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THE BELFAST AGREEMENT

by
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INTRODUCTION

The Belfast Agreement (or "Agreement"), to give it its proper name,¹ reached at Stormont on Good Friday 1998, is an important document of Irish history. It is certainly a political text, but it has important legal effects. And these I wish to emphasize. As a member of the Ulster Unionist Party ("UUP")—elected later to the Northern Ireland Assembly—I accepted the Agreement on April 10 as the best opportunity for the return of power to all the people of Northern Ireland. At the time of writing (early March 1999), the major issue remains the decommissioning of Irish Republican Army ("IRA") arms before—I submit—Sinn Féin is entitled to its two seats on the Northern Ireland executive.

Selected aspects of the Agreement are discussed in other contributions to this book. Given the representation herein of Irish nationalism, including Irish-America, I must begin by defining—against the condescension of some observers of Ireland—the plain people of Ulster as important historical actors.

I. ULSTER UNIONISM

Ulster unionists—contrary to those who believe in an Irish nation—affirm the 1800 acts of union, whereby Ireland and Great Britain merged to form the United Kingdom. (The two hundredth anniversary of the union, which will be celebrated hopefully throughout Ireland, is January 1, 2001—the vacated start of the millenium). Scholars in Ireland are producing a more balanced history of the union, which witnessed famine and violence, but also industrialization and democracy. Ulster unionism, a pan-class alliance, dates from the 1880s, when Irish

* Ulster Unionist Party; Member of the Northern Ireland Assembly. I am grateful to fellow Assembly member, Esmond Birnie, and to Graham Gudgin, special advisor to the First Minister, the Rt. Hon. David Trimble MP, for comments on an earlier draft.

1. Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998, Cm. 3883 (presented to parliament on Apr. 20, 1998) [hereinafter Belfast Agreement]. This is the same thirty-page text that was sent to the people of Northern Ireland immediately after its conclusion. The Northern Ireland Act 1998 also refers to the Belfast Agreement. Northern Ireland Act, 1998, ch. 47 (Eng.).

nationalism, in association with some British liberals, pressed for home rule for the whole of Ireland.

Unionists opposed nineteenth-century secession as bad for Ireland, Ulster included. But they, unlike their opponents, did not rest their case exclusively on imputed identity or nationality. The union was the constitutional *status quo*, and the Westminster parliament was the place for legislative reform. The—divided—will of the people led eventually to partition, a British solution to an Irish problem. This was a vindication of—British and Irish—democracy.

Sir James Craig, soon to be Northern Ireland's first prime minister, accepted the 1920 Government of Ireland Act ("GOIA"). He was not much concerned with the rest of Ireland, and subsequently left the U.K. government and the then Sinn Féin to agree on a new dominion state for twenty-six counties—the Irish Free State, later Éire (or Ireland), and now the independent Republic of Ireland. Northern Ireland, consisting of the remaining six counties, or "Ulster" as unionists called the region, remained part of the United Kingdom, but with its own subordinate parliament and government. The unionists accepted devolution, designed ironically to appease Irish nationalists, in order to preserve the link with Great Britain. Sir James never characterized Northern Ireland as having a Protestant parliament for a Protestant people in the 1930s, as alleged by Irish nationalists,² but the Rt. Hon. David Trimble MP, my party leader, acknowledged in his Nobel lecture in Oslo in December 1998 that it was a "cold house" for the Catholic minority.

The rest is history, albeit of a contemporary kind. Historians are unearthing the Stormont regime of 1921-1972, and scholarship—not the streets—should be the arena of contestation. But one political conclusion is surely incontestable: whatever civil rights were denied (and this was remedied by 1973 at the latest), nothing justified the military campaign of the IRA between 1970 and July 1997 (when it resumed the "complete cessation of military operations" that it had broken with the London docklands bomb in February 1996).

2. J.J. Campbell, *Between the Wars, in BELFAST: THE ORIGIN AND GROWTH OF AN INDUSTRIAL CITY* 152 (J.C. Beckett & R.E. Glasscock eds., 1967). The misquotation—an inaccurate paraphrasing of Campbell's words selected out of context—was popularized during the civil rights movement.

