

January 1987

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### Recommended Citation

Alpha M. Connelly, Political Violence and International Law: The Case of Northern Ireland, 16 Denv. J. Int'l L. & Pol'y 79 (1987).

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## Political Violence and International Law: The Case of Northern Ireland

### Keywords

International Law: History, Northern Ireland, Violence, Criminals, Prisoners, War, Extradition

# Political Violence and International Law: The Case of Northern Ireland

ALPHA M. CONNELLY\*

## I. INTRODUCTION

In the best tradition of British understatement, the violence of the last twenty years in Northern Ireland is referred to locally as "the Troubles". Sparked off by civil rights grievances, the Troubles are but the latest chapter in a long-running saga of armed resistance to a British presence in Ireland. The forefront of the resistance in this century has been the Irish Republican Army. Today armed resistance is concentrated in Northern Ireland, which is constitutionally part of the United Kingdom. Here the I.R.A. claims to be waging a war of national liberation on behalf of the Irish people against alien, i.e. British rule. In this scenario, the British troops in Northern Ireland are seen not as knights in shining armor upholding law and order and protecting the ordinary citizen, but as forces of occupation, oppressors who would deny to the Irish people the realization of their right to self-determination. This paper will examine the claim of the I.R.A. at the present day to be an army of national liberation.<sup>1</sup> The legitimacy of the claim will be assessed against the norms and principles of public international law. The I.R.A. itself asserts not only a moral right to use violence but also a legal right, expressly invoking recog-

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\* Faculty of Law, University College, Dublin, Ireland. This is a revised version of a paper delivered to the conference *International Terrorism: Challenge and Response* at the University of Denver College of Law, 4 April 1987.

1. In this paper the term I.R.A. is used to signify the Provisional Irish Republican Army. The Provisional I.R.A. is not the only body using armed force in Northern Ireland apart from the British army and the police. There are other groups both on the loyalist/unionist side and on the nationalist side which use force either, as in the case of the loyalists, to maintain the link with Britain, or, as in the case of the nationalists, to sever the link. The Provisional I.R.A. is the largest organized grouping of a military character to promote the nationalist cause. There is some uncertainty over whether the Official I.R.A., from which the Provisionals split in 1969/70, has in fact disbanded, but whether or not it has done so, it is clear that the Officials have not engaged in any significant military action in recent years and that, as they moved to the left politically, the voices advocating the use of the established political process rather than violence in pursuit of national unity prevailed. The other main nationalist grouping, the Irish National Liberation Army, which was established in 1975, has itself recently split over the question of its continued existence, and has been subject to a bitter internal feud, with members of rival factions killing one another. The examination in this paper of the claim of the Provisional I.R.A. applies *mutatis mutandis* to these other militant nationalist groups. The claimed justification for resort to force by loyalist paramilitary organizations, such as the Ulster Volunteer Force and the Ulster Freedom Fighters, is of course somewhat different to that of the I.R.A., and any examination of their claims is outside the scope of this paper.

nized principles of international law to validate its actions.<sup>2</sup>

International law has traditionally applied, and still applies, two general tests in relation to armed conflicts to determine the legality of the use of violence, and each test is based on a different body of rules. The first is a threshold test with respect to the legality of the initial resort to violence. In its application to inter-state conflict, this test is often described by the Latin tag, *jus in bellum*, the right to go to war or to engage in armed conflict. It is, for example, universally recognized that one state is entitled to use armed force against another in self-defense, and international law defines the circumstances in which resort to armed force by way of self-defense is justified. In the post-1945 era, the concept of international armed conflict has been extended to cover situations other than the classic inter-state combat, and a threshold test also applies to these other situations. Of particular relevance to this paper is the fact that, in recent years, there has been increasing recognition of the legitimacy of resort to force by an entity other than the state. This entity is a people, and the circumstances in which a people (or their representatives) are justified in resorting to force is when the people are subject to colonial domination or alien occupation, resort to force being justified against the colonizer or occupying power. The people often perceive of themselves (and are perceived) as a nation, and hence when force is used to reject alien rule, the struggle is described as a war of national liberation. The I.R.A. claim relates to this threshold test. It is a claim that the I.R.A. is waging in Northern Ireland a war of national liberation on behalf of the Irish people against a colonial power.<sup>3</sup>

The threshold test is a group test. It applies to a state, a people, or some other collectivity, and is used to assess the legality of resort to force by the collectivity. It does not apply to specific incidents of violence engaged in by the group or by members of the group. These incidents are judged by other rules.

When armed conflict erupts, there is an extensive body of rules and principles of international law, *jus in bello*, which seeks to regulate the conflict. There are rules regulating both international armed conflicts (the type of armed conflict in which the I.R.A. claims to be engaged) and non-international armed conflicts.<sup>4</sup> These rules, known collectively as international humanitarian law, have been supplemented over the last forty years or so by international human rights norms and an evolving international criminal law which penalizes certain activities (e.g. genocide and

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2. SINN FEIN, A SCENARIO FOR PEACE: A DISCUSSION PAPER 3-4 (1987).

