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INTERNATIONAL AGREEMENTS—*Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland, signed November 15, 1985, reprinted in 24 I.L.M. 1582 (1985)*

On November 15, 1985, Great Britain and Ireland signed an Agreement at Hillsborough Castle in Northern Ireland creating the Anglo-Irish Intergovernmental Conference for Northern Ireland (the Conference). The Conference, through which Ireland will be able for the first time to participate regularly and formally in Northern Ireland's affairs, will continue until some form of devolved self-government wins widespread acceptance in Northern Ireland or until a majority of the people there consent to reunification with Ireland. The Agreement also reflects new willingness on the part of the United Kingdom to face up to unionist obstructionism in Northern Ireland.

The Anglo-Irish Agreement¹ is the latest of numerous British and Irish attempts to address a national division deeply rooted in Irish history. Northern Ireland, also referred to as Ulster,² has had an identity independent from that of the rest of Ireland for at least 350 years.³ The "plantation of Ulster," beginning in 1607, introduced a large Scottish Presbyterian population into what had hitherto been the most Gaelic part of Ireland.⁴ Many settlers were killed in the Ulster

1. Agreement between the Government of the United Kingdom and the Government of Ireland, reprinted in 24 I.L.M. 1582 (1985) [hereinafter cited as Anglo-Irish Agreement]. The Agreement was subject to ratification and was to enter into force on the date on which the two governments exchanged notifications of their acceptance. *Id.* art. 13. The Irish Parliament approved the Agreement on November 21, 1985 and the British Parliament approved it on November 27, 1985. Notifications of acceptance were exchanged on November 29, 1985. 24 I.L.M. 1579 (1985).

2. "The term 'Ulster' is popularly used in Ireland to describe two different areas. The first is the nine counties of the traditional province—Antrim, Down, Armagh, Derry, Tyrone, Fermanagh, Donegal, Monaghan and Cavan. The other area is the administrative and political unit which since 1921 has formed the state of Northern Ireland . . ." Darby, *The Historical Background*, in NORTHERN IRELAND, THE BACKGROUND TO THE CONFLICT 13 (J. Darby ed. 1983).

3. Evans, *The Personality of Ulster*, 51 TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 4 (1970). The two standard textbooks are J.C. BECKETT, *THE MAKING OF MODERN IRELAND, 1603-1923* (1966) and F.S.L. LYONS, *IRELAND SINCE THE FAMINE* (1973). On English attitudes, see N. MANSERGH, *THE IRISH QUESTION, 1840-1921* (1965). Eastern Ulster and western Scotland had exchanged immigrants since before the middle ages. P. ARTHUR, *GOVERNMENT AND POLITICS OF NORTHERN IRELAND* 3 (1984).

4. Northern Ireland was the last part of Ireland to succumb to the military ambitions of the English Tudors and almost wholly Gaelic when in 1603 it surrendered to the united power of England and Scotland under James I. P. ARTHUR, *supra* note 3, at 1-2; P. BUCKLAND, *A HISTORY OF NORTHERN IRELAND* 1-2 (1981). Henry VIII, as King of Ireland from 1541, began a policy of imposed Protestantism and land seizures which Elizabeth I continued and James I confirmed with the comprehensive "plantation of Ulster," through which, beginning in 1607, thousands of Presbyterian Scotsmen were introduced into Ireland and settled on lands taken from the clans of the Irish rebel chieftains. Stewart, *The Mind of Protestant Ulster*, in *THE CONSTITUTION OF NORTHERN IRELAND* 32-38 (D. Watt ed. 1981).

Rebellion of 1641,⁵ but Protestant ascendancy in Northern Ireland was assured in 1690 with the victory of William of Orange over the forces of the Catholic James II in the battle of the Boyne.⁶ Ulster has been a British bastion against Irish rebellion ever since.⁷

Ireland's political unity was established by the British, who ruled from 1692 through a Protestant legislature sitting in Dublin,⁸ and after 1800 and the Act of Union, through the Parliament at Westminster.⁹ Despite Ulster's cultural differences from the rest of Ireland, political separation did not begin until passage of the Government of Ireland Act of 1920, by which the British Government created two Irish Parliaments, one for the South and West and one for the six most Protestant of the Ulster counties in the North. Both Irish Parliaments were made subject to the British Parliament at Westminster.¹⁰ When an Anglo-Irish treaty created the Irish Free State in 1921, the Northern Irish counties were permitted to exclude themselves from the new state if their Parliament so voted. The Parliament

5. T.W. MOODY, *THE ULSTER QUESTION 1603-1973* 6-7 (1974).

6. P. BUCKLAND, *supra* note 4, at 3. By 1703 Catholics owned less than 14 % of the land in Ulster. P. ARTHUR, *supra* note 3, at 2.

7. The Professor of Political Economy at Oxford observed after a visit to Ireland that Ulster was to be thought of as a separate country, with a population "not merely dissimilar but opposed to" that in the rest of the island. NASSAU SENIOR, *1 JOURNALS, CONVERSATIONS AND ESSAYS RELATING TO IRELAND* 22 (1868); Mansergh, *The Influence of the Past*, in *THE CONSTITUTION OF NORTHERN IRELAND* 5-6 (D. Watt ed. 1981); G. BELL, *THE PROTESTANTS OF ULSTER* 7-8 (1976).

8. This early Irish unity was not entirely illusory. Presbyterians suffered nearly as much as Roman Catholics from the dominance of the Established (Episcopalian) Church. The Presbyterian-led "United Irishmen" began in Belfast from 1791 to fight to unite "the whole people of Ireland" against British misrule, but Catholic participation was half-hearted and the rising of 1798 a miserable failure. P. ARTHUR, *supra* note 3, at 4-5.