April 10, 1998 was virtually the thirtieth anniversary of the outbreak of the Northern Ireland Troubles. The Belfast Agreement is the most recent in a series of proposed solutions, starting with the Sunningdale experiment of 1974. Mainly, unionists had opposed that experiment. Nationalists scuppered subsequent attempts to create political stability. The 1998 solution—from the perspective of March 1999—still looks the most viable for three major reasons: one, the sheer length of the hurting stalemate in Northern Ireland; two (though I have my criticisms), the inclusive nature of the negotiations hosted by the U.K. government, at the behest of the Irish government, in 1996-1998; and three, the determination of London and Dublin, particularly Tony Blair and Bertie Ahern, to remove the problem from their political agendas.

II. THE NEGOTIATIONS

The negotiations can be traced from approximately 1988, over almost a ten-year period.³ Secretary of State for Northern Ireland, Peter Brooke (1989-1992), began the process. Sir Patrick Mayhew (1992-1997) continued it. (The role of Mo Mowlam, who was formally in charge at Castle Buildings⁴ on Good Friday, has been exaggerated by British commentators.) While some progress was made in talks in 1990-1992, there remained a nationalist refusal to reach a historic compromise with unionism.

At that stage, Sinn Féin, as the political wing of the IRA, was excluded. London, encouraged actively by Dublin, then made an offer: give up violence, and you can be part of the solution. Unfortunately, the republicans took without reciprocating, and the British and Irish governments compromised democratic institutions by making concession after concession to fully-armed terrorists. The Mitchell report of January 1996, little remembered, had envisaged decommissioning (that is, the surrendering of illegally-held arms and explosives) during all-party talks.⁵ The IRA did not decommission during the talks, even af-

3. EAMONN MALLIE & DAVID MCKITTRICK, *THE FIGHT FOR PEACE: THE SECRET STORY BEHIND THE IRISH PEACE PROCESS* (1997).

4. The venue for the talks, on the Stormont Estate outside Belfast.

5. THE INTERNATIONAL BODY, *REPORT OF THE INTERNATIONAL BODY 11-12* (Jan. 22, 1996).

ter Sinn Féin was admitted as a full participant in September 1997, and nine months after the Belfast Agreement, the IRA has yet to begin handing in weapons.

The Downing Street Declaration of December 1993 and the Framework Documents of February 1995, agreed upon by the two governments (but drafted mainly in Dublin), are considered gestatory of the final Agreement. They were considerably less relevant than the Heads of Agreement of January 12, 1998, which turned out to be the framework for the Belfast Agreement three months later. Without Tony Blair, and to a considerably lesser extent, Bertie Ahern, there would have been no agreement. Indeed, it is widely believed that the letter from the British prime minister to David Trimble on that Friday afternoon (see further below) was necessary to unblock final unionist resistance to Senator Mitchell's draft paper. I can confirm that this is a correct interpretation.

III. THE BELFAST AGREEMENT

It is always naive to associate a historic document with an outbreak of spontaneous reconciliation. Perhaps agreements come about through changes in consciousness. But more often they resemble the Dayton Agreement, which ended the war in Bosnia. The negotiation of the Belfast Agreement was never quite that painful (despite Irish attempts to coax participants to one isolated spot after another), but it was an imposed political settlement. Senator Mitchell, the independent chairman who had been appointed by the London and Dublin governments, has iron teeth behind his American smile. And his draft paper of April 6, 1998, which the deputy leader of the UUP, John Taylor, refused to touch with his forty-foot pole, was designed to force an outcome.

A. Legitimization

The process of legitimization—selling the Agreement—came after the parties assented to the Good Friday text. (Sinn Féin should be excluded from this description; the party reserved its position, and ministers have been unclear as to whether it signed up to the agreement).⁶ There were two demo-

6. Gerry Adams MP told the final plenary: "When we have democratically come to a conclusion we will let you know." *IRISH TIMES*, Apr. 11, 1998.

cratic opportunities: the May 22 referendum and the Northern Ireland Assembly elections on June 25, 1998, both of which produced results in favor of the Agreement.