3. Although the I.R.A. regard the Southern Irish authorities as illegitimate, and indeed as having aligned themselves politically and economically with Britain, it is I.R.A. policy not to use violence against these authorities. See, e.g., G. ADAMS, *THE POLITICS OF IRISH FREEDOM* 39f (1986), and T.P. COOGAN, *THE I.R.A.* 327-8, 681 (3d ed. 1987).

4. See, e.g., the two Geneva Protocols of 1977 Additional to the Geneva Conventions of 12 August 1949. Protocol I relates to the Protection of Victims of International Armed Conflicts; Protocol II to the Protection of Victims of Non-International Armed Conflicts.

hijacking) both in time of peace and of armed conflict. Even if the use of violence does not meet the minimum level required to constitute an armed conflict and hence be governed by the rules of international humanitarian law, international criminal law will apply to the activities of all those engaged in violent conduct, and the state authorities will additionally be bound by the norms of international human rights law.

The term international armed conflict now includes wars of national liberation,<sup>5</sup> and if, as the I.R.A. claims, the present violence in Northern Ireland is occurring in the context of such a war, then the rules of international humanitarian law relating to international armed conflicts apply. If it is not, then other rules apply. The important point is that irrespective of the precise categorization of the violence under international law, and irrespective of the legitimacy of the I.R.A. claim, some rules apply, and members of the I.R.A. as well as of the state authorities may be held accountable under international law for their conduct. Even a legitimate cause does not of itself legitimate every use of violence by those fighting for the cause. Even a war of national liberation does not necessarily validate every act of violence by the liberation army and its individual members.

This paper is concerned with the threshold test of the legality under international law of the I.R.A.'s resort to violence. It is not concerned with the legality of specific incidents or tactics. Nor is it concerned with the ethics or politics of the I.R.A. claim. It does not deal with whether the I.R.A. should be regarded as a national liberation movement, but with whether it is so recognized under international law at the present time and with whether its claim to be exercising the right of self-determination of the Irish people is well-founded in law or not. The self-perception of a group is not sufficient in law to confer on it the status claimed. The group must fulfil the requirements posited by law for the enjoyment of that status.

## II. THE I.R.A. CLAIM

The beacon of militant Irish nationalism in this century is the Proclamation of the Irish Republic on Easter Monday, 1916, by a motley collection of insurrectionaries outside the main post office in the center of Dublin. The Proclamation, "the Magna Carta of all Irish Republicans",<sup>6</sup> was signed by seven men claiming to speak on behalf of the Provisional Government of the Republic of Ireland, and was addressed by that Government to the people of Ireland:

"Irishmen and Irishwomen: In the name of God and of the dead generations from which she receives her old tradition of nationhood, Ireland, through us, summons her children to her flag and strikes for her freedom. . . .

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5. Geneva Protocol I, Art.1(4).

6. COOGAN, *supra* note 3, at 38.

We declare the right of the people of Ireland to the ownership of Ireland and to the unfettered control of Irish destinies, to be sovereign and indefeasible. The long usurpation of that right by a foreign people and government has not extinguished the right, nor can it ever be extinguished except by the destruction of the Irish people. In every generation the Irish people have asserted their right to national freedom and sovereignty. . . Standing on that fundamental right and again asserting it in arms in the face of the world, we hereby proclaim the Irish Republic as a Sovereign Independent State, and we pledge our lives and the lives of our comrades-in-arms to the cause of its freedom, of its welfare and of its exaltation among the nations. . . .

Until our arms have brought the opportune moment for the establishing of a permanent National Government, representative of the whole people of Ireland, and elected by the suffrages of all her men and women, the Provisional Government, hereby constituted, will administer the civil and military affairs of the Republic in trust for the people. . .”(extracts from the Proclamation).

Neither the Sovereign Independent State nor the permanent National Government, representative of the whole people of Ireland, envisaged by the Proclamation, have ever come into existence. The insurrection, or the Rising as it is popularly known, was a failure. However, in the history of Irish nationalism, nothing succeeds like failure, especially a bloody failure. The execution by the British of many of the leaders of the Rising elicited revulsion among the Irish people and ensured that the high-sounding phrases of the Proclamation would echo down the century, assuring and inspiring those who see in Northern Ireland the continued denial by an alien government of the right of the Irish people to control its own destiny.

Irish nationalism was of course not born in 1916. It has its roots deep in the past in wars of conquest, resistance, reconquest and renewed resistance. Despite centuries of rule by England, the Irish were never assimilated. They retained a sense of separate identity, an identity which accommodated without yielding to colonial influences. The English common law may have replaced the Irish Brehon law, but the Irish maintained different traditions and culture to the conqueror. The use of the Irish language may have diminished in favor of English, but as Engels remarked, “The more the Irish accepted the English language and forgot their own, the more Irish they became”.<sup>7</sup> And religion had a part to play in this maintenance of a separate identity. The colonizer was Protestant, the indigenous people Catholic.

The association of religion with domination and exploitation is today nowhere more evident than in Northern Ireland where sectarianism presents a direct challenge to the noble Republican aspiration of substituting “the common name of Irishmen in place of the denomination of

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7. *The Preparatory Material for the History of Ireland*, quoted in S. CRONIN, *IRISH NATIONALISM: A HISTORY OF ITS ROOTS AND IDEOLOGY* 11 (1980).

Protestant, Catholic and Dissenter" (Wolfe Tone). The seeds of this conflict were sown in the Ulster plantation of the early seventeenth century when the British confiscated vast tracts of land in the northeast of the country and handed them over to English and Scottish settlers. The English settlers were Anglican by religion, the Scots Presbyterian. The settlers prospered, and to be Protestant was to be part of the ascendancy, to be Catholic was to be disadvantaged and, for the most part, poor. The deprivation and discrimination suffered over the years by Catholics in the north of the island fuelled a resentment which later found expression in the civil rights movement of the 1960s and a more militant voice in the long tradition of armed resistance by the I.R.A. to British oppression.

Were it not for the partition of Ireland, the I.R.A. would not exist today, but rather would enjoy pride of place in Irish history books as national heroes who contributed to the creation of the Republic proclaimed in 1916. But Northern Ireland remains part of the United Kingdom, and the I.R.A., weathering internal splits and repression by both the British and Irish authorities, has survived. Seventy years on from the Rising, the I.R.A. still claims to be an army of national liberation, fighting to remove the last vestiges of colonial occupation by the British from the northeastern part of Ireland.

The last all-Ireland Parliamentary elections were held in December 1918, when Sinn Fein, the political associates of the I.R.A., won 73 of the 105 Irish seats in the British Parliament. Instead of taking up these seats, those of the 73 who were not in jail or elsewhere on Republican business met in Dublin, in January 1919, and held their own parliament, the first Irish Dail.<sup>8</sup> The Dail described itself as the parliament of the Irish Republic 'proclaimed in Dublin on Easter Monday, 1916, by the Irish Republican Army acting on behalf of the Irish people', and *inter alia* adopted a Programme of Social and Democratic Rights based on the 1916 Proclamation. The Dail was of course not recognized by Britain, and it met clandestinely while hostilities with Britain continued. In 1920, the British Parliament passed the Government of Ireland Act which effectively partitioned Ireland. Under this Act, there were to be two parliaments in Ireland, both bicameral, one in the North in the six counties, and one in the South. The first Dail refused to recognize these new institutions, and when, in 1921, elections were held to the lower house of the Southern parliament, it regarded the elections as being held for a second Dail. In the election, 124 Sinn Fein candidates were returned unopposed. Later in 1921 an Anglo-Irish Treaty was agreed by British and Irish representatives, and was approved by the Dail in January 1922, by 64 votes to 57.

Under the Treaty, a degree of independence was conferred on the 26

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8. On the first and second Dails, and the repudiation by the I.R.A. of the 1921 Treaty, see COOGAN, *supra* note 3, at 40-51; CRONIN, *supra* note 7, at 123-4, 131f; and J. BOWYER BELL, *THE SECRET ARMY: THE I.R.A. 1916-1979* 18-21, 25-26, 30-31 (rev. ed. 1979).

counties which were henceforth to be known as the Irish Free State. The new State fell far short of the Irish Republic proclaimed in 1916. For one thing, it did not encompass the whole island, but only 26 of its 32 counties. The six counties in the North were allowed to opt out of the Free State and to retain their own parliament and government and status as part of the United Kingdom. For another, the 26 counties became a self-governing dominion of the British Empire, on a par with Australia, Canada, New Zealand and South Africa, and its status within an empire was marked by the presence of a British Governor-General in Dublin. Members of the new southern Parliament also had to swear an oath of allegiance to the British Crown, and the British retained control of a number of Irish ports. Those Dail deputies who opposed the Treaty walked out of the southern Parliament, and an I.R.A. convention in Dublin rejected the Treaty and affirmed its allegiance to an all-Ireland Republic. In the I.R.A. interpretation of Irish history, it is its army council which is today the provisional government of the Irish people and 'the direct lineal successor of the Provisional Government of 1916, the first Dail of 1919 and the second Dail of 1921'.<sup>9</sup>

In the I.R.A. view, neither the Free State Parliament and Government, nor their successors under the 1937 Constitution of Ireland, represent the Irish people. Indeed, they are usurpers who have betrayed the Republic proclaimed in 1916. Over time the imperial ties of the Free State with Britain were severed. An Irish Government under De Valera subsequently abolished the oath of allegiance, persuaded the British to relinquish control of the ports, and eventually secured the adoption of a new Irish Constitution. Under this Constitution, the Governor-General was replaced by a President, and in 1948 the Irish Parliament passed legislation declaring the State to be a Republic. Yet, according to the I.R.A. view, while six counties in the North remain under British rule, Ireland, is not, and cannot be, truly independent. The maintenance of the link between Northern Ireland and Britain is a colonial remnant, left over from the Anglo-Irish Treaty of 1921; and it is the I.R.A. and its political wing, Sinn Fein,<sup>10</sup> which have remained faithful to the Irish Republic of 1916 and who are the true representatives of the Irish people. Neither the '21 Treaty nor events subsequent thereto have brought about the complete decolonization of Ireland. British troops in Northern Ireland are an army of occupation, and the I.R.A. is engaged in a war of national liberation on behalf of the Irish people against an alien, occupying power.

Such is the claim. Let us examine it against the rules and principles of international law.

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9. *I.R.A., Green Book*, quoted in COOGAN, *supra* note 3, at 685.

10. When on 2 November 1986, at its annual meeting in Dublin, Sinn Fein dropped its abstentionist policy with respect to participation in the Irish Parliament and decided to contest the next general elections in the South, a splinter group which favored continued abstention formed, calling itself Republican Sinn Fein.



### III. ASSESSMENT

#### A. *The Right of Self-Determination*

The word "self-determination" appears to have entered the language of politics in the mid nineteenth century in connection with the European nationalism of that day.<sup>11</sup> It does not feature in the Covenant of the League of Nations, but when the U.N. Charter was adopted in 1945, it was included, in tandem with equal rights, as a principle of international law.<sup>12</sup> Post 1945, this principle has been developed and fleshed out in the practice of the United Nations, mainly in the context of that organization's decolonization program, but now also extending to situations of alien domination and occupation as well as racist regimes. Important documents include the 1960 U.N. General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples, the 1966 International Human Rights Covenants, the 1970 U.N. General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States,<sup>13</sup> and the 1974 Assembly Resolution on the Definition of Aggression. In these documents, self-determination is no longer referred to simply as a principle of international law, but as a right enjoyed by peoples. It has been lifted out of the exclusively colonial context and brought within the international movement for the promotion and protection of human rights. In fact, on one widely-held view of the right of self-determination, it is a prerequisite for the enjoyment of all individual human rights.<sup>14</sup> The evolution of the principle post 1945 outside the U.N. has entailed a similar broadening of its application to situations of alien domination and exploitation. Recent landmarks include the 1977 Geneva Protocol I Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, and the 1981 African Charter of Human and Peoples' Rights.

As evidenced by such texts as the International Human Rights Covenants and the African Charter, the right of self-determination is now widely recognized as a matter of treaty law. Indeed, these treaties, together with other evidence of state practice such as that mentioned above, suggest that self-determination is now a universally recognized right pertaining to peoples under customary international law.

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11. See, e.g., U.O. UMOZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW* 3 (1972).

12. Arts.1(2) and 55.

13. These international texts are specifically cited by Sinn Fein in support of the right of the Irish People to sovereignty, independence and unity: see Fein, *supra* note 2, at 3-4.

14. See, e.g., H. Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions*, Report presented to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities para.78, E/CN./sub.2/405/Rev.1 (1980); and A. Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, Report presented to the Sub-Commission para.228, E/CN./sub.2/404/Rev.1 (1981).

The I.R.A. claim to be exercising the right of self-determination of the Irish people therefore has a basis in international law in that the existence of such a right is generally accepted by the international community of states at the present time. In its political dimension,<sup>15</sup> self-determination signifies the right of a people to reject colonial rule or other forms of alien domination and the freedom to choose both their own external political status and their own form of government. With respect to choice of political status, the international texts mention a range of options from emergence as a sovereign independent state to integration with an existing independent state. With respect to choice of government, racist regimes are precluded by many of the international texts, and such regimes are in fact viewed as a legacy of colonial oppression and alien domination. Otherwise the choice would appear to be an open one.

The I.R.A. claim cites two principal justifications for regarding Northern Ireland as a self-determination issue: firstly, that Northern Ireland is a colony of Britain; and secondly, that it is subject to alien occupation.<sup>16</sup>

While there is an obvious overlap between the two justifications in that when a people is subject to colonial rule, it is also *ipso facto* subject to alien domination, the latter may take forms other than colonial rule. The argument that Northern Ireland is under foreign occupation of a variety other than the colonial cannot be seriously entertained. Indeed, between 1922 and 1972, until the introduction of direct rule from London, Northern Ireland had its own regional legislative assembly and government, flawed though these institutions may have been in terms of representing the interests of all sections of the population of Northern Ireland. Attempts to revive and to remodel such institutions since 1972 have failed, and direct rule by Britain continues to be the order of the day. The argument that this constitutes alien rule, and that the British forces in Northern Ireland are an army of occupation, does not afford a distinct legal basis for the I.R.A. claim, but is rather a variant of the contention that Northern Ireland is a British colony.

As we have seen, the Irish people never entirely accepted being ruled by Britain or forming part of a larger political unit comprising both Ireland and Great Britain. They retained a sense of distinct identity and resented being governed by what they regarded as an alien administration. This resentment surfaced periodically in violent resistance and Irish

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15. For the economic, social and cultural dimensions see, e.g., Espiell, *supra* note 14, paras.135-165, and Cristescu, *supra* note 14, chs.V-VII.

16. The I.R.A. sometimes analogize between the administration of Northern Ireland and racist regimes. It is alleged that the administration discriminates against a nationalist, predominantly Catholic minority, and that this is analogous to racism, e.g. in South Africa. The international texts on self-determination mention only racist regimes and contain no reference to other forms of oppressive government unless they be "alien" or "colonial". The allegation is more suited to the non-discrimination norms of international human rights law, and does not specifically fall within the law relating to self-determination.

history records a panoply of national heroes and heroines, some operating within the established political structures of the day to advance Irish independence, others without. The problem for Irish unity is that, for the last three to four hundred years, a significant number of the inhabitants of Ireland, concentrated in the northeastern part of the island, do not share this sense of Irishness, but see themselves either as British or as a different variety of Irish to the rest of the inhabitants. The I.R.A. claim sees the Irish people as comprising the whole population of the island, including the loyalist concentration in the northeastern corner. The loyalists may be reluctant Irishmen and women but, in that they inhabit an island which was colonized by Britain and the majority of the inhabitants of that island wish it to have an existence separate from Britain as a sovereign, independent state, the veto which the loyalists have been allowed to exercise over the unity of the country for the last 65 years is, in the I.R.A. view, invalid and contrary to the right of self-determination of the whole people.

There is some strength in this argument in that most colonial territories have been treated as a unit for the purpose of decolonization. Colonies with many disparate ethnic groups within their borders have become independent without reference to the wishes of each of the component parts, and any tension between groups has been treated as a problem to be resolved post-decolonization by the new state. However, although this has been the predominant pattern of decolonization, it has not been a uniform pattern. There have been instances of a colonial territory being divided, and of the wishes of the inhabitants of one part of the territory being respected when they did not accord with those of the inhabitants of another part or parts. Thus, the Belgian colony of Ruanda-Urundi was granted independence as two separate states, Rwanda and Burundi; and the northern region of the British Cameroons joined with Nigeria, the southern with the state of Cameroun.<sup>17</sup>

The argument is therefore not watertight. The counter-argument, that decolonization was effected under the Government of Ireland Act 1920 and the Anglo-Irish Treaty 1921, also has merit. But even if it is accepted that the decolonization of Ireland in 1920/1921 was only partial, that Northern Ireland is a colonial remnant, and that full decolonization in line with the wishes of the majority of the inhabitants of the island has yet to occur, there remains one important question with respect to the I.R.A. claim — the entitlement of the I.R.A. to speak and act on behalf of the Irish people, and this involves consideration of the status of national liberation movements under international law and of the credentials of any group claiming to be such a movement.

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17. See, e.g., M. POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE* 19-20 (1982) for these and other examples.

### B. *National Liberation Movements*

National liberation movements clearly enjoy a degree of legal personality under international law. Organizations such as the Palestine Liberation Organization and the South-West Africa People's Organization have been afforded observer status in a number of intergovernmental bodies including the U.N. The League of Arab States has repeatedly endorsed the right of the P.L.O. to act on behalf of the Palestinians and expressed support for national liberation movements in South Africa. Polisario represents the Sahrawi Democratic Republic in the Organization of African Unity. Of particular significance with respect to the law relating to armed conflict is the fact that, in 1974, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted, by consensus, a resolution inviting national liberation movements recognized by regional intergovernmental organizations to participate without voting rights in the Conference. Ten delegations participated in the Conference as representatives of national liberation movements: the Mozambique Liberation Front (FRELIMO), the People's Movement for the Liberation of Angola (MPLA), the Angola National Liberation Front (FNLA), the African National Congress (ANC), the African National Council of Zimbabwe (ANCZ), the Pan African Congress (PAC), the Zimbabwe African People's Union (ZAPU), SWAPO, the Seychelles People's United Party (SPUP), and the PLO. Over 100 states were represented at the Conference, and provision was made in the Final Act of 1977 for ANC, PLO, PAC and SWAPO to sign it.<sup>18</sup> Moreover, as we have seen, one of the treaties negotiated at the Conference, Geneva Protocol I, has extended the concept of an international armed conflict to include wars of national liberation.<sup>19</sup> International law therefore addresses itself to liberation movements, and in accepting the credentials of particular movements confers on the armed struggles in which they are engaged a status under the law which is denied to other situations of violent conflict.

The I.R.A. claims to be a national liberation movement. It is anxious to distinguish itself from the violent anti-capitalist exploits of groupings such as the Red Army Faction, Action Directe and the Red Brigades in Europe. Whatever the merits or demerits of the violent activities of these groups, they are seen as belonging to a different category to the violent activities of national liberation movements. Rather the I.R.A. analogizes between its struggle in Northern Ireland and the Algerian war of independence and refers, as a present day parallel, to the oppression of the colored inhabitants of South Africa by a racist regime.<sup>20</sup> The parallels are at best partial, but they do clearly tie the I.R.A. claim to legitimacy to a

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18. See, e.g., Espiell, *supra* note 14, para.233. See also *id.* paras.104-5 and 191-233 on the legal personality and recognition of national liberation movements generally.

19. Art.1(4). See also 96(3).

20. See, e.g., ADAMS, *supra* note 3, at 5, 28; and CRONIN, *supra* note 7, at 185, 208.

recognized institution of international law, the national liberation movement. But is the I.R.A. in fact such a movement? Has it been recognized as a national liberation movement for the purpose of exercising the right of self-determination of the Irish people?

Despite the many changes in the nature and structure of international law in this century, international law is still essentially a state-based system of law, and the self-perception of a particular group as a national liberation movement is not of itself sufficient to confer that status on it as a matter of international law. Such status can only be conferred by states, acting either individually or collectively. Have either of the two internationally-recognized states most directly concerned, the United Kingdom and Ireland, or any other state or grouping of states accepted the claim of the I.R.A. to be an army of national liberation?

### *1. United Kingdom*

The United Kingdom does not accept the I.R.A. as the legitimate representative of the nationalist minority in Northern Ireland, still less of the whole people of Ireland. Rather the attitude of the British authorities in recent years has been one of straightforward criminalization. The I.R.A. is proscribed by law, and persons convicted of offenses relating to its activities are treated as common criminals.

Government policy towards the I.R.A. had earlier been somewhat less harsh. In the early '70s, those detained for I.R.A.-related activities were given special category status while in detention. Special category prisoners were housed in special compounds, were allowed to wear their own clothes, were not required to work, and were afforded additional privileges, such as extra visits and food parcels. In November 1975, however, this changed. The Secretary of State for Northern Ireland announced the Government's intention to phase out special category status, and this process began on March 1, 1976. No prisoner convicted on or after that date has been accorded special category treatment.<sup>21</sup> Neither 'dirty protests', nor hunger strikes, nor resort to the human rights institutions in Strasbourg, have succeeded in securing the reintroduction of such status.

Even when granted, the status, although signifying an acceptance by the authorities that the I.R.A. prisoners were of a somewhat different species to 'ordinary' criminals, cannot be regarded as tantamount to conferral of prisoner-of-war status or to recognition by the United Kingdom of the I.R.A. as a national liberation movement. As we have seen, Geneva Protocol I brings within the scope of international armed conflicts and therefore of the substantial body of international humanitarian law relating thereto "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exer-

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21. See *McFeeley v. United Kingdom*, 20 DECISIONS AND REPORTS OF THE EUR. COMM'N ON HUMAN RIGHTS 44, 48 (1980) (decision of the Eur. Comm'n on Human Rights).

cise of their right of self-determination."<sup>22</sup> At the time of signing this Protocol in 1977, the British Government entered several reservations including one requiring a certain level of intensity of military operations before a situation could be regarded as an armed conflict, and another that an authority which claims to represent a people "be recognized as such by the appropriate intergovernmental organization." No such recognition has been afforded the I.R.A., and the British authorities would deny that the level of intensity of military operations in Northern Ireland is sufficient to constitute a non-international armed conflict (governed by Protocol II), let alone an international armed conflict (governed by Protocol I).<sup>23</sup>

Another indicator of possible recognition by the United Kingdom of a conflict situation in Northern Ireland is the fact that for years the British Government took advantage of Article 15 of the European Convention on Human Rights to derogate from its human rights obligations under that Convention. Article 15 allows derogation in "time of war or other emergency threatening the life of the nation." But while the British authorities would concede that there was an emergency situation in Northern Ireland, they would not concede that there was a war or international armed conflict. Moreover, on August 22, 1984, the United Kingdom withdrew its notice of derogation under the Convention.

## 2. Ireland

Articles 1-3 of the Irish Constitution assert the right of self-determination of the Irish nation and give expression to the nationalist aspiration to a united Ireland. Article 1 affirms, *inter alia*, the right of the nation to choose its own form of government. Article 2 states that the national territory comprises the whole island of Ireland, its islands and territorial seas. Article 3 provides that, although the Parliament and Government established by the Constitution have the right to exercise jurisdiction over the whole of the national territory, the laws enacted by that Parliament shall, pending the re-integration of the national territory, apply

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22. Art.1(4).

23. The U.K. has not yet ratified Protocol I. Under it, even a member of a national liberation movement will forfeit the right to be regarded as a prisoner-of-war when captured if she/he fails to carry arms openly during each military engagement and during such time as that member is visible to the adversary while engaged in a military deployment preceding the launching of an attack: *see* Art.44(3). The U.K. has also signed (but not yet ratified) Protocol II which applies to non-international armed conflicts between the armed forces of a Contracting Party and "dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [the] Protocol", Art.1(1). It does not apply to situations of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts", Art.1(2). Although the I.R.A. is an organized armed group with a command structure, it is debatable whether, by the level and nature of its military operations, it would attract the application of this Protocol.

only to the 26 counties. No Irish Government post 1922 has accepted that the I.R.A. is entitled to act on behalf of the Irish people. The present Constitution was adopted by referendum in the 26 counties in 1937 in the name of the people of Ireland,<sup>24</sup> and according to Article 3 it is the Parliament and Government established by the Constitution which have the right to exercise jurisdiction over the entire national territory, not any other institution or group.

There is widespread sympathy among the population of the South for the nationalist aim of the I.R.A., but less sympathy for the means it uses to realize this goal. It has often been noted that the Irish are ambivalent in their attitude to violence, but this ambivalence has been less marked in recent years with increasing condemnation not only of indiscriminate bombings in the North but also of targeted attacks on state personnel such as members of the Royal Ulster Constabulary and of the judiciary.<sup>25</sup> After a slight upsurge in popular support following the death of ten hunger strikers in the North in 1981,<sup>26</sup> concern has switched to more mundane matters such as the high level of taxation, the ever increasing rate of unemployment and the continuing drain of emigration. The unity of Ireland by any means, whether violent or non-violent, is no longer high on the list of political priorities in the South.

This hardening of popular opinion in the 1980s towards the use of violence has been mirrored in the courts. Where less than ten years ago a person wanted for I.R.A.-related activities in the North would have successfully resisted extradition on the basis of the political offence exception, the plea is now much more readily rejected by the courts. Instead of being categorized as political, the offence for which the person is wanted is more likely to be described as "revolting and cowardly" and as 'dishonoring the cause espoused by its perpetrator',<sup>27</sup> and the fugitive accordingly extradited to the North. Moreover, the courts now cite the Irish Constitution to condemn organizations such as the I.R.A. as treasonable and hence deny them any recognition under the political offence exception.<sup>28</sup>

In like vein, Irish Governments have taken a succession of measures to suppress and marginalize the I.R.A. In February 1986, the then Government signed the European Convention on the Suppression of Terrorism, and in December of that year introduced legislation into Parliament

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24. 65% of the electorate voted and 57% of those who voted approved the Constitution.

25. There has been particular revulsion at attacks on economic targets, such as building contractors who repair British army barracks.

26. See ADAMS, *supra* note 3, at 80-85. Sinn Fein polled a low vote in the February 1987 general election in the Republic and failed to gain a seat.

27. McGlinchey v. Wren [1982] I.R. 154 at 159. See also Shannon v. Fanning [1984] I.R. 569, and Quinn v. Wren [1985] I.R. 322.

28. Arts. 15.6 and 39: see Quinn [1985] I.R. 322. This case concerned the I.N.L.A., not the I.R.A.

to give effect in Irish law to the Convention. The main targets of this legislation are of course groups such as the I.R.A. and the I.N.L.A. A year earlier, in November 1985, the Government concluded the Anglo-Irish Agreement.<sup>29</sup> This agreement tackles head on, in its very first Article, the question of the status of Northern Ireland. Under it, the British and Irish Governments 'affirm that any change in the status of Northern Ireland will only come about with the consent of a majority of the people of Northern Ireland', "recognize that the present wish of a majority of the people of Northern Ireland is for no change in the status of Northern Ireland", and "declare that, if in the future a majority of the people of Northern Ireland clearly wish for and formally consent to the establishment of a united Ireland, they will introduce and support in the respective Parliaments legislation to give effect to that wish."

In concluding this Agreement, the two Governments recognize and attempt to reconcile the two traditions in Northern Ireland, the loyalist and the nationalist, and assert that any change in the status of that territory may only come about by constitutional means, and moreover by means which respect the wishes of the majority of the population of Northern Ireland. This sounds very like a classic implementation of self-determination, except that the people exercising the right are no longer the people of the whole island, still less those of the United Kingdom as a unit, but the people of Northern Ireland. On the one side, the Government of the United Kingdom has formally accepted that a majority of the inhabitants of Northern Ireland may one day wish to be united with the Irish Republic rather than to continue as part of the United Kingdom, and has undertaken to give effect to that wish should it arise. On the other side, the Irish Government has conceded that the nationalist claim to Northern Ireland should not take priority over the wishes of a majority of its inhabitants, and that, although the Irish Government has been given a consultative role under the Agreement with respect to certain matters in Northern Ireland, it is ultimately the people of Northern Ireland who will themselves decide their own future.

### 3. *Other States*

It would appear that the only state which today unequivocally recognizes the I.R.A. as waging a war of national liberation in Northern Ireland against an occupying colonial power is Libya. While statesmen of other countries have from time to time expressed support for the nationalist cause, there has been no endorsement of violence in pursuit of this cause, much less acceptance that the I.R.A. is the legitimate representative of the Irish people for the purpose of securing Irish unity.

The situation in Northern Ireland has over the years come before

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29. The present Prime Minister of Ireland, after initially rejecting the Agreement while in opposition, has indicated that his Government will in fact honor it: see *The Irish Times*, March 17 and 18, 1987.



many international fora including the U.N. Human Rights Commission and the European Court of Human Rights, but concern about human rights violations is one thing, categorization of the situation in which they occur as an international armed conflict is another, and it has never been accepted by any intergovernmental organization that there is currently being waged in Northern Ireland a war of national liberation. In 1969, when violence escalated in Northern Ireland, the Irish Government attempted to bring the situation before the U.N. and to persuade the British Government to allow a U.N. peacekeeping force into Northern Ireland. The U.K. rejected this suggestion, and when it also managed to persuade the U.S.A. that the situation was an internal civil rights matter, the prospect of U.N. action evaporated.<sup>30</sup> Furthermore, as we have seen, one of the fora in which the question of the status of specific organizations as national liberation movements was addressed was the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, and the I.R.A. was not among the movements invited to participate in the Conference.

#### IV. CONCLUDING REMARKS

Although the argument that Northern Ireland is a British colony appears at first sight plausible given the history of Ireland, on closer examination, it becomes clear that it does not mesh entirely with reality. As far as the vast majority of states in the world today are concerned, Ireland was decolonized in 1922 with the establishment of the Irish Free State, or at some time in the following decades when the new state began to assert its independence of Britain. Northern Ireland is today legally part of the United Kingdom, a status most recently confirmed in the Anglo-Irish Agreement by the government with the greatest interest in the territory and its inhabitants apart from Britain, that is, the Irish Government.

But even if it be accepted that Northern Ireland is a lingering outpost of a once great empire and represents "unfinished business",<sup>31</sup> the claim of the I.R.A. to be exercising the right of self-determination of the Irish people is weak and has not been generally endorsed by the international community of states. Nor can it claim to represent the people of Northern Ireland, the majority of whom have for the last 65 years made it clear that they want no part of Irish unity. That leaves the nationalist minority in Northern Ireland, but international law has not yet accepted that a minority may constitute a people for the purpose of exercising the right of self-determination.

To reject as not well-founded in international law the claim of the I.R.A. to be a national liberation movement is not to denigrate the courage of many of its members or to question the sincerity with which they

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30. See COOGAN, *supra* note 3, at 426; and BOWYER BELL, *supra* note 8, at 364.

31. ADAMS, *supra* note 3, at 38.

hold this view. The fact is that they are not 'ordinary' criminals, and no amount of terrorist labelling can make them so. Both the British and the Irish Governments should recognize this. Some recognition may be afforded the ideological motivation of members of the I.R.A. and some distinction drawn between them and 'ordinary' criminals, without conceding that they are waging a war of national liberation and without conferring on them the status of combatants or prisoners-of-war when detained. Thus, the authorities in Northern Ireland could allow them certain privileges denied to other prisoners, and the Irish authorities could retain the political offence exception to extradition for acts which, if they had occurred in a situation of recognized armed conflict, would be regarded as legitimate. In this latter connection, it is my view that the European Convention on the Suppression of Terrorism is too crude an instrument in that it provides for extradition for certain offenses irrespective of motivation and of the context and circumstances in which the offence occurs. To kill an 'enemy' soldier in an imagined war of national liberation is not the same thing as to plant a bomb on a crowded bus. In an actual war or armed conflict, the former killing may be legitimate, the latter is prohibited.

The I.R.A. of 1987 is not the same organization as the I.R.A. (Irish Volunteers) of 1916. It is a time-warp to view the I.R.A. today as an army of national liberation. Much water has passed under the bridge since 1916. A new state with democratic institutions has come into existence in the greater part of the island, and even in the North some democratic institutions survive, however inadequate they may be.

The way forward in Northern Ireland with its horrendous social problems and imbedded religious bigotry is not through the gun. Significant social reform is needed not only to end discrimination in such matters as jobs and housing, but to secure to each member of the community irrespective of religious affiliation, political beliefs or social class, a life of dignity. The greatest problem of all is clearly sectarianism, and one of the greatest perpetrators of sectarianism is the system of segregated education at primary and secondary levels— segregation not on the basis of color or sex, but of religion. Integrated schooling must be seen as a priority. Such radical change would be resisted by powerful vested interests, but where there's a will, there's a way. Ironically, the introduction of such reform would in all probability be fundamentally undemocratic in that it would have to be introduced against the wishes of the majority of the population on both sides of the sectarian divide. Without such reform, however, little will change. Bigotry will continue to stalk the land claiming victims and, as in the past, the seething cauldron will periodically bubble over in violent fashion. There must be a better way.