9. The Act of Union of 1800 disbanded "Grattan's Parliament" (1782-1800), whose members after 1793 were elected by Catholic as well as Protestant voters, and instituted direct rule from Westminster. *Id.*

Despite Ulster's cultural differences from the rest of Ireland, the Home Rule agitators of the 1880's thought of Ireland as a unit, as did their opponents. Mansergh, *supra* note 7, at 6-7. The notion of excluding Northern Ireland arose only when opposition to Home Rule began to seem a lost cause. *Id.* at 8-9.

10. The Government of Ireland Act, 1920, 10 & 11 Geo. 5, ch. 67. "On and after the appointed day there shall be established . . . for Northern Ireland a Parliament to be called the Parliament of Northern Ireland consisting of His Majesty, the Senate of Northern Ireland, and the House of Commons of Northern Ireland. For the purposes of the Act, Northern Ireland shall consist of the parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone and the parliamentary boroughs of Belfast and Londonderry and Southern Ireland shall consist of so much of Ireland as is not comprised within the said parliamentary counties and boroughs." *Id.* § 1. "Notwithstanding the establishment of the Parliaments of Southern and Northern Ireland, or the Parliament of Ireland, or anything else contained in this Act, the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters, and things in Ireland and every Part thereof." *Id.* § 75. C. PALLEY, *THE EVOLUTION, DISINTEGRATION AND POSSIBLE RECONSTRUCTION OF THE NORTHERN IRELAND CONSTITUTION* 389 (1973); P. ARTHUR, *supra* note 3, at 20-22; Mansergh, *supra* note 7, at 12-15.

later voted to exercise this right to opt out.¹¹ A third of the Northern Irish population was Roman Catholic and opposed to partition, as was the population of the South.¹²

Northern Ireland's present troubles developed out of the worldwide civil rights movement of the late 1960's.¹³ Both Ireland and Britain claimed sovereignty over the counties of Northern Ireland but neither took much interest in the actual governance of Northern Ireland, which in practice devolved upon the Northern Irish Parliament at Stormont.¹⁴ The Stormont Parliament was dominated by Protestants who ran the province in the Protestant interest.¹⁵ Civil rights marches and demonstrations by Catholics were met with violence and eventually the British army had to be brought in to restore order.¹⁶ In 1972, the British Parliament, acting under the authority of the 1920 Government of Ireland Act, adjourned the Parliament at Stormont and imposed direct rule over Northern Ireland.¹⁷

The Anglo-Irish Agreement is the latest of a series of attempts since 1972 to arrange Northern Irish affairs so that the British troops will

11. Mansergh, *supra* note 7, at 17-19.

12. The New Irish Constitution of 1937 declared the national territory to extend to the whole island of Ireland. Article 2 declares: "The national territory consists of the whole island of Ireland, its islands and territorial seas." Article 3 declares: "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 like area and extent of application as the laws of the *Saorstát Éireann . . .*" (i.e. the twenty-six counties of the Republic) "and the like extra-territorial effect." See J. BOWMAN, *DE VALERA AND THE ULSTER QUESTION 1917-1973* 148-51 (1982); K. BOYLE & T. HADDEN, *IRELAND, A POSITIVE PROPOSAL* 44 (1985); P. ARTHUR, *supra* note 3, at 18-19; Mansergh, *supra* note 7 at 20-21. When Ireland seceded from the Commonwealth in 1949, *id.* at 20; P. ARTHUR, *supra* note 3, at 18-19; BOWMAN, *supra* at 267-70, the British responded with the Ireland Act of 1949 declaring that "Northern Ireland remains a part of His Majesty's dominions and of the United Kingdom and it is hereby affirmed that in no event will Northern Ireland or any part thereof cease to be part of His Majesty's dominions and of the United Kingdom without the consent of the Parliament of Northern Ireland." *Id.* at 270-72; N. MANSERGH, *THE GOVERNMENT OF NORTHERN IRELAND, A STUDY IN DEVOLUTION* 314 (1963). This has been taken as a "guarantee" of a Protestant right of veto to any alteration in the governance of Northern Ireland. K. BOYLE & T. HADDEN, *supra* at 45.

13. White, *From Conflict to Violence: The Re-emergence of the IRA and the Loyalist Response*, in *NORTHERN IRELAND: THE BACKGROUND TO THE CONFLICT 181-96* (J. Darby ed. 1983); P. BUCKLAND, *supra* note 4, at 115-31; K. BOYLE & T. HADDEN, *supra* note 12, at 64; D. HARKNESS, *NORTHERN IRELAND SINCE 1920* 139-72 (1983).

14. P. ARTHUR, *supra* note 3, at 24-30.

15. *Id.* at 67-83; P. BUCKLAND, *supra* note 4, at 55-81.

16. P. ARTHUR, *supra* note 3, at 108-9; Carroll, *The Search for Justice in Northern Ireland*, 6 *N.Y.U. J. INT'L L. & POL.* 30-35 (1973).

17. The suspension of Northern Irish Home Rule followed "Bloody Sunday," January 30, 1972, when British paratroopers fired on Catholic marchers and killed 14 people. Ulster Catholics became unanimous in vehement opposition to the Protestant regime and, after establishing the "Widgery Tribunal" to look into the affair, the English Prime Minister, Edward Heath, became convinced that only direct action could ever hope to alleviate the Ulster problem. P. BUCKLAND, *supra* note 4, at 156-58; Carroll, *supra* note 16, at 35; P. ARTHUR, *supra* note 3, at 114.

be able to leave without precipitating communal violence.¹⁸ The British hope has been for a devolved Parliament with minority participation and support.¹⁹ The Irish hope has been for a peacefully united Ireland.²⁰ Meanwhile, Britain rules Northern Ireland through the Secretary of State for Northern Ireland and his secretariat.²¹ This, however, was never intended to be a permanent arrangement.²² The Northern Ireland Constitution Act of 1973 provided for a single-chamber Assembly and the appointment of a Northern Ireland Executive which must be "widely accepted throughout the community" and govern "by consent."²³ To effect this there was a conference held at Sunningdale between the British and Irish leaders, who issued a parallel declaration asserting that the status of Northern Ireland would remain unchanged until a majority of the province's population desired otherwise.²⁴ They also agreed to establish a Council of Ireland, with representatives from both Northern Ireland and the Republic, and an all-Ireland police authority.²⁵ The Sunningdale Agreement was the most comprehensive attempt to solve the Ulster problem since 1921.²⁶ The arrangement failed, however, when Protestants joined the Ulster Worker's Council strike in May, 1974, and brought the whole Province to a halt.²⁷

18. There have been several British attempts at a settlement since Sunningdale; see *infra* note 27. On the numerous nongovernmental peace groups see D. BARRITT, *NORTHERN IRELAND, A PROBLEM TO EVERY SOLUTION* 91-117 (1982).

19. K. BOYLE & T. HADDEN, *supra* note 12, at 66-77.

20. *NEW IRELAND FORUM*, REPORT 5.2 (1984) [hereinafter cited as REPORT]; K. BOYLE & T. HADDEN, *supra* note 12, at 28.

21. P. BUCKLAND, *supra* note 4, at 159-73; K. BOYLE & T. HADDEN, *supra* note 12, at 66.

22. K. BOYLE & T. HADDEN, *supra* note 12, at 71.

23. Northern Ireland Constitution Act, 1973, ch. 36, § 2.

24. Sunningdale Communique of December, 1973: "The Irish Government fully accepted and solemnly declared that there can be no change in the status of Northern Ireland until a majority of the People of Northern Ireland desired a change in that status. The British Government solemnly declared that it was, and would remain, their policy to support the wishes of the majority of the people of Northern Ireland. The Present status of Northern Ireland is that it is part of the United Kingdom. If in the future, the majority of the People of Northern Ireland should indicate a wish to become a part of a United Ireland the British Government would support that wish." See K. BOYLE & T. HADDEN, *supra* note 12, at 48. This is essentially the same assertion as that made in Article I of the Anglo-Irish Agreement.

25. *Id.* at 48, 72.

26. Nearly every Secretary of State for Northern Ireland has attempted his own solution. Merlyn Rees established the Northern Ireland Convention in 1974; Humphrey Atkins held a series of abortive discussions in 1979 and 1980; James Prior reestablished the Northern Ireland Assembly in 1982 with a view to setting in motion a process of "rolling devolution" under which individual powers may be devolved if and when the Westminster Parliament is satisfied that such an order is likely to command widespread acceptance throughout the community. Northern Ireland Act, 1982, sec. 2.2. K. BOYLE & T. HADDEN, *supra* note 12, at 72.

27. P. BUCKLAND, *supra* note 4, at 170-73; P. ARTHUR, *supra* note 3, at 117.

The major impetus behind the Anglo-Irish Agreement of November 15, 1985 came from the New Ireland Forum Report of May 2, 1984.²⁸ The Forum had been "established for consultations on the manner in which lasting peace and stability could be achieved in Ireland through the democratic process"²⁹ All the major southern Irish political parties took part, as did the Social Democratic and Labour Party from the North.³⁰ The Forum could thus speak for over 90% of the nationalist population of Ireland when it rejected "[a]ttempts from any quarter to impose a particular solution through violence."³¹ The Report proposed three possible solutions to the Irish problem: a Unitary State,³² a Federal or Confederal State,³³ and Joint Authority.³⁴ All three solutions included broad guarantees of protection for the Protestant sensibilities of unionist Ulstermen.³⁵ The reasonable tone of the Report,³⁶ its demonstrations of the urgency of the problem,³⁷ and the manifest willingness of the Irish Taoiseach to compromise,³⁸ all called

28. REPORT, *supra* note 20; Rutherford, *Hands Across the Irish Sea*, Financial Times, Nov. 16, 1985, at 8, cols. 6-7.

29. REPORT, *supra* note 20, at 1.1.

30. *Id.* at 1.2. Together they represent 90% of the nationalist population and almost 75% of the entire population of Ireland.

31. *Id.* at 5.2(2). The Report also asserts that "the political arrangements for a new and sovereign Ireland would have to be freely negotiated and agreed to by the people of the North and by the people of the South." *Id.* at 5.2(3).

32. *Id.* at 6.1-6.8. The Unitary State would operate under a new constitution, which would be non-denominational. *Id.* at 6.1. A major practical obstacle to the Unitary State would be Ireland's inability to match the subvention currently given Northern Ireland by the British taxpayer, its withdrawal would create financial imbalances "so severe that the adjustment in living standards would be unconscionable." DAVY, KELLEHER & MCCARTHY ECONOMIC CONSULTANTS, *THE MACROECONOMIC CONSEQUENCES OF INTEGRATED ECONOMIC POLICY, PLANNING AND CO-ORDINATION IN IRELAND* 21 (1984); see also K. BOYLE & T. HADDEN, *supra* note 12, at 28-29.

33. REPORT, *supra* note 20, at 7.1-7.9. A Federal or Confederal arrangement would give Protestants some assurance that their culture would survive, while improving pan-Irish coordination of justice, commerce and industry. It would suffer some of the same economic disadvantages as the Unitary State, with the added drawback that the stronger the central government was, the unhappier the Northern Protestants would be. Yet without a strong center, minority rights would have as little protection as before, and communal dissension would continue. K. BOYLE & T. HADDEN, *supra* note 12, at 29-30.

34. REPORT, *supra* note 20, at 8.1-8.7. Joint Authority would have the advantage of preserving the British element in Northern Irish sovereignty about which the Unionists are so adamant, while protecting the interests of the minority. Joint rule from Dublin and London would leave little room for the democratic voice of the people of Northern Ireland, but this might, initially at least, prove to be an advantage. *Don't Cry for Ulster*, ECONOMIST, Nov. 23, 1985, at 16.

35. REPORT, *supra* note 20, at 6.1, 6.7, 7.1, 7.2, 8.4, 8.5.

36. See P. ARTHUR, *supra* note 3, at 146 on its subtlety.

37. "Britain has a duty to respond *now* in order to ensure that the people of Northern Ireland are not condemned to yet another generation of violence and sterility." REPORT, *supra* note 20, §§ 2.4-2.6, 3.19-20, 5.2(10).

38. The Irish Taoiseach, Dr. Garret FitzGerald, has committed his political career to the peaceful reconciliation of Ireland's religious communities and to constitutional reform in the Republic of Ireland. His mother was an Ulster Protestant. P. O'MALLEY, *THE UNCIVIL WARS*:

for a British response,³⁹ as did the continuing violence of the Irish Republican Army.⁴⁰

The Anglo-Irish Agreement consists of a preamble and thirteen articles.⁴¹ It was accompanied by a Joint Communiqué.⁴² As indicated in the preamble, the purpose of the Anglo-Irish Agreement is to encourage reconciliation and dialogue between the nationalists and unionists in Northern Ireland through mutual recognition and acceptance of each other's rights.⁴³

The Anglo-Irish Agreement begins by affirming that any change in the status of Northern Ireland will only come about with the consent of the majority of the people of Northern Ireland, but declares that if that majority ever clearly desires, and formally consents to, the establishment of a united Ireland, legislation will be introduced to give effect to that desire.⁴⁴ An Intergovernmental Conference is established,⁴⁵ to deal on a regular basis with political matters,⁴⁶ security and related matters,⁴⁷ legal matters, (including the administration of justice),⁴⁸ and cross-border cooperation on security, economic, social, and cultural affairs.⁴⁹ The Conference is to meet regularly and frequently at the Ministerial level, and when it does so the British Secretary of State for Northern Ireland and an Irish Minister are to

IRELAND TODAY 30-33 (1983); Johnson, *Why the Talks Had to Start*, *The Guardian*, Nov. 15, 1985, at 15, col. 6; Ford, *Deceptive Style of a Leader*, *The Times* (London), Nov. 15, 1985, at 5, cols. 3-5; DeYoung, *Britain and Ireland Near Deal on Future of Ulster*, *Manchester Guardian Weekly*, Nov. 17, 1985, at 16, col. 3

39. P. ARTHUR, *supra* note 3, at 146-47.

40. See Shannon, *The Anglo-Irish Agreement*, 64 FOREIGN AFF. 849, 865 (1986). Mrs. Thatcher referred to the violence in moving the government motion to approve the Anglo-Irish Agreement. See *Agreement Not Slippery Slope to Irish Unity*, *The Times* (London), Nov. 27, 1985, at 4, col. 1; Blanche, *Total Disaster Seen Facing Northern Ireland*, *The Irish Times*, Oct. 20, 1982, at A2, col. 2; Ford, *Long History of Violence and Intimidation*, *The Times* (London), Nov. 16, 1985, at 5, cols. 1-2; Van Hattem, *The Scale of the Damage*, *Financial Times*, Nov. 16, 1985, at 6, cols. 4-6.

41. Anglo-Irish Agreement, *supra* note 1.

42. Joint Communiqué, Nov. 15, 1985, reprinted in 24 I.L.M. 1579 (1985) [hereinafter cited as Joint Communiqué].

43. Anglo-Irish Agreement, *supra* note 1, at 1583. The "nationalists" are those (usually Roman Catholic Irishmen of Gaelic descent) who desire a sovereign united Ireland. The "unionists" are those (usually Protestant Irishmen of Scottish descent) who wish for no change in the present status of Northern Ireland. Stewart, *supra* note 4, at 31-45; Vaizey, *The Mind of Republicanism*, in THE CONSTITUTION OF NORTHERN IRELAND 52-65 (D. Watt ed. 1981); K. BOYLE & T. HADDEN, *supra* note 12, at 11-12; Swan, *Quasi-Constitutional Developments in Northern Ireland: Enduring Stalemate and Potential Resolution*, 13 CAL. W. INT'L L.J. 397, 378-412 (1983).

44. Anglo-Irish Agreement, *supra* note 1, art. 1.

45. *Id.* art. 2.

46. *Id.* arts. 5-6.

47. *Id.* art. 7.

48. *Id.* art. 8.

49. *Id.* arts. 9-10.

preside jointly.⁵⁰ The working of the Conference will be reviewed after three years of the signing of the Agreement.⁵¹

Both governments declare a policy of encouraging the devolution within Northern Ireland of certain governmental powers, provided that both the nationalist and unionist communities approve.⁵² Upon devolution, these devolved powers will cease to be the responsibility of the Intergovernmental Conference.⁵³

The bulk of the Anglo-Irish Agreement is concerned with defining the responsibilities that the Intergovernmental Conference will have in the absence of a devolved Northern Irish executive.⁵⁴ With respect to "political matters," the Conference will be a framework within which the Irish Government may "put forward views" on proposals for legislation when the "interests of the minority community are significantly or especially affected."⁵⁵ Changes in electoral arrangements will be considered, as will the possibility of a Bill of Rights in Northern Ireland.⁵⁶ "Security and related matters" under the purview of the Conference will include security policy, relations between the security forces and the community, and prisons policy.⁵⁷ "Legal matters, including the administration of justice" will be discussed, especially the possible harmonization of the criminal law in the North and South,⁵⁸ and the possibility of mixed courts in both jurisdictions.⁵⁹ "Cross-border cooperation on security, economic, social, and cultural matters" will be encouraged,⁶⁰ but responsibility for police operations will remain with the heads of the respective police forces.⁶¹ An attempt will be made to obtain economic aid for those areas of both parts of Ireland which have suffered most severely from the recent "instability."⁶²

The Joint Communique issued in conjunction with the Anglo-Irish Agreement declares that, at its initial meetings, the Intergovernmental

50. *Id.* art. 3.

51. *Id.* art. 11.

52. *Id.* art. 4.

53. *Id.* art. 10.

54. *Id.* arts. 5-11. Article 5(c) states that should it prove impossible to sustain devolution, the Irish government may use the Conference as a forum to speak for the Northern Irish minority, when nationalist interests are significantly or especially affected.

55. *Id.* art. 5(c). See *id.* art. 6 for the Northern Irish administrative bodies about whose composition the Irish Government will be consulted.

56. *Id.* art. 5(a).

57. *Id.* art. 7(a).

58. *Id.* art. 8. For a comparative study of the two legal systems, see generally C.K. BOYLE & D.S. GREER, *THE LEGAL SYSTEMS, NORTH AND SOUTH: A STUDY PREPARED FOR THE NEW IRELAND FORUM* (1984).

59. Anglo-Irish Agreement, *supra* note 1, art. 8. The British legal establishment has opposed the idea of mixed courts. *Fixing Ulster*, *ECONOMIST*, Nov. 16, 1985, at 15.

60. Anglo-Irish Agreement, *supra* note 1, art. 9(a).

61. *Id.* art. 9(b).

62. *Id.* art. 10(a).

Conference will concentrate on relations between the security forces and the minority community in Northern Ireland, security cooperation between the two governments and administration of justice.⁶³ The Taoiseach stated that it was the intention of his government to accede as soon as possible to the European Convention on the Suppression of Terrorism,⁶⁴ and it has since done so.⁶⁵ It was left for Parliamentary decision in Dublin and Westminster whether to establish an Anglo-Irish Parliamentary body of the kind adumbrated in the Anglo-Irish Studies Report of November, 1981.⁶⁶

Previous attempts at a Northern Irish settlement have failed because unionist parties have refused to share any executive power with "republicans" and nationalist parties have refused to enter into any governmental structure that does not include a substantial Irish dimension.⁶⁷ The Anglo-Irish Agreement attempts to circumvent these problems by creating an Intergovernmental Conference for Northern Ireland in which the Northern Irish themselves will play no role.⁶⁸ This dispenses with the necessity of local cooperation which destroyed the Sunningdale settlement.⁶⁹ Moderate nationalists are expected to support the Anglo-Irish Agreement because it gives the Irish Government a voice in the administration of Northern Ireland.⁷⁰ Unionists are intended to be appeased by the absence of any derogation of British sovereignty and the formal recognition of partition by Dublin.⁷¹ The expectation is that unionists will prefer power-sharing with local nationalists to joint administration by London and Dublin.⁷² The fear

63. Joint Communique, *supra* note 42, at 1580.

64. *Id.* at 1581. Under the European Convention on the Suppression of Terrorism, which has been open for signature since January, 1977, countries agree not to treat alleged terrorist offenses as political for the purposes of extradition. The Irish Government had not signed, because it disagreed with the way article 1 sought to redefine the concept of a political offense. Accession has become easier after a series of judgments by the Irish Supreme Court during the past two years, beginning with the decision in extradition proceedings against Mr. Dominic McGlinchey in 1983, which redefined the concept of political offenses in very much the same way as would the convention. Evans, *Dublin Promises a Blow to Terrorism*, Financial Times, Nov. 16, 1985, at 6, col. 1.

65. Boston Globe, Feb. 20, 1986, at 8, col. 4. This is the most tangible result of the Anglo-Irish Agreement. The Irish Parliament must now ratify the convention which its government has signed. *Opening the Stable Door*, ECONOMIST, March 29, 1986, at 46.

66. Anglo-Irish Agreement, *supra* note 1, art. 12.

67. K. BOYLE & T. HADDEN, *supra* note 12, at 72-74.

68. Anglo-Irish Agreement, *supra* note 1, art. 2. *No Referendum*, The Times (London). Nov. 19, 1985, at letter page, col. 2.

69. *Don't Cry for Ulster*, *supra* note 34, at 16.

70. Rutherford, *supra* note 28, at 8, col. 8.

71. Carnegie, *No Victors, Nor Any Losers in Pact, Says Fitzgerald*, Financial Times, Nov. 16, 1985, at 6, col. 2. Some unionists worry that British sovereignty has been impaired. Brown, "Treachery" Charge at Dublin Deal, Financial Times, Nov. 16, 1985, at 12, col. 1. See *infra* notes 92-93.

72. Anglo-Irish Agreement, *supra* note 1, art. 4(c).

is that nationalists will hope for a larger Irish role and withhold the "acceptance" without which devolution cannot take place.⁷³

Neither northern unionists nor British Conservatives can yet accept any Irish solution involving a derogation of British sovereignty in Northern Ireland.⁷⁴ Under the Anglo-Irish Agreement, all ultimate power is retained in British hands.⁷⁵ All the difficult questions have been left to be decided later.⁷⁶ The Agreement's significance arises from the framework now created in which such decisions will take place.⁷⁷ British and Irish bureaucrats will secretly deliberate about the future administration of Northern Irish affairs.⁷⁸ Thus, although the Irish will have no real power in Northern Ireland,⁷⁹ they will have tremendous influence.⁸⁰ With the passage of time, absent a reconciliation between the communities of the North, this Irish influence is likely to obtain a quasi-constitutional status in the governance of Northern Ireland.⁸¹

The major losers in the new dispensation are the Ulster unionists, who are now subject to creeping federalism until they find it in their hearts to compromise with the northern nationalists.⁸² Extremists

73. *Id.* at art. 4(b).

74. Mrs. Thatcher's initial response to the three proposals of the New Ireland Forum, *supra* notes 25-27, was that they were "Out, out, and out!" Naughtie, *Irish and English Nationalists Are United*, Manchester Guardian Weekly, Nov. 24, 1985, at 4, col. 3; K. BOYLE & T. HADDEN, *supra* note 12, at 28, 110.

75. Mrs. Thatcher said that "the agreement makes it clear that there is not derogation from sovereignty of the United Kingdom . . . [which] retains responsibility for the decisions and administration of its own jurisdiction." *Unionists Bitterly Attack Agreement*, The Times (London), Nov. 19, 1985, at 4, col. 5. She has stated that "the Republic has no veto on decisions north of the border." *Id.* at 4, col. 2. Mrs. Thatcher has also remarked that the Anglo-Irish Agreement was not a "slippery slope to Irish unity." *Agreement Not a Slippery Slope to Irish Unity*, The Times (London), Nov. 27, 1985, at 4, col. 1.

76. Changes in electoral arrangements, the possible Bill of Rights, the composition of the Northern Ireland commissions, the security policy, the prisons policy, the harmonization of criminal law, the possibility of mixed courts, and cross-border economic coordination were all left to be dealt with later. Anglo-Irish Agreement, *supra* note 1, arts. 5-9; *Don't Cry for Ulster*, *supra* note 34, at 16.

77. *Don't Cry for Ulster*, *supra* note 34, at 16.

78. The Joint Communique states: "The two Governments envisage that the meetings and agenda of the Conference will not normally be announced." Joint Communique, *supra* note 42, at 1580; *Dublin Proposals Will Not Be Public*, The Guardian, Nov. 20, 1985, at 6, col. 2.

79. Mrs. Thatcher has pointed out that "full responsibility for the decisions and administration of government will remain with the United Kingdom Government." *Unionists Bitterly Attack Agreement*, *supra* note 75, at 4, col. 1.

80. Unionists believe, with some justification, that Northern Ireland will in practice, if not in strict law, be ruled jointly by London and Dublin. Hadden & Boyle, *How to Make the Deal Acceptable to Unionists*, Financial Times, Nov. 20, 1985, at 27, cols. 5-8.

81. *Cf.* Swan, *supra* note 43, at 405-10.

82. Harold McCusker, Official Unionist MP for Upper Bann said: "Better they had never looked at the Union Jack, and believed they were British, and put their trust in the House of Commons, knowing that they would have to spend their lives as some sort of semi-British citizens." Haviland, *Ulster Deal Approved as Unionists Quit House*, The Times (London), Nov. 28, 1985, at 1, col. 3; *Unionists Asked to Accept House Decision*, in The Times (London), Nov. 28, 1985, at 4, col. 4; *Don't Cry for Ulster*, *supra* note 34, at 16.

threaten to destroy the Anglo-Irish Agreement as they did the settlement at Sunningdale,⁸³ but they are unlikely to succeed.⁸⁴ Previous initiatives owe their failure less to Northern Irish intransigence than to British lack of determination.⁸⁵ The strength of character at the center of the current British government makes such a loss of will unlikely.⁸⁶

The Anglo-Irish Agreement poses major constitutional questions in both Britain and Ireland.⁸⁷ Irish acceptance of the current "status" of Northern Ireland⁸⁸ seems to contradict articles 2 and 3 of the Irish Constitution,⁸⁹ while the Irish role in the Intergovernmental Conference could violate the Act of Union of 1800⁹⁰ and the Northern Ireland Constitution Act of 1973.⁹¹ Judicial decisions in both countries

83. The Rev. Ian Paisley stated: "This country will not be governable." See Ford & Haviland, *Cabinet Ready to Defy Ulster Threats*, *The Times* (London), Nov. 18, 1985, at 1, cols. 8-9; Ford, *Unionists Plan Battle Options*, *The Times* (London), Nov. 19, 1985, at 2, cols. 3-7; Carnegy, *Unionists Ready to Do Battle with Thatcher*, *Financial Times*, Nov. 25, 1985, at 48, col. 1; Owen, *Violence "Will Not Stop Government Implementing Ulster Pact"*, *Financial Times*, Nov. 27, 1985, at 16, cols. 1-7; Owen, *Unionists Voice Determination to Frustrate Ulster Pact*, *Financial Times*, Nov. 28, 1985, at 14, cols. 2-6.

84. The British and Irish governments have orchestrated their accord with a view to frustrating violence. By signing in November they avoided the warm weather protest season, and gave themselves some time to consolidate their gains. *Old Militants, New Moderates*, *ECONOMIST*, March 1, 1986, at 54; *Thatcher Wades into the Irish Bog*, *ECONOMIST*, Nov. 23, 1985, at 50; Naughtie, *supra* note 74, at 4, cols. 2-5. The expected violence came with the warm weather, but British resolve has remained firm. *Summer Starts Early in Ulster*, *ECONOMIST*, April 5, 1986, at 63-64.

85. Harold Wilson's Labour government allowed the Sunningdale Agreement to collapse rather than risk his narrow majority in the House of Commons. R. FISK, *THE POINT OF NO RETURN: THE STRIKE WHICH BROKE THE BRITISH IN ULSTER 198* (1975); O'Malley, *supra* note 38, at 228; Young, *The Neglected English Dimension*, *Manchester Guardian Weekly*, Dec. 1, 1985, at 4, cols. 3-5.

86. Owen, *supra* note 83, at 16, col. 1; K. BOYLE & T. HADDEN, *supra* note 12, at 107.

87. Hermann & Hughes, *A Legal Challenge to the Anglo-Irish Pact*, *Financial Times*, Nov. 20, 1985, at 10, cols. 4-8. Cf. Palley, *Constitutional Solutions to the Irish Problem*, 33 *CURRENT L. PROBS.* 121-46 (1980). See generally H. CALVERT, *CONSTITUTIONAL LAW IN NORTHERN IRELAND* (1968); Palley, *The Evolution, Disintegration, and Possible Reconstruction of the Northern Ireland Constitution*, in *ANGLO-AM. L. REV.* 368-476 (1973); R. FANNING, *INDEPENDENT IRELAND* (1983); K. BOYLE & T. HADDEN, *supra* note 12, at 44-47.

88. Anglo-Irish Agreement, *supra* note 1, art. 1(a).

89. Carnegy, *Haughy Demounces Ulster Accord in Dail Debate*, *Financial Times*, Nov. 20, at 1, col. 3. Articles 2 and 3 of the Irish Constitution declare the national territory to extend to the whole island of Ireland. See *supra* note 12.

90. The Act of Union stated that "In all treaties made by his majesty . . . with any foreign power, his majesty's subjects of Ireland shall have the same privileges, and be on the same footing, as his majesty's subjects of Great Britain." An Irish role in Northern Ireland might be seen as putting British subjects in Ireland on a different footing from those in Great Britain. Hermann & Hughes, *supra* note 87, at 10, col. 4. *Hard Sell Needed*, *The Times* (London), Nov. 23, 1985, at 17, col. 1; Hughes, *Unionists' Challenge to Agreement Fails Again*, *Financial Times*, Nov. 26, 1985, at 9, col. 4.

91. Hughes, *supra* note 90, at 9, col. 4. The Unionists have interpreted the Ireland Act of 1949 as a guaranteed Protestant veto over any new dispensation in the North, K. BOYLE & T. HADDEN, *supra* note 12, at 45. For section 1.2 of the Act, see *supra* note 12.

have already dispensed with these questions,⁹² but they remain the focus of bitter controversy.⁹³ Still to be resolved is the difficult question of mixed courts in Northern Ireland.⁹⁴ Unionist legal challenges to the Anglo-Irish Agreement have been rejected because the Intergovernmental Conference has no legislative or executive powers.⁹⁵ Mixed courts would constitute a much more significant threat to Britain's existing constitution.⁹⁶ Whatever responsibilities a devolved Northern

92. The judges of the Supreme Court of the Irish Republic held that the declaration made by the Government of the Republic at Sunningdale, *supra* note 24, was not unconstitutional, since it amounted at most to a *de facto* rather than a *de jure* recognition of Northern Ireland as part of the United Kingdom. *Boland v. An Taoiseach* (1974) IR 338. Hughes, *supra* note 90, at 9, col. 4; Hermann & Hughes, *supra* note 87, at 10, col. 4; Hermann, *A Link in the Constitutional Chain*, Financial Times, Nov. 22, 1985, at 7, cols. 1-3; Webster, *Unionists Refused Court Challenge*, The Times (London), Nov. 22, 1985, at 2, col. 8.

93. Ian Gow, Conservative MP for Eastbourne stated: "the overwhelming majority of the People of Northern Ireland do actually believe there has been a change of status. So do I." *Agreement Not a Slippery Slope to Irish Unity*, *supra* note 75, at 4, col. 4; Harold McCusker, Official Unionist MP, (Upper Bann) remarked: "Sovereignty . . . changed fundamentally . . . I will never accept this agreement as the means by which I will be governed in Northern Ireland." *Unionists Asked to Accept House Decision*, *supra* note 82, at 4, cols. 4-5; cf. Kennedy, *Anglo-Irish Pact* (letter to the Editor), The Times (London), Nov. 26, 1985, at 17, col. 4; Hughes, *Fresh Challenge to Ulster Pact*, Financial Times, Nov. 22, 1985, at 7, cols. 1-3. The Irish opposition leader, Charles Haughey TD, is not entirely happy with the pact either, but he committed himself in the New Ireland Forum to the process which has produced it, and his objections have been largely *pro forma*. Rutherford, *supra* note 28, at 8, cols. 3-9; *A Civilised Agreement*, Financial Times, Nov. 18, 1985, at 22, col. 2; Carnegie, *supra* note 88, at 1, cols., 3-5. Imperfect judicial coordination between Britain and Ireland remains a serious problem. *Opening the Stable Door*, *supra* note 65, at 45.

94. Anglo-Irish Agreement, *supra* note 1, art. 8. REPORT, *supra* note 20, §§ 5.1(3), 6.3, 7.2. See *Unionists Bitterly Attack Agreement*, *supra* note 75, at 4, col. 5 for Mrs. Thatcher's misgivings. See also K. BOYLE & T. HADDEN, *supra* note 12, at 99-100. The Northern Irish courts, as presently constituted are distrusted and disliked by nationalist Ulstermen (and many others). Donahue, *Human Rights in Northern Ireland: Ireland v. the United Kingdom*, 3 B.C. INT'L & COMP. L. REV. 377-432 (1980); *Ulster's "Rotten Justice"*, The Guardian, Nov. 16, 1985, at 3, col. 4; Carroll, *The Search for Justice in Northern Ireland*, 6 N.Y.U.J. INT'L L. & POL. 28-56 (1973). One judge, no jury "Diplock Courts" were introduced in 1973 in response to the Diplock Report. *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland*, CMD 5185. Suspects can be held for up to three days under the Northern Ireland (Emergency Provisions) Act of 1973 and up to seven days under the Prevention of Terrorism Act of 1974. O'MALLEY, *supra* note 38, at 211-13; K. BOYLE & T. HADDEN, *supra* note 12, at 67-69. The system is designed to extract confessions and has resulted in interrogatory excesses by the security forces. Amnesty International, *Report of the Amnesty International Mission to Northern Ireland*, (1978); *Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland*, CMD 7497 (1979). See generally K. BOYLE, T. HADDEN & P. HILLYARD, TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE (1980); P. TAYLOR, BEATING THE TERRORISTS? (1980). For a comparative study of Irish and Northern Irish justice, with a discussion of possible amalgamation, see C.K. BOYLE & D.S. GREER, THE LEGAL SYSTEMS, NORTH AND SOUTH: A STUDY PREPARED FOR THE NEW IRELAND FORUM (1984).

95. Hughes, *supra* note 90, at 9, cols. 4-5.

96. The British legal establishment squashed any suggestion that judges from north and south should sit together in terrorist cases within each other's jurisdictions. *Fixing Ulster*, *supra* note 59, at 15. Both Ireland and the United Kingdom are, however, subject to the overriding European Court of Human Rights. See Donahue, *supra* note 94, at 377-80. Britain, however,

Irish government would assume, security and the courts are not likely to be among them,⁹⁷ so any new dispensation in the Northern Irish judiciary would be difficult to reverse.⁹⁸ It is unlikely that the British will accede to mixed courts at any time in the near future.⁹⁹

The significance of the Anglo-Irish Agreement is almost entirely symbolic, but it indicates an important new commitment to the Northern Irish problem on the part of the Thatcher government.¹⁰⁰ From now on, unless the Protestants of Northern Ireland can agree to a powersharing devolution formula acceptable to Catholics, the rights of the minority community will be represented in direct rule decision-making by southern politicians and officials.¹⁰¹ This has few immediate consequences, but it changes the value of inertia in the Northern Irish equation. The Intergovernmental Conference requires no Ulstermen to make it work. Ulster unionists must now cooperate in the search for peace in Northern Ireland or watch their views become increasingly irrelevant in the face of an Anglo-Irish entente.

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has yet to sign the European Convention on extradition, and judicial coordination between the two countries has left much to be desired. *Come out, We Know You're in There*, *ECONOMIST*, March 29, 1986, at 46; *Opening the Stable Door*, *supra* note 65, at 45.

97. *A Way Forward for Ireland*, *Manchester Guardian Weekly*, Nov. 24, 1985, at 10, cols. 1-2.

98. *Id.* at 10, col. 1.

99. Mrs. Thatcher has made it clear that she believes the problems surrounding the possibility of mixed courts are insurmountable. *Dublin Gets a Voice in Running Ulster*, *Manchester Guardian Weekly*, Nov. 24, 1985, at 3, col. 2; *Unionists Bitterly Attack Agreement*, *supra* note 75, at 4, col. 5.

100. *Don't Cry for Ulster*, *supra* note 34, at 16. The United States has announced a \$250 million package of aid for Ireland and Northern Ireland. Thomas, *Irish Premier Vows to Press on with Ulster Accord*, *N.Y. Times*, March 6, 1986, at A17, col. 1; *British-Irish Accord Praised*, *Congressional Quarterly Weekly Report*, Dec. 21, 1985, at 2696, col. 3.

101. The Ulster response to the Anglo-Irish Agreement has been unremittingly hostile. Mrs. Thatcher met several times with unionist leaders since the signing of the Anglo-Irish Agreement, and arranged with them to hold a round-table conference leading to a devolved government. This had to be abandoned in the face of Protestant rank and file opposition. Lewis, *Violence Takes a Grip on Ulster Protest*, *Manchester Guardian Weekly*, March 9, 1986, at 4, col. 2; *Old Militants, New Moderates*, *supra* note 84, at 52. Protestant leaders called a one-day strike on March 3, 1986, which was accompanied by widespread violence and effectively closed down the province for the day. Lohr, *Ulster Strike Turns Violent*, *N.Y. Times*, March 9, 1986, at 2E, cols. 1-2. Unionist leaders have deplored the violence, but continue to inflame their followers. *Emotion Is All, Reason Nowhere*, *Manchester Guardian Weekly*, March 9, 1986, at 1, cols. 1-3. Both Mrs. Thatcher and Dr. FitzGerald remain adamant in their support of the Anglo-Irish Agreement, which they have registered with the United Nations. Thomas, *supra* note 100, at A17, cols. 1-6. The major threat to the agreement thus comes less from unionist opposition than from the unrelated political unpopularity which might replace the British and Irish Prime Ministers with less decisive rivals. *Unloved at Home*, *ECONOMIST*, Feb. 28, 1986, at 47; Carnegie, *The Pressure Is on FitzGerald*, *Financial Times*, Nov. 16, 1985, at 7, cols. 7-8.