In the May 22 referendum, with an 81.1% voter turnout in Northern Ireland, 676,966 voters comprising 71.12% voted "yes" to the Agreement, whereas 274,879 voters comprising 28.88% voted "no." The U.K. Government hailed the result as a 71% "yes." Unfortunately, as was to be seen in the Assembly elections, most of the "no"s came from the unionist majority. To many Unionists, the pro-nationalist nature of the Agreement was reinforced by a second referendum on May 22, in the Republic of Ireland. The simultaneous referendums, albeit on different questions, was an aspect of reinforcing the nationalist worldview; republicans saw it as a plebiscite of the Irish people. With a 56.3% turnout in the Republic, 1,442,583 voters comprising 94.39% voted "yes," whereas 85,748 comprising 5.61% voted "no." This 94% figure resembled the suspect democratic acclamations often found in third world nations! Contrary to the view of some Dublin commentators, there is no constitutional basis for combining the northern and southern figures because there are two states in Ireland. The view of so-called revisionists in the Republic, that the national question mattered little, was vindicated fully by this referendum result. "Yes" campaigners had difficulty finding opponents, other than the few usual suspects in the Dublin media. Because the 5.61% "no"s were spread fairly evenly throughout the state, it was not possible to form a nationalist community in the border counties or even the west of Ireland.

The referendum results, I would argue, show that the British and Irish Governments got the balance of the Agreement wrong. London too readily accepted Dublin's view of nationalist preoccupation, Sinn Féin having exploited successfully the traditional political culture in its meetings with Dublin ministers and officials. The split in the protestant majority is the biggest challenge facing not just pro-Agreement unionists, but northern nationalists and their southern supporters. The southern political class, which took few political risks, could have afforded a larger "no" vote, ideally preserving, in aspic, some national myths about the destiny of the Irish people. As it was, the Belfast Agreement, which was seen to favor the northern minority, simultaneously affirmed nationalist aspirations and revisionist values and re-

flected the communal, consensual nature of the Irish state.⁷

Dublin could have done a great deal more for peace in Ireland by affirming liberal pluralism and purging its polity of nationalist shibboleths. Had this been accomplished, my colleagues and I would have found it that much easier to rebut many of the fanciful arguments of anti-Agreement unionists.

The Assembly elections five weeks later pointed up the persisting protestant "no"s problem. There were 108 seats to be filled, an extraordinary number for some one million voters. This was, however, the product of a London/Dublin policy to help minority—especially pro-paramilitary—parties!⁸ My party, the UUP, secured the largest number of seats: twenty-eight. The mainly Catholic Social Democratic and Labour Party ("SDLP"), though it got the largest number of first preference votes, placed second with twenty-four seats. Together, the two biggest parties control fifty-two of the 108 seats. With potential allies, David Trimble and John Hume can perhaps claim the support of an additional ten, making a centrist majority of sixty-two against forty-six on a simple vote.

Things, however, are unlikely to be that simple. The third largest party is the Democratic Unionist Party ("DUP"), led by Dr. Ian Paisley, and the fourth is Sinn Féin, with eighteen seats. There are, in addition to the DUP, another eight anti-Agreement unionists.⁹ Extremes of eighteen (Sinn Féin) and twenty-eight (the combined "no" unionists) are a threat to the centrist parties, even if they are unlikely to combine on a matter of principle. Commentators—seeing Sinn Féin as part of the solution—have estimated that the pro/anti-Agreement split (insofar as relevant) in the Assembly is eighty versus twenty-eight. This healthy British majority of 74.1% to 25.9% (almost three to one) represents an improvement on the May 22 referendum result.

7. The Irish Government, for reasons that were not made clear, distributed copies of the Agreement to all households in the Republic, even though electors were only voting on a constitutional amendment. (In the simultaneous referendum on the Amsterdam treaty on the European Union, voters in the Republic were not sent copies of the relevant document!).

8. Sinn Féin, which got 18 seats, did not need this help. The Progressive Unionist Party ("PUP") got two seats, but the Ulster Democratic Party ("UDP"), led by Gary McMichael, failed to win any. The Northern Ireland Women's Coalition, a favorite of the Secretary of State, surprised most commentators by winning two seats.

9. Northern Ireland Unionist Party ("NIUP"), 4; United Kingdom Unionist Party ("UKUP"), 1; United Unionist Assembly Party ("UUAP"), 3.

But, again, the intra-sectarian balances, especially for unionists, may prove decisive, given the phenomenon of cross-community voting provided for in the Agreement.

Only eight members of the Assembly are registered "Other," under the designation of identity.¹⁰ There are forty-two nationalists and fifty-eight unionists registered, which roughly reflects the 60/40 Protestant/Catholic ethnic balance. While the SDLP-Sinn Féin relationship remains to be tested, the fifty-eight unionists are already split: thirty "yes" supporters and twenty-eight "no" supporters.

David Trimble leads twenty-eight of the "yes" unionist Assembly members and would hope to rely upon the two Progressive Unionist Party ("PUP") members. But thirty against twenty-eight is only a slight tribal majority. This is especially crucial given the existence of cross-community support in the Assembly.¹¹

Thirty is not the threshold figure that some believe it to be. In fact, a petition of concern by at least thirty Assembly members can trigger a cross-community vote.¹² This would be achieved if the two PUP members allied with the "no" unionists, or there were two defectors from the UUP.¹³ But a cross-community vote can only succeed on a basis of parallel consent, a majority of unionists plus a majority of nationalists,¹⁴ or a sixty percent weighted majority, comprising at least forty percent of unionists and forty percent of nationalists. "No" unionists, on a parallel vote, would have to get at least thirty of the fifty-eight unionist votes, involving two UUP defectors, but they would be unlikely to get a nationalist majority on the same vote. More likely, "no" unionists would be intent upon blocking a cross-community

10. Belfast Agreement, *supra* note 1, Strand One, Democratic Institutions in Northern Ireland, Operation of the Assembly ¶ 6; Northern Ireland Act, 1998, ch. 47, § 4(5) (Eng.); Initial Standing Orders, 3(1).

11. Belfast Agreement, *supra* note 1, Strand One, Democratic Institutions in Northern Ireland, Safeguards ¶ 5(d); Northern Ireland Act, 1998, ch. 47, §§ 4(5), 41(2), 42(1)-(2); Initial Standing Orders, 12. "Cross community support" is essentially the idea that key (including certain procedural) decisions can only be taken by nationalists and unionists present in the Assembly voting together.

12. Belfast Agreement, *supra* note 1, Strand One, Democratic Institutions in Northern Ireland, Safeguards ¶ 5(d); Northern Ireland Act, 1998, ch. 47, § 42(1)-(2); Initial Standing Orders, 12(5).

13. On January 18, 1999, a Ulster Unionist Party ("UUP") Assembly member, Peter Weir, voted against a party position. The following day he lost the whip.

14. There is also a requirement for a majority of all members present and voting.

vote, which makes the petition of concern irrelevant. One defector is enough to frustrate a unionist majority. On a weighted majority, "no" unionists would need at least sixty percent of the unionist vote, that is thirty-five members, involving seven defectors from the UUP. Under the Initial Standing Orders, parallel consent is the system for the election of the first minister and deputy first minister,¹⁵ but it is not clear whether a weighted majority will be required for all other key decisions.¹⁶

Two UUP defectors for a petition of concern may be within the grasp of the "no" camp, but they are unlikely to achieve the thirty-five members (involving seven such defectors) necessary to frustrate a weighted-majority cross-community vote. Nevertheless, the "no" camp should not be underestimated politically, given its readiness—to varying degrees—to oppose individual decisions in the name of destroying the Agreement.

B. *The Agreement in Outline*

The Agreement runs to some thirty printed pages, and readers may consult the text in this volume. It has become the practice to refer to specific paragraphs within each section listed in the table of contents. While there are eleven sections, the Agreement addresses three principal areas: one, the constitutional position of Northern Ireland; two, the institutions of government, mainly devolution but with north/south and east/west additions; and three, what is sometimes called rights, but is better referred to as the transition from terrorism to democracy. I will look at each of these three areas in turn, but first it is necessary to appreciate the structure of the Agreement.

1. How to Read the Belfast Agreement

Lawyