensus in Puerto Rico and the United States that the right to self-determination now requires a re-evaluation of the relationship of the island to the power which obtained it by military conquest in 1898.⁶⁸ On

63. See *supra* notes 37-38 and accompanying text. The argument that the Decolonisation Declaration forms part of customary international law is further strengthened by the incorporation of article 6 of that declaration into the preamble of the Friendly Relations Declaration. Compare Decolonisation Declaration, *supra* note 38, art. 6 with Friendly Relations Doctrine, *supra* note 59, preamble.

64. Cremin Memo, *supra* note 37, at 6-7.

65. *Id.* at 5.

66. The committee, established as a subsidiary organ by the General Assembly, G.A. Res. 1654, 16 GAOR Supp. (No. 17) at 65, U.N. Doc. A/5100 (1965), is mandated to conduct an annual review of the progress of territories to self-determination. BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 31, at 298-99.

67. In 1972, 1976 and every year since, the Decolonisation Committee has kept the situation in Puerto Rico under annual review, despite the opposition of the United States government.

68. Spain ceded Puerto Rico to the United States by the Treaty of Paris at the end of

a number of occasions the testimony before the Decolonisation Committee has stressed the similarities between the denials of self-determination in Ireland and in Puerto Rico.⁶⁹ The committee's terms of reference, however, would require either a resolution of the General Assembly or a referral by the secretary-general before it could hold hearings on the Six Counties.⁷⁰

Moreover, with the entry into force in 1976 of common article 1 of the two human rights covenants, Ireland would also be in a position today to demand that Britain transmit regular reports to the secretary-general of the United Nations, pursuant to article 73 of the Charter, to notify the international community of the steps being taken to ensure that the Irish people as a whole are guaranteed their right to self-determination.⁷¹ With the abolition of the sectarian, discriminatory Parliament that governed the Six Counties for half a century,⁷² it is arguable that Britain has thereby created a "non-self-governing territory,"⁷³ albeit not a true

the Spanish American War. In 1990 legislation was proposed in the United States Congress aimed at holding a plebiscite in which Puerto Ricans could choose between their present "Commonwealth" status and the alternatives of full independence or statehood. Early in 1991, however, legislators voiced misgivings about the proposal, expressing concern that the majority of the population would qualify for welfare benefits and questioning the readiness of Puerto Ricans to be assimilated into the United States. Tolchin, *Moynihan Tries to Save Puerto Rico Referendum*, N.Y. Times, Feb. 22, 1991, at A18, col. 1. The *New York Times* noted that, perversely, these are the same politicians who upbraid Mikhail Gorbachev for ignoring Lithuania's independence plebiscite. *America's Captive Nation*, N.Y. Times, Feb. 22, 1991, at A28, col. 1 (editorial). In short, "Puerto Ricans have learned not to hold their breath when members of Congress promise action." *Pallid Promises to Puerto Rico*, N.Y. Times, Nov. 6, 1990, at A22, col. 1 (editorial).

69. See generally N.Y. Brehon Soc'y of Ir. Lawyers, *Petitions to the United Nations Decolonisation Committee* (1988, 1989, 1990).

70. See G.A. Res. 1654, 16 GAOR Supp. (No. 17) at 65, U.N. Doc. A/5100 (1965).

71. U.N. CHARTER art. 73(e).

72. Northern Ireland's first prime minister, Lord Craigavon, stated: "All I boast is that we have a Protestant parliament and a Protestant state." M. FARRELL, *supra* note 14, at 92-93.

73. Article 73 of the United Nations Charter prescribes the responsibilities of member states "for the administration of territories where people have not yet attained a full measure of self-government." U.N. CHARTER art. 73. These include the duty to:

[T]ransmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible

Id. art. 73(e). By abolishing the Northern Ireland Parliament and instituting a policy of direct rule from Westminster, Britain has removed the self-government (albeit an undemocratic and discriminatory body) and put nothing in its place.

self-determination unit under international law. The Six Counties do not constitute a self-determination unit because the province itself constitutes a "partial or total disruption of the national unity and territorial integrity"⁷⁴ of the Irish State in violation of the Decolonisation Declaration and Friendly Relations Declaration. Certainly, the Six Counties appear to fall squarely within the principles annexed to General Assembly resolution 1541,⁷⁵ as guidelines to member states on whether they are obliged to transmit information to the secretary-general concerning non-self-governing territories.⁷⁶

C. Anglo-Irish Acceptance of Britain's Non-Exclusive Jurisdiction Over the Six Counties

When the British government signed the Anglo-Irish Agreement in 1985,⁷⁷ it effectively recognized the right of the Irish government to a

74. See *supra* notes 38 & 63 and accompanying text.

75. G.A. Res. 1541, 15 U.N. GAOR Supp. (No. 16) at 29, U.N. Doc A/4684 (1961).

76. *Id.* The relevant principles are:

Principle IV: Prima facie there is an obligation to transmit information in respect of a territory which is *geographically separate and is distinct ethnically and/or culturally* from the country administering it.

Principle V: Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an *administrative, political, juridical, economic or historical* nature. If they affect the relationship between the metropolitan State and the territory concerned *in a manner which arbitrarily places the latter in a position or status of subordination*, they support the presumption that there is an obligation to transmit information under article 73(e) of the Charter.

Id. (emphasis added). The Irish government would be justified in arguing that each of the italicized criteria are met by the Six Counties.

77. The Anglo-Irish Agreement, also known as the Hillsborough Agreement, signed on November 15, 1985, provides that 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) recognise 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 their respective Parliaments legislation to give effect to that wish.

Treaty on Northern Ireland, Nov. 15, 1985, United Kingdom-Republic of Ireland, art. 1, 1985 Gr. Brit. T.S. No. 62 (Cmnd. 9690).

The agreement also provides for a permanent Anglo-Irish Conference, giving Irish government ministers and civil servants a consultative voice in such matters as security,

voice in the way affairs of the Six Counties are managed.⁷⁸ At the same time, the Irish government accepted that de facto control of the North by Britain would only change with the consent of the majority of the North's population.⁷⁹ The intense hostility of unionist politicians towards this agreement is based on the fact that

[i]t spells out officially that Northern Ireland is not, 'like Finchley,'⁸⁰ just another part of the U.K. For there is no way in which a British government would accept the right of a foreign power to express its views on internal political affairs in Finchley. So the agreement is really a way of saying both to Protestants and to people in Britain that Northern Ireland is really a foreign country.⁸¹

The Irish Supreme Court, the ultimate interpreters of the Irish Constitution,⁸² recently ruled in *McGimpsey v. Ireland & Ors.*⁸³ that article 2 of the Irish Constitution must be construed as a "claim of legal right" and not a political claim or aspiration.⁸⁴ The Supreme Court held that no government of Ireland could repudiate that claim by any legal instrument, and thus the Anglo-Irish Agreement did not concede any recognition by Ireland of the right of Britain to maintain control of any part of the national territory.⁸⁵

D. Ireland's Reunification Conforms with Other International Law Precedents

With the reunification of Germany endorsed by the United States, the Soviet Union, France and the United Kingdom itself,⁸⁶ those four

discrimination and injustice in the North. *Id.* arts. 2, 5.

78. See B. ROWTHORN & N. WAYNE, *supra* note 10, at 129 ("Traditionally, the British government has denied the Republic any right to be consulted about Northern Ireland. It has said that the province is no different from any other part of the United Kingdom and, as such, no foreign power should interfere in its affairs. Now . . . Britain has conceded to the government of the Irish Republic the *right* to express its opinion about the way Northern Ireland's affairs are managed.").

79. *Id.*

80. Prime Minister Thatcher's parliamentary constituency.

81. B. ROWTHORN & N. WAYNE, *supra* note 10, at 133.

82. IR. CONST. art. 34.4.4 ("No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution.").

83. [1990] I.L.R.M. 441.

84. *Id.* at 442.

85. *Id.* at 450.

86. Friedman, *Four Allies Give Up Rights in Germany*, N.Y. Times, Sept. 13, 1990,

permanent members of the United Nations Security Council have implicitly recognized that the right of peoples to self-determination is universal and continuous. It is therefore not limited to "third world" countries, nor is it restricted to victims of colonialism and foreign domination. Recently, North and South Yemen have merged into one,⁸⁷ and the two Koreas are also reportedly exploring the possibility of reuniting.⁸⁸ That which was unthinkable only a year ago has suddenly become actual.

While the causes of partition in Germany, Yemen and Korea may be different from Ireland and from each other, changing economic conditions, at least as much as shifts in ideology, have played an undeniable role in opening up room for political change. Long before these developments, Professor Alain Fenet of the University of Picardy in France, argued that reunification in the case of Ireland, as elsewhere, would be in harmony with international law:

Reunification would be in line with the contemporary historical trend, which favours the reconstitution of political units established by history. Further examples of this practice are to be found in India's recovery of Goa, Spain's right, recognized by the United Nations, to reacquire Gibraltar, and Morocco's right to Ceuta and Melilla, as well as the attention given by the International Court of Justice to the historical argument put forward by Morocco in the case of Western Sahara.

The reunification of Ireland would simply be a further example of the right of peoples to self-determination which was recognized by the League of Nations and took concrete form in the Aaland Islands case. The desires of local populations cannot serve to justify breaking up a country, but if they form a clearly separate community their interest must be guaranteed and they may have the right to specific protection. When Ireland is viewed in the light of these considerations, we may conclude that although the Protestant population of Ulster has no legal right to insist on the partition of Ireland and likewise no right to oppose its reunification, in return it does have standing to demand guarantees for the preservation of its interests, of its rights and beliefs, in a united island.⁸⁹

at A1, col. 3.

87. *2 Yemens Become One, and Celebrate*, N.Y. Times, May 23, 1990, at A3, col. 4.

88. *Seoul Relaxing North Border*, N.Y. Times, June 30, 1990, at A3, col. 3.

89. A. Fenet, *Invoking the Right of Peoples to Self-Determination in the Context of Ireland*, Address to the International Conference of Lawyers for Ireland, Univ. of Picardy,

Therefore, as we proceed to examine the effects upon Ireland of over seventy years of division, it will be important to bear in mind that the objective economic and political conditions which led to partition are not immutable. We must look to see whether the United Nations or any of its member states can assist in finding some way out of the present impasse which will guarantee human rights for all people of Ireland.

IV. THE CONTINUING CONFLICT IN THE SIX COUNTIES AS A THREAT TO INTERNATIONAL PEACE AND SECURITY

A. *The Conflict Has Created a Generation of Casualties*

Twenty-one years after the United Nations Security Council was urged to consider the Six Counties as a threat to international peace and security, British troops remain on the streets and the heavily armed local police force, the Royal Ulster Constabulary (RUC), is further augmented by an entire army regiment, the Ulster Defence Regiment (UDR). Both the RUC and the UDR draw their members almost exclusively from the Protestant population.⁹⁰ One in ten of all Protestant men in employment works in the security services in some capacity.⁹¹ In 1969 there was one full time member of the security forces for every 477 people in the Six Counties; today there is one full time member of the security forces for every sixty-nine people.⁹²

In recent years, while overseas troop levels have been reduced, this has been achieved "only at the cost of turning the RUC itself into a paramilitary force and of relying more on the UDR, which is frequently perceived as a Protestant militia."⁹³ Between 1969 and 1986 the security

Amiens, Fr. (May-June 1985) (R. Harvey trans.).

90. B. ROWTHORN & N. WAYNE, *supra* note 10, at 112; Rowthorn, *Unemployment: The Widening Sectarian Gap*, FORTNIGHT, Dec. 16-Jan. 26, 1986, at 4-5.

91. B. ROWTHORN & N. WAYNE, *supra* note 10, at 112; Rowthorn, *supra* note 90, at 4-5.

92. Hillyard, *Political and Social Dimensions of Emergency Law in Northern Ireland*, in JUSTICE UNDER FIRE: THE ABUSE OF CIVIL LIBERTIES IN NORTHERN IRELAND 192 (A. Jennings ed. 1988).

93. G. HOGAN & C. WALKER, *supra* note 18, at 39. Those authors note the anomalous role of the UDR, whose recruits come solely from Northern Ireland, almost exclusively from its Protestant populace and which is "the only regiment in the Army never to tour away from base." *Id.* The disbanding and disarming of the UDR is seen by many as a precondition for any peaceful resolution of the present conflict, see B. ROWTHORN & N. WAYNE, *supra* note 10, at 145-48, especially in view of the many recent revelations of UDR complicity in individual Catholics. See, e.g., Stevens Inquiry Preliminary Report into Allegations of Collusion Between Members of the Security Forces and Loyalist Paramili-

forces made nearly 75,000 arrests.⁹⁴ It is reliably estimated that one in four Catholic men between the ages of sixteen and forty-four were arrested at least once during that period.⁹⁵ Between 1971 and 1986, the security forces conducted 338,803 house searches—75% of all houses in the North and the equivalent of two searches for every Catholic household.⁹⁶ Again, between 1970 and 1988 the prison population of the Six Counties rose by 170%.⁹⁷ The Six Counties have the highest number of prisoners per capita of all countries in the European Economic Community (121 per 100,000 in 1987),⁹⁸ and more than two-thirds of those prisoners are jailed under emergency legislation.⁹⁹ Initially accorded “special category” status in recognition of the political motivation of their offenses,¹⁰⁰ these prisoners protested when the British administration instituted its “criminalisation” policy in 1976.¹⁰¹ Prison conditions led to protracted and agonizing protests, culminating in the deaths of Bobby Sands and his nine comrades on hunger strike in 1981.¹⁰² The European Commission of Human Rights, while rejecting the admissibility of the prisoners’ complaints in *McFeeley et al. v. United Kingdom*,¹⁰³ was openly critical of the inflexible approach taken by the authorities.¹⁰⁴

In 1969 the Irish government estimated that “at least 10,000 persons have been affected and are in need of help as a result, either through the destruction of their homes during the violence or because they were forced through intimidation or fear to flee as refugees across the border to the south and to Britain.”¹⁰⁵ Twenty-one years later, records show that there have been over 2,700 deaths in the Six Counties resulting from the armed conflict which has persisted since 1969.¹⁰⁶ Over fifty-five percent

taries (Report Prepared by Chief Constable of the Cambridgeshire Constabulary at the Request of Chief Constable of Royal Ulster Constabulary) (1990).

94. B. ROWTHORN & N. WAYNE, *supra* note 10, at 197.

95. *Id.*

96. *Id.*

97. Ir. Information Partnership, *supra* note 8, at B13.

98. *Id.* at B13i.

99. *Id.*

100. B. ROWTHORN & N. WAYNE, *supra* note 10, at 64.

101. *Id.*

102. Hadden, Boyle, & Campbell, *Emergency Law in Northern Ireland: the Context*, in JUSTICE UNDER FIRE, *supra* note 92, at 9.

103. 20 Eur. Comm’n H.R. 44 (1980).

104. *Id.*

105. Cremin Memo, *supra* note 37, at 3.

106. Ir. Information Partnership, *supra* note 8, at 2.

of these fatalities were civilians uninvolved with paramilitary activities¹⁰⁷ and almost one-third were members of the British army, RUC or UDR.¹⁰⁸ With the "Ulsterization" policy implemented by Britain in the mid-1970s,¹⁰⁹ there has been a reduction in British casualties.¹¹⁰ The resulting statistics show, however, that "the average career policeman in Northern Ireland will have nearly a 1 in 20 chance of being killed by the Irish Republican Army (IRA) during his period of service."¹¹¹ Since 1969, official records show more than 30,000 security-related injuries,¹¹² over 30,000 shooting incidents,¹¹³ approximately 9,000 explosions¹¹⁴ and a further 4,000 neutralized bombs,¹¹⁵ and almost 14,000 armed robberies which netted over UK £14 million.¹¹⁶

The destruction of life and the destruction of the economic base of society has produced an incalculable toll on the people of the Six Counties. While 10,000 people there were already affected by the troubles two decades ago, an entire generation has since grown to adulthood in a world of violence, joblessness and deprivation of human rights and fundamental civic freedoms.

B. The Conflict Has Caused Widespread Economic Disaster

The Irish government estimates that since 1969 it has incurred expenditure of over Ir £1.5 billion (\$2.3 billion) on additional security costs as a result of the Northern situation.¹¹⁷ When that figure is adjusted for inflation, in 1989 prices security costs as a result of the troubles of the last twenty-one years amount to Ir £2.5 billion (\$3.9 billion).¹¹⁸ The Irish government further estimates that it consistently spends four times more per head of population than the British government

107. *Id.*

108. *Id.*

109. *See* B. ROWTHORN & N. WAYNE, *supra* note 10, at 45-47; G. HOGAN & C. WALKER, *supra* note 18, at 38-39.

110. B. ROWTHORN & N. WAYNE, *supra* note 10, at 61; *see also* Ir. Information Partnership, *supra* note 8, at 2.

111. B. ROWTHORN & N. WAYNE, *supra* note 10, at 61.

112. Ir. Information Partnership, *supra* note 8, at 2.

113. *Id.* at 1.

114. *Id.*

115. *Id.*

116. *Id.* at 2.

117. 393 DÁIL DEB. col. 1672 (Nov. 24, 1989).

118. *Id.*

on additional security expenditures in respect of the Six Counties.¹¹⁹ This would mean that Britain currently spends more than \$1 billion a year and, since 1969, has spent over \$42.5 billion.¹²⁰

Official British government statistics for the year 1987 to 1988 estimate expenditure on law, order, protective and miscellaneous services as about UK £512 million.¹²¹ When the UK £168 million cost of deploying the army in support of the police¹²² is factored in, UK £680 million or approximately \$1 billion in current terms are spent on security-related matters. Total British government expenditure in the province for 1987 was approximately UK £5 billion (over \$9 billion in current terms).¹²³

Precise figures on government expenditures for security-related matters are notoriously hard to obtain. If the Irish government, nevertheless, is correct in its estimates, Britain has spent over \$42.5 billion on security expenditures in connection with the Six Counties since 1969, and that total would exceed \$75 billion at current rates.¹²⁴

As Ray Burke, Irish minister for justice, told the Dáil on November 24, 1989,

[I]t is a matter of deep regret that such enormous expenditure has been incurred in such an unproductive way. One cannot help but reflect on the major benefits which would have accrued to the State over the last 20 years from the investment of 1.5 billion punts in such vital areas for the development of our economy and the improvement of our overall well-being as roads, communications, education, health services and the provision of employment for our young people.¹²⁵

The economic depression of Ireland, North and South, has led to massive unemployment and wholesale emigration in the current generation. At an international conference held in Belfast in August 1990 entitled "Ireland: The Way Forward," Professor Raymond Crotty, an economist and author from the Irish Republic, charged that successive Irish governments had made capital cheap but labor too dear to encourage employment-oriented investment. Thus, he said, "the people with capital

119. *Id.*

120. 384 DÁIL DEB. col. 756 (Nov. 16, 1988).

121. K.D. EWING & C.A. GEARTY, FREEDOM UNDER THATCHER 210 (1990).

122. *Id.*

123. *Id.*

124. 384 DÁIL DEB. col. 755 (Nov. 16, 1988).

125. 393 DÁIL DEB. col. 1672 (Nov. 24, 1989).

acquire more capital at the expense of keeping one-fifth of the population idle, one-third reduced to poverty and one-half of the present generation forced to emigrate."¹²⁶ He pointed out that all of these destructive conditions exist in the Republic despite an excellent written constitution and the absence of the evils of British occupation, the RUC and the UDR.¹²⁷

Employment discrimination in the North remains a major problem, with Catholic unemployment twice as high as that for Protestants.¹²⁸ Britain's Fair Employment legislation is generally accounted a failure,¹²⁹ leading many states and municipalities in the United States to adopt the anti-discriminatory "MacBride Principles."¹³⁰

C. *The Conflict Has Created a Permanent "Emergency"*

When Lord Caradon told the Security Council in 1969 that "British troops will be withdrawn when law and order was restored,"¹³¹ that "the greater number of the demands of the Civil Rights Movement have been accepted"¹³² and that "reform was under way,"¹³³ he was being, at best, wildly optimistic. Not only do the British troops remain in armed occupation of the Six Counties twenty-one years later, but the demand for domestic civil rights has grown into a demand for internationally recognized human rights. Meanwhile, all attempts at "reform" have only served to make obvious the root cause of the problem: the partition of Ireland.

Numerous studies have been published by international lawyers' groups and human rights organizations, condemning the impact of the draconian laws which have been enacted in the last twenty-one years in the name of restoring order.¹³⁴ Characterized as "emergency" measures and

126. Author's note at conference presentation.

127. *Id.*

128. B. ROWTHORN & N. WAYNE, *supra* note 10, at 110-11.

129. *Id.* at 106-19.

130. K. KELLEY, *supra*, note 3, at 364-65. These require companies with branches in the Six Counties, on pain of losing contracts with state and local governments in the United States, to subscribe to a series of anti-discrimination provisions proposed by the late Seán MacBride. *Id.*

131. Caradon Address, *supra* note 39, at 6 (quoting Downing Street Declaration, *supra* note 4).

132. *Id.* at 7.

133. *Id.*

134. The annual reports issued by Amnesty International, Britain's National Council for Civil Liberties and the Northern Ireland Standing Advisory Commission for Human

"temporary provisions," these statutes have now assumed permanency.¹³⁵ In an official review of the Northern Ireland (Emergency Provisions) Act, the presiding judge noted that an emergency was defined as "a sudden and unexpected occurrence"¹³⁶ and pointed out that this was inappropriate for a state of affairs that had lasted over twenty years.¹³⁷

These laws have destroyed central pillars upon which public confidence in the institutions of justice have traditionally stood. The right to jury trial, sacrosanct for centuries, was removed in the Six Counties (in 1973)¹³⁸ and in the Irish Republic (in 1972)¹³⁹ without one shred of evidence that jury trial was proving problematic, let alone unworkable.¹⁴⁰

Under the "exclusion order" provisions of the Prevention of Terrorism Acts,¹⁴¹ a form of "internal exile"¹⁴² has been created. The executive order is not subject to judicial review and no reason has to be given for the government's decision to exclude a person from entering or

Rights have all detailed the sorry record of human rights violations in the Six Counties. Important contributions have been made by various international inquiries into specific subjects, such as INT'L LAWYERS INQUIRY INTO THE LETHAL USE OF FIREARMS BY THE SECURITY FORCES IN NORTHERN IRELAND, SHOOT TO KILL? (1985) [hereinafter SHOOT TO KILL?]. The International Association of Democratic Lawyers has published many reports of observers at controversial political trials. *See, e.g.*, INT'L ASS'N OF DEMOCRATIC LAWYERS, LEGAL DEFENCE IN NORTHERN IRELAND FOLLOWING THE MURDER OF PATRICK FINUCANE, REPORT OF AN INTERNATIONAL DELEGATION OF LAWYERS (1989) [hereinafter FINUCANE REPORT]; IADL Submission, *supra* note 43. In the Six Counties much valuable work has been produced by the Association for Legal Justice and the Committee for the Administration of Justice.

135. These statutes include: the Northern Ireland (Emergency Provisions) Acts, of 1973, 1975, 1978 and 1987 (applicable only in the Six Counties); the Prevention of Terrorism (Temporary Provisions) Acts, of 1974, 1976 and 1984 (applicable throughout the United Kingdom); and the Offenses Against the State (Amendment) Act of 1972 (applicable only in the Republic of Ireland).

136. REVIEW OF THE OPERATION OF THE NORTHERN IRELAND (EMERGENCY PROVISIONS) ACT 1978, 1984, CMND. 9222 at 7 [hereinafter BAKER REPORT].

137. *Id.* at 7-8.

138. *See generally* S.C. GREER & A. WHITE, ABOLISHING THE DIPLOCK COURTS (1986); Greer & White, *A Return to Trial by Jury*, in JUSTICE UNDER FIRE, *supra* note 92, at 47-72.

139. Offences Against the State (Amendment) Act (Ir. 1972); *see* M.T.W. ROBINSON, THE SPECIAL CRIMINAL COURT (1974).

140. *See generally* R. HARVEY, DIPLOCK AND THE ASSAULT ON CIVIL LIBERTIES, (Haldane Soc'y of Socialist Lawyers Report No. 1, 1981); Greer & White, *supra* note 138, at 47.

141. Prevention of Terrorism (Temporary Provisions) Act, 1984, pt. II.

142. *See* K.D. EWING & C.A. GEARTY, *supra* note 121, at 217-21.

being in the Six Counties or any other part of the "United" Kingdom.¹⁴³

The right to silence, a firm principle of common law, was dramatically undermined by allowing unsupervised interrogations to persist for seven days without suspects being given access to legal advice or medical treatment.¹⁴⁴ When gross abuses were exposed by Amnesty International and other human rights bodies, other means were found to increase the level of "confessions."¹⁴⁵ More recently, the British government has abolished the right to silence utterly in the Six Counties and imposed a requirement that all suspects in police interrogation and all accused defendants must provide any defence they have to any allegation made against them, with the alternative that their silence will be deemed evidence of guilt.¹⁴⁶

The massive number of arrests under the emergency legislation creates human rights concern, given that in the Six Counties over 8,000 people were detained under the Prevention of Terrorism Acts between 1977 and 1989, more than half of whom were held for more than forty-eight hours. Yet only 110 (1.35%) were charged under the act and 2,750 (34.35%) were charged under other legislation.¹⁴⁷ Thus almost two-thirds of all those detained in the Six Counties for up to seven days are released without charge, and only a handful are charged under the anti-terrorist legislation itself.¹⁴⁸

In Britain, from 1977 to 1984, 186 people were charged under the act, representing "slightly more than 4 percent of the total detained during this period."¹⁴⁹ A further 228 were charged with other offenses.¹⁵⁰

Based on this evidence, Ewing and Gearty conclude that, if the Home Office's assertion that the prime objective of the legislation is questioning

143. See G. HOGAN & C. WALKER, *supra* note 18, at 96.

144. See AMNESTY INT'L, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO NORTHERN IRELAND (1978).

145. See generally REPORT OF THE COMMITTEE OF INQUIRY INTO POLICE INTERROGATION PROCEDURES IN NORTHERN IRELAND, 1979, CMND. 7479 (the BENNETT REPORT). For "other means," see *infra* notes 159-61 and accompanying text.

146. Criminal Evidence (N. Ir.) Order, 1988. This executive order provides, under section 3, that an inference of guilt may be drawn from an accused's failure to divulge information to interrogating officers. *Id.* § 3. Section 4 empowers the trial judge (the sole judge of fact as well as law) to require the accused to testify at trial under the threat that a failure or refusal to testify may be treated as corroboration of any other evidence indicative of guilt. *Id.* § 4.

147. K.D. EWING & C.A. GEARTY, *supra* note 121, at 225-27; see also BAKER REPORT, *supra* note 136, app. M.

148. K.D. EWING & C.A. GEARTY, *supra* note 121, at 225-27.

149. *Id.* at 226.

150. *Id.*

so as to enable proceedings to be initiated, "then the whole business has been a dismal failure."¹⁵¹

In the recent case of *Brogan & Others v. United Kingdom*¹⁵² the European Court of Human Rights held that these seven day detentions violate article 5(3) of the European Convention on Human Rights and Fundamental Freedoms (the "European Convention"), which requires that "[e]verybody arrested or detained . . . shall be brought promptly before a judge or other officer authorised by law to exercise judicial power."¹⁵³

The British government has refused to accept the European Court's judgment in favor of all four of the complainants, who had been released without charge after detentions varying in length from 102 hours to 160 hours,¹⁵⁴ and Britain has now derogated from the relevant provisions of the European Convention and the International Covenant on Civil and Political Rights due to a "public emergency threatening the life of the nation."¹⁵⁵

The judiciary in the non-jury "Diplock courts"¹⁵⁶ have shown themselves to be so conviction-oriented and so supportive of all actions undertaken by the police and army that they have lost credibility with a significant proportion of even the unionist populace from which they overwhelmingly stem.¹⁵⁷ Hogan and Walker note: "Any hope that the

151. *Id.* at 225.

152. 145-B Eur. Ct. H.R. (ser. A) (1988).

153. *In force*, Sept. 3, 1953, art. 5, para. 3, 213 U.N.T.S. 221 [hereinafter European Convention], reprinted in BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 31, at 320; see also Note, *Pre-Trial Detention of Suspects in Northern Ireland: A Violation of Fundamental Human Rights*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 297 (1990).

154. See K.D. EWING & C.A. GEARTY, *supra* note 121, at 224.

155. European Convention, *supra* note 153, art. 15; International Covenant on Civil and Political Rights, *supra* note 51, art. 6. Britain is currently in derogation from article 5(3) of the European Convention, AMNESTY INT'L, AMNESTY INTERNATIONAL CONCERNS IN WESTERN EUROPE 64 (May-Oct. 1990); see also Whitney, *Britain, Citing Ulster Terrorism, Keeps Detention*, N.Y. Times, Dec. 24, 1988, at A4, col 1, and article 9(3) of the International Covenant. U.N. Doc. ST/LEG/SER.E/8/Add.1 at 157-58 (1990).

156. Named for Lord Diplock, whose proposals to abolish jury trial and remove restrictions on police powers, especially in relation to interrogations and searches, were incorporated in the Diplock Report. See generally REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, CMND. 5815 (the DIPLOCK REPORT). See also K. BOYLE, T. HADDEN & P. HILLYARD, *supra* note 14, at 94-105.

157. For a fuller analysis of the role and public perceptions of the Diplock courts, see generally, K. BOYLE, T. HADDEN & P. HILLYARD, TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF LEGAL CONTROL OF POLITICAL VIOLENCE (1980); see also S.C. GREER & A. WHITE, *supra* note 138; R. HARVEY, *supra* note 140; Greer & White, *supra* note 138, at 47-72.

judiciary in Northern Ireland would mitigate the unfairness of special laws against political violence has generally not been fulfilled."¹⁵⁸

The use of "shoot-to-kill" tactics by members of the security forces in recent years has been accompanied by virtual immunity from accountability before the courts.¹⁵⁹ The Stalker/Sampson Report¹⁶⁰ into six lethal shootings in 1982 disclosed a police conspiracy to pervert the court of justice.¹⁶¹ The attorney general, Patrick Mayhew, however, announced that it would be contrary to the interests of the public and national security to prosecute the guilty officers.¹⁶²

The Diplock courts have further compounded the problem by a number of controversial decisions, the most startling of which was the acquittal by Lord Justice Gibson of three RUC officers charged with murdering three unarmed men. The judge expressly praised the officers for their "courage and determination in bringing the three deceased men to justice; in this case, the final court of justice."¹⁶³ These and similar decisions led the International Lawyers' Inquiry into the Lethal Use of Firearms by the Security Forces in Northern Ireland¹⁶⁴ to conclude that the security forces had repeatedly violated article 2(1) of the European Convention¹⁶⁵ and article 6(1) of the International Covenant on Civil and Political Rights.¹⁶⁶ That inquiry held: "The British Government is under

158. G. HOGAN & C. WALKER, *supra* note 18, at 33.

159. See generally SHOOT TO KILL?, *supra* note 134; Bishop, *The Right to Be Arrested: British Government Summary Executions*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 207 (1990).

160. See G. HOGAN & C. WALKER, *supra* note 18, at vi n.8; K.D. EWING & C.A. GEARTY, *supra* note 121, at 234-35. For the full circumstances surrounding the appointment of Manchester's deputy chief constable to investigate allegations of "shoot-to-kill" practices and his subsequent removal just as he was inquiring into the extent of responsibility for those practices, see J. STALKER, STALKER (1988). Stalker himself concludes that the evidence "pointed to a police inclination, if not a policy, to shoot suspects dead without warning." *Id.* at 253.

161. G. HOGAN & C. WALKER, *supra* note 18, at vi n.8.

162. *Id.*

163. R. v. Montgomery, [1984] 4 N.I.J.B. 65; Johnson, *Judge Praises RUC 'Justice,'* The Guardian (London), June 6, 1984, at 2, col. 2.

164. SHOOT TO KILL?, *supra* note 134, at 92-97.

165. Article 2(1) of the European Convention provides: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which the penalty is provided by law." European Convention, *supra* note 153, art. 2, para. 1.

166. Article 6(1) of the International Covenant on Civil and Political Rights provides: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." International Covenant of Civil and

a duty at international law to act swiftly to remedy these violations. The continued failure to provide adequate remedies for the victims of violations appears to violate Article 13 of the European Convention and would clearly justify the Government of Ireland in bringing an inter-state application under Article 24 of the Convention."¹⁶⁷

The right to any form of legal defense under the emergency legislation in Northern Ireland was undermined still further in January 1989 with the assassination of Patrick Finucane, one of the most prominent human rights lawyers in the Six Counties.¹⁶⁸ He had only recently persuaded the High Court to order that the three police officers acquitted by Lord Justice Gibson should be compelled to testify at the coroner's inquest into the deaths of the three victims.¹⁶⁹ Shortly after that landmark decision,¹⁷⁰ Mr. Finucane became at first the target of vicious and untrue allegations by Douglas Hogg, a Conservative government minister,¹⁷¹ and, within a month, he was shot dead in his own home in front of his wife and children.¹⁷²

The International Association of Democratic Lawyers reported on

Political Rights, *supra* note 51, art. 6, para. 1.

167. SHOOT TO KILL?, *supra* note 134, at 97. Article 13 of the European Convention provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." European Convention, *supra* note 153, art. 13.

Article 24 provides: "Any High Contracting Party may refer to the Convention, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party." *Id.* art. 24.

168. See generally FINUCANE REPORT, *supra* note 134.

169. *Id.* at 17; see *R v. Montgomery*, [1984] 4 N.I.J.B. 65.

170. Previously in Northern Ireland, it had been the frequent practice of the Coroners' Courts in such cases to refuse to allow the lawyer for the family of the deceased to cross-examine members of the security forces responsible for the death. See SHOOT TO KILL?, *supra* note 134, at 105-13.

171. See K.D. EWING & C.A. GEARTY, *supra* note 121, at 122. On the Parliamentary record, Hogg said he had "to state as fact, but with great regret, that there are in Northern Ireland a number of solicitors who are unduly sympathetic to the cause of the IRA." Challenged by Seamus Mallon, M.P. "to provide specific support for what he had said," Hogg refused. Mallon placed on record that he had "no doubt that there are lawyers walking the streets or driving on the roads of the North of Ireland who have become targets for assassins' bullets as a result of the statement that had been made" by the Minister. *Id.* (citing Official Report of Standing Committee B on the Prevention of Terrorism Bill, cols. 508-09, 519, Jan. 17, 1989); see also Whitney, *Sectarian Killings in Ulster Are Continuing to Increase*, N.Y. Times, Mar. 12, 1989, at A8, col. 5.

172. See Moloney, *The Loyalist Assassination*, Sunday Tribune (Dublin), Feb. 19, 1989, at 7, col. 1.

their inquiry into this killing¹⁷³ that there was convincing evidence that the RUC had been responsible for smears and innuendoes against lawyers in Northern Ireland and that "Douglas Hogg's statement played a part in creating a climate in which the likelihood of murder of Patrick Finucane, or another lawyer, was increased."¹⁷⁴ Since then, another lawyer who received a paramilitary death threat withdrew from a case which his client then dropped. In addition, the international delegation concluded that paramilitary threats against lawyers were having a greater impact than before and that "a small minority of legal cases are not being pursued as they would have been before January 1989."¹⁷⁵

The police-state powers and the Diplock courts have not only failed in their avowed purpose of halting the conflict but, on the contrary, the injustices created by those laws have fuelled still greater disaffection and dissidence. Paddy Hillyard, Bristol University's senior lecturer in social administration, writes,

The internment strategy coupled with the use of in-depth interrogation consolidated Republican support for the Provisional IRA, which in turn escalated its fight against the security forces. In the period up to 9 August 1971, 30 people were killed. In the following five months, 143 people were killed, including 46 members of the security forces. There were some 729 explosions and 1,437 shooting incidents. Adding to the hostilities were the army's mass house searches, head counts, stop and search and arrests in the early 1970s and, more recently, the Diplock courts, the adoption of brutal interrogation techniques, the willingness of the authorities to rely on supergrasses to obtain convictions, the shoot-to-kill policy and the abolition of the special status [political prisoner] category. . . . Despite repeated assurances by successive British Governments that they were concerned about correcting the injustices against the minority, the daily reality for large sections of the Catholic population was quite the reverse: their position under the old Unionist regime, as far as law and order was concerned, was probably marginally better than under direct rule.¹⁷⁶

173. See generally FINUCANE REPORT, *supra* note 134.

174. *Id.* at 20.

175. *Id.* at 21.

176. Hillyard, *supra* note 92, at 203-04. On the "supergrasses," London slang adapted in the Six Counties to mean a former paramilitary who testifies against his ex-comrades in mass, multi-defendant show trials, see T. GIFFORD, SUPERGRASSES: THE USE OF ACCOMPLICE EVIDENCE IN NORTHERN IRELAND (1984); Greer, *The Supergrass System*, in JUSTICE UNDER FIRE, *supra* note 92, at 73.

Most recently, the British government has imposed censorship on the broadcast media, banning interviews with or quotes from members of organizations, including legal electoral parties, that are critical of British policies in the Six Counties.¹⁷⁷ As Ewing and Gearty note,¹⁷⁸ the ban was presented to Parliament "as a fait accompli. There was no consultation with any interested party before it was issued and no requirement that either House should approve it. The measure is not temporary, nor in any way linked to the level of violence in Northern Ireland."¹⁷⁹ The ban survived legal challenge¹⁸⁰ and extends to the dead, such as Seán MacBride and Ireland's former taoiseach and president, Eamon de Valera,¹⁸¹ as well as to the living, such as democratically-elected member of Parliament, Gerry Adams. Since the ban does not extend to cable or satellite, however, "Gerry Adams may speak to us about Sinn Féin from outer space—but not from West Belfast."¹⁸² This ban has led to the refusal by the British Broadcasting Authority to air a song devoted to the wrongful convictions of the Birmingham Six and Guildford Four defendants on the grounds that these people were convicted terrorists and because the song criticized British justice.¹⁸³

D. *The Irresistible Spread of "Emergency" Powers*

As is shown by the cases of the Birmingham Six, Guildford Four and many other defendants accused in Britain of support for the IRA,¹⁸⁴

[T]he reasons for which they came to be arrested in the first place, the reasons for their having been convicted and for having remained in prison, together with the way in which they have been treated in prison, are only part of a pattern of unfair and discriminatory treatment in relation to Irish suspects.¹⁸⁵

177. IADL Submission, *supra* note 43, at 6-7.

178. K.D. EWING & C.A. GEARTY, *supra* note 121, at 241-50.

179. *Id.* at 243.

180. *Id.* at 249.

181. *Id.* at 246.

182. *Id.* at 247.

183. IADL Submission, *supra* note 43, at 6-7.

184. On the Birmingham Six, see generally C. MULLIN, *ERROR OF JUDGMENT: THE BIRMINGHAM BOMBINGS* (1986); on the Guildford Four and the Maguire family, see generally G. MCKEE & R. FRANNEY, *TIME BOMB: IRISH BOMBERS, ENGLISH JUSTICE AND THE GUILDFORD FOUR* (1988).

185. IADL Submission, *supra* note 43 at 1; see also K.D. EWING & C.A. GEARTY, *supra* note 121, at 248.

The "emergency" legislation that started in the Six Counties has spread to Britain and to the Irish Republic.¹⁸⁶ Allegations of brutal treatment in interrogations have been substantiated in both Britain and the Irish Republic in a number of cases relating to the Six Counties.¹⁸⁷ Unjust convictions in both jurisdictions have resulted in intervention by Amnesty International and other human rights groups.¹⁸⁸

British police forces have become ever more heavily armed in the past two decades. Adapting to the techniques and equipment first tried in the Six Counties, they are now equipped with riot shields and CS gas canisters, plastic bullets and sub-machine guns.¹⁸⁹

The Irish Republic has also instituted a non-jury court, the Special Criminal Court, which sits with three judges, instead of the one Diplock judge in the North.¹⁹⁰ No debate was required under the Irish Constitution for the establishment of this special court and no justification for its continued existence need be provided to the Dáil by the government.¹⁹¹ The broadcasting ban referred to above is analogous to the Broadcasting Authority Act of 1960 which prohibits any matter which is "an interview, or report of any interview" with a spokesperson for certain organizations, which include legal political parties, such as Sinn Féin.¹⁹²

186. "[L]aws designed to cope with the very special problems of Northern Ireland have a habit of being extended to the rest of the United Kingdom This occurs without the controversy and debate that would ensue if the measure were entirely new." K.D. EWING & C.A. GEARTY, *supra* note 121, at 213. For the emergency legislation in the Irish Republic, see generally, G. HOGAN & C. WALKER, *supra* note 18, at 192-278.

187. See generally C. MULLIN, *supra* note 184; G. MCKEE & R. FRANEY, *supra* note 184. In the Irish Republic, see D. DUNNE & G. KERRIGAN, *ROUND UP THE USUAL SUSPECTS* (1984).

188. International observers at trial and appeal hearings have been sent by Amnesty International, the International Association of Democratic Lawyers, the Brehon Irish Law Society (New York), the National Lawyers Guild (United States) and the National Conference of Black Lawyers (North America). Numerous members of the United States Congress have called for the release of the Birmingham Six. S. Con. Res. 104, 101st Cong., 2d Sess. (1990); H.R. Con. Res. 249, 101st Cong., 2d Sess. (1990).

189. K.D. EWING & C.A. GEARTY, *supra* note 121, at 106, 108 (stating that, by November 1987, 20 police forces in Britain had been issued with plastic bullets without any formal power granted by Parliament). By 1980, an estimated 12,000 police in Britain had received special training in riot control and following uprisings in black communities around Britain in 1981, "six senior police officers travelled to Northern Ireland to discuss riot control with the Royal Ulster Constabulary." Gordon, *The Police, the Miners and Black People*, in *POLICING THE MINER STRIKE* 164 (B. Fine & R. Millar eds. 1985).

190. See *Offenses Against the State (Amendment) Act (Ir. 1972)*.

191. *Id.*; see J.M. KELLY, *supra* note 29, at 312.

192. Broadcasting Authority Act, § 31 (Ir. 1960); see G. HOGAN & C. WALKER, *supra* note 18, at 267-69.

E. The Internationalization of the Problem

Throughout the past twenty-one years, numerous studies and inquiries have been undertaken to examine both the general situation in the Six Counties and also specific aspects of it which have risen to prominence at different times. The International Association of Democratic Lawyers, together with the International League for the Rights of Man, sponsored the International Conference of Lawyers for Ireland in Paris from May 31 to June 1, 1985. That conference was attended by lawyers from France, Ireland, Great Britain, Belgium and the United States and concluded,

The situation of conflict in Ireland stems from the partition treaty of 1921 which cut into two parts a country which was in fact, through its long history and its ancient civilisation, a single nation.

The treaty, while giving rise to a new independent state, which became the Republic of Ireland, amputated a portion of its territory, which became a part of the United Kingdom.

In the North, which thus became detached from the rest of Ireland, the Protestant majority occupied most positions of responsibility in the economy, the civil service and the government, as against the Catholic minority which faced widespread discrimination. Thus the issue of national independence came to be distorted into an issue of religion.

At the heart of the conflict is the question of the unification of Ireland

The only way to end the violence is to find a political solution. This, for the majority of people in the Republic of Ireland and for a minority in Northern Ireland, means the reunification of Ireland.¹⁹³

Among other specific findings, the conference: declared that the right to self-determination of the people of the whole of Ireland must be clearly recognized; observed that through the treaty of 1921 this right was denied; and called upon "the Government of the Republic of Ireland to assert vigorously the right to self-determination of the people of the whole of Ireland, and to ensure that the enforcement of this right is placed upon the agenda of the United Nations General Assembly and other appropriate

193. International Conference of Jurists for Ireland, Paris, June 1, 1985, at 104.

international institutions."¹⁹⁴

*F. The Conflict Has Had an Adverse Impact on Other
Member States of the United Nations*

The impact of the armed conflict in the Six Counties has been felt keenly by many other members of the United Nations, in Europe and beyond. Deaths, injuries and property damage resulting from the conflict have occurred in Belgium,¹⁹⁵ the Netherlands,¹⁹⁶ the German Federal Republic¹⁹⁷ and Gibraltar,¹⁹⁸ as well as in Great Britain¹⁹⁹ and the Irish Republic.²⁰⁰ Many courts and legal bodies of national and international jurisdictions have been called upon to determine the legality or otherwise of Britain's role in the Six Counties and of those who have waged armed struggle against that role.²⁰¹

194. *Id.*

195. *See, e.g.,* Rule, *Four I.R.A. Suspects Seized in Europe*, N.Y. Times, June 20, 1990, at A3, col. 4; *Belgians and Dutch Seize 2 Suspected of I.R.A. Activity*, N.Y. Times, June 17, 1990, at A11, col. 1.

196. *See, e.g.,* Rule, *Four I.R.A. Suspects Seized in Europe*, N.Y. Times, June 20, 1990, at A3, col. 4; *Belgians and Dutch Seize 2 Suspected of I.R.A. Activity*, N.Y. Times, June 17, 1990, at A11, col. 1.

197. *See, e.g.,* Protzman, *I.R.A. Gunman Kills Wife of a Briton*, N.Y. Times, Sept. 9, 1989, at A3, col. 1; *2 British Soldiers Wounded by Gunman in West Germany*, N.Y. Times, Sept. 3, 1989, at A16, col. 1; Cowell, *British Barracks Struck in Bombing*, N.Y. Times, July 14, 1988, at A12, col. 4.

198. *See, e.g.,* Clines, *Gunman Terrorizes Belfast Crowd Gathered at Rites for 3 Guerillas*, N.Y. Times, Mar. 17, 1988, at A1, col. 2. On March 6, 1988, a plain clothes Special Air Services (SAS) team shot dead three unarmed members of an IRA active service unit in Gibraltar in what has been called "the most dramatic and controversial 'shoot to kill' to date." K.D. EWING & C.A. GEARTY, *supra* note 121, at 235-41; *see also* Jack, *Gibraltar*, in 25 GRANTA 15 (1988).

199. *See, e.g.,* Prokesch, *Blast Rocks Club for Tories in London, Injuring 7*, N.Y. Times, June 26, 1990, at A7, col. 1.

200. *See, e.g.,* *Mountbatten Bomber Opens Fire in Dublin Court Cell*, Reuters, July 20, 1988.

201. *See, e.g.,* the case of Fr. Patrick Ryan, whose extradition was demanded from Belgium for "conspiring with persons unknown to murder persons unknown." K.D. EWING & C.A. GEARTY, *supra* note 121, at 251-52. Belgium refused to extradite him to Britain and sent him to Ireland where his extradition was refused due to the inflammatory nature of British press and politicians' comments on the case. *Id.*; *The Legacy of Father Ryan*, ECONOMIST, Dec. 10, 1988, at 59; *see also* *In Re Kelly & McFarlane*, [1987] NJ 931. *But see* the case of Desmond Ellis, the first person extradited to Britain from Ireland under an Irish law introduced in 1987 as part of European anti-terrorism measures. Ryder, *Dublin Judges Hand Over IRA Bombs Suspect*, Daily Telegraph (London), Nov. 15, 1990, at 11,

In the United States, the case of Joseph Doherty continues into the seventh year of his detention, long after the United States courts have ruled that Mr. Doherty's shooting of a British soldier "present[s] the assertion of the political offense exception [to the Extradition Treaty] in its most classic form."²⁰² Mr. Doherty is not charged with any offense against the criminal laws of the United States, and his detention remains a form of internment at the behest of the British government, while the United States Justice Department seeks to implement Britain's wishes despite losing all its arguments before the judiciary.²⁰³

Based on the author's own knowledge of immigration and extradition cases in the United States during the past decade, it would be a conservative estimate that at least fifty persons have come before the United States courts since 1980 on charges related to the situation in the Six Counties. Many similar cases have been heard by courts in France, the German Federal Republic, the Netherlands and Belgium. Frequently, foreign jurisdictions have either refused extradition on political exception grounds, or have severely curtailed the basis for extradition in recognition of the political nature of the offenses. In all of these cases, protracted and detailed hearings and appeals have been held, taking up considerable court time and involving issues of great diplomatic, as well as legal, subtlety. It is thus in the interest of many more governments, in addition to those of Ireland and Britain, to find a solution to the problem of the Six Counties.

V. THE WAY FORWARD

Twenty-one years after British troops returned to the streets of the Six Counties and over seventy years after the partition of Ireland, we today must seek a way forward which will provide the opportunity for peace, respect for fundamental human rights and true political, economic and cultural self-determination for all of the Irish people. This necessity was recognized by a major international conference held in Belfast in August 1990, entitled "Ireland: The Way Forward."²⁰⁴ It was attended by over 400 delegates from more than 100 organizations and fourteen countries in Europe, North America and Australasia.

col. 1; *IRA Suspect Is Extradited to London for Bombing Trial*, N.Y. Times, Nov. 15, 1990, at A10, col. 6.

202. *Matter of Doherty* by the Government of the United Kingdom, 599 F. Supp. 270 (S.D.N.Y. 1984).

203. See generally Note, *Deportation as De Facto Extradition: The Matter of Joseph Doherty*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 263 (1990).

204. The conference was organized by the Springhill Community Association on Aug. 9-11, 1990.

After discussing the many problems faced by all of the people of Ireland and having heard from experts in constitutional law, economics, sociology, political science and human rights, from members of the Norwegian and Swedish Parliaments, from organizers of Britain's "Time to Go" movement and many others,²⁰⁵ the conference adopted a declaration which concluded:

- (1) Any prospect of peaceful progress to a solution of these problems requires that the British Government act to implement its binding legal and international obligations to observe and promote human rights, which must inevitably include setting a firm and irreversible date for military disengagement from the North of Ireland within the lifetime of a single parliament;
- (2) The Way Forward must be decided by all the people of Ireland and a political settlement must be reached that involves people of all religious and political persuasions, through a convention to establish a new constitution which shall guarantee human dignity and democratic freedoms and promote economic, social and cultural rights of all the Irish people in a pluralistic state.²⁰⁶

The conference expressly requested the international community of United Nations member states and non-governmental organizations to:

- (a) Demand that the British Government cease and desist from its programme of violations of the human rights of Irish people;
- (b) Act to ensure that economic and political support does not go to maintaining the presently unacceptable status quo of a partitioned Ireland but rather to ensure maximum economic and political aid to a united democratic Ireland; and

205. Conference participants included Ira Glasser, Esq., executive director of the American Civil Liberties Union; Bjorn Cato Funnemark, secretary of the Norwegian Helsinki Committee for Human Rights; Naomi Wayne, co-author of *NORTHERN IRELAND: THE POLITICAL ECONOMY OF CONFLICT*, *supra* note 10; Fr. Desmond Wilson, author of *AN END TO SILENCE* (1986); Prof. Raymond Crotty, *see supra* notes 126-27 and accompanying text, author of *IRELAND IN CRISIS: A STUDY IN CAPITALIST COLONIAL UNDEVELOPMENT* (1986); Prof. Bob Lafferty of Oslo University; and Bernadette Devlin McAliskey.

206. The Belfast Declaration (conference document to be published by the organizers by the end of 1990).

- (c) Use all appropriate international fora, including the United Nations and its agencies and the Conference for Security and Co-operation in Europe to promote Ireland's human rights agenda and organize international debates, seminars and conferences toward that end.²⁰⁷

It concluded that the enormous success of the conference,

[T]aking place as it does in the year of the release of Nelson Mandela and other dramatic human rights advances in other parts of the world, reflects a growing international recognition that the people of Ireland have the right to peace and justice, and we urge that the Way Forward be pursued by all people of good will in their local communities and in national and international gatherings until Ireland is truly re-united, democratic and free.²⁰⁸

Such a program is ambitious indeed, but surely no more so than the Lancaster House talks of 1978 in which a Conservative British government brokered the independence of Zimbabwe under majority rule²⁰⁹ and no less realizable than the final accession to independence of Namibia in 1990, following decades of armed struggle, international sanctions and concerted action by the United Nations.²¹⁰ International cooperation has helped to effect the transition of power from entrenched reactionary white minorities to non-racist majorities, and new developments in South Africa strengthen hopes that such a settlement may be effected there too within the reasonably foreseeable future.²¹¹

207. *Id.*

208. *Id.*

209. The 1978 talks, chaired by Margaret Thatcher's Conservative government and held at Lancaster House, London, between the Zimbabwean Patriotic Front and the leaders of the outlawed Rhodesian regime, led to a constitutional settlement and peaceful transfer of power to a democratically elected government. The United Nations Security Council, at Britain's request, imposed economic sanctions on Rhodesia in 1965. S.C. Res. 202, 20 U.N. SCOR (1202d mtg.) at 6-7, U.N. Doc. S/INF/20/Rev. 1 (1965).

210. In March 1990, following decades of international sanctions against South Africa for its illegal occupation of Namibia, *see supra* notes 45-46 and accompanying text, the Republic of Namibia achieved its independence under the leadership of the majority party, Swapo. The United Nation Council for Namibia for years assisted the oppressed majority of Namibians in their struggle for self-determination and played a vital role in organizing the electoral process which preceded independence.

211. The United Nations Special Committee Against *Apartheid* and Centre Against *Apartheid* have supported the world-wide anti-*apartheid* movement. In 1977 the Security Council imposed an embargo on all arms trade with South Africa. S.C. Res. 418, 32 U.N. SCOR (2046th mtg.) at 5, U.N. Doc. S/INF/33 (1977). The United Nations has played

In these and many other international disputes the United Nations acted when the interested parties were too deeply mired in conflict to find a way out themselves, and a peaceful resolution could only be achieved by international co-operation. The situation confronting unionists and nationalists and the rest of the people of Ireland and Britain is not different.

The Anglican Bishop of Salisbury, the Most Reverend Dr. John Austin Baker, a leading Church of England theologian, was chaplain to the House of Commons at the time of the Long Kesh hunger strike.²¹² He told British members of Parliament in 1980,

No British government ought ever forget that this perilous moment, like so many before it, is the outworking of a history for which our country is primarily responsible. England seized Ireland for its own military benefit. It planted Protestant settlers there to make it strategically secure. It humiliated and penalized the native Irish and their Catholic religion; and then, when it could no longer hold the whole island, it kept back part to be a home for the settlers' descendants, a non-viable solution from which Protestants have suffered as much as anyone.

Our injustice created the situation; and by constantly repeating that we will maintain it so long as the majority wish it, we actively inhibit Protestant and Catholic from working out a new future together. This is the root of violence, and the reason why the protestors think of themselves as political offenders.²¹³

Seán MacBride called this "the truest and most concise analysis of British policy towards Ireland."²¹⁴ Mr. MacBride pointed out,

The British Government like to pretend that they are merely playing the role of the 'honest broker' between the minority of British settlers and the Irish people and that they are prepared to withdraw from Ireland if they are asked to do so by that minority. However, this has not been borne out by the confidential minutes

an important role in pressing for the release of Nelson Mandela and all other South African political prisoners, as well as for full democratic rights for all in a non-racial, non-sexist unitary South African state.

212. For a detailed account of the 1980 and 1981 hunger strikes in Long Kesh, see D. BERESFORD, *TEN MEN DEAD* (1987).

213. *Reprinted in S. MACBRIDE, IRELAND'S RIGHT TO SOVEREIGNTY, INDEPENDENCE AND UNITY ARE INALIENABLE AND INDEFEASIBLE 3* (1983).

214. *Id.*

of the British Cabinet which have been released recently and which state categorically: 'So far as can be foreseen, it will *never* be to Great Britain's advantage that Northern Ireland should form a territory outside His Majesty's jurisdiction. Indeed, it seems unlikely that Great Britain would *ever* be able to agree to this *even if the people of Northern Ireland desired it.*'²¹⁵

As has been noted above,²¹⁶ the Six Counties do not constitute a self-determination unit under international law, which cannot legitimize either the present division of Ireland or any attempt to create an independent Six County state since the province is no more viable economically than legally.²¹⁷ The only realistic solution which remains untried is the reunification of Ireland.

International law addresses the right of self-determination "of peoples," rather than of governments.²¹⁸ The future of Ireland's people is not a matter to be left to the governments of the presently constituted states of Ireland and the United Kingdom. Rather, the United Nations Secretary-General, under article 73 of the United Nations Charter,²¹⁹ and the Decolonisation Committee, pursuant to resolution 1654,²²⁰ share a duty with the member states of the United Nations imposed by the Friendly Relations Declaration to create conditions in which the "freely expressed will of the peoples concerned"²²¹ can be ascertained reliably.

In the context of Puerto Rico, it has been pointed out repeatedly that a necessary precondition for such free expression of the people's will is the removal of all forms of repression by the state apparatus of the administering power.²²² In the Irish context this would require not only the abolition of emergency laws and special courts in both parts of Ireland, but also the removal of every barrier created to enforce and maintain the partition of the national territory of Ireland.

More than two decades of political and military stalemate have demonstrated to the world that the British and Irish governments have no solution. The status quo is ruinously costly to the British taxpayer and the

215. *Id.*

216. *See supra* note 74 and accompanying text.

217. B. ROWTHORN & N. WAYNE, *supra* note 10, at 98.

218. *See* Decolonisation Declaration, *supra* note 38 and accompanying text; Friendly Relations Declaration, *supra* note 59 and accompanying text.

219. U.N. CHARTER art. 73; *see supra* note 71 and accompanying text.

220. *See supra* note 66 and accompanying text.

221. *See* Friendly Relations Declaration, *supra* note 59, preamble.

222. *See, e.g.*, Int'l Ass'n of Democratic Lawyers, Submission to the United Nations Decolonisation Committee (Aug. 1990); *see also supra* notes 66-70 and accompanying text.

Irish Republic is "caught in a debt trap of Third World proportions."²²³

From an economic standpoint, Rowthorn and Wayne offer some valuable signposts on the way forward, pointing out that peace itself will provide a substantial incentive to investment in the economy of a united Ireland.²²⁴ They stress, however, that for Britain simply to abandon the Six Counties, with no interim aid program, would result in a potential decline of forty percent in their inhabitants' standard of living.²²⁵ They propose that Britain should offer substantial aid to the new United Ireland, as long as guarantees are given that aid would go to the reconstruction of the economy in the North and that satisfactory arrangements would be made to provide employment for Northern Protestants, a disproportionate number of whom are currently employed in the security forces and whose jobs should be made unnecessary by the restoration of peace.²²⁶

Rowthorn and Wayne suggest one possible way to create a workable reunited Ireland. They may not have all the answers, but at least they have challenged some of the basic assumptions which have congealed around twenty-one years of stalemate. This does not suggest that any glib or simplistic formula will solve the problem. That problem, however, has become so deeply entrenched because, to those most closely concerned, all futures have become unthinkable and the present is intolerable. It is in situations such as this that the combined efforts of the United Nations have so often proved fruitful in breaking deadlocks and demonstrating that workable solutions can be found.²²⁷

In this spirit, the United Nations secretary-general should request annual reports from the British government in accordance with article 73 of the Charter and that he should ask the Decolonisation Committee to undertake an annual review of the problems generated by the partition of Ireland.

A first step on the way forward out of the current deadlock would be for the United Nations to convene an international conference on the future of Ireland. Such a conference would invite representatives of all political views to meet with international experts on decolonization and conflict resolution. It would examine such issues as the need for a new constitution to include guarantees for the economic and political rights of all the people of Ireland, with express protections for the rights of

223. B. ROWTHORN & N. WAYNE, *supra* note 10, at 102.

224. *Id.* at 140-71.

225. *Id.* at 154. "If forced to live within its means, Northern Ireland would experience a catastrophic fall in living standards. It would drop well below standards in the Irish Republic, and could end up on a par with Latin American countries like Mexico or Argentina." *Id.* at 99.

226. *Id.* at 152-59.

227. See *supra* notes 210-11 and accompanying text.

minorities in a united Ireland. Such a conference would also investigate means of restructuring the island's economy with appropriate assistance from international and regional sources for investment in nondiscriminatory business enterprises.

Rowthorn and Wayne conclude,

When all the various arguments are considered, it is evident that Britain should withdraw from Northern Ireland. Britain is fighting a war it cannot win, to preserve a state which should never have been created and which cannot be saved. The costs are economically burdensome and morally unacceptable.

To bring peace to Northern Ireland, Britain should announce a clear, public timetable for withdrawal and stick to it. For once in its long and sorry relationship with Ireland, Britain should do the right thing at the right time. And that time is now.²²⁸

Participation by the United Nations, as guarantor of respect for international law and fundamental human rights, is a prerequisite if discussion is to lead to positive action. As the only impartial body with the experience and expertise necessary to assist all parties to resolve their differences, the United Nations has an indispensable role to play in creating a workable future for the coming generations of Irish and British men and women.

Seán MacBride, that great Irish statesman who earned both the Nobel and Lenin Peace Prizes and who served the United Nations as Commissioner for Namibia, once told this author that he longed for the day when the United Nations would finally lend its assistance to Ireland in completing its process of decolonization. He summed up his views on the question in the title of his famous pamphlet written in 1983: "Ireland's Right to Sovereignty, Independence and Unity Are Inalienable and Indefeasible."²²⁹

228. B. ROWTHORN & N. WAYNE, *supra* note 10, at 170-71.

229. S. MACBRIDE, *supra* note 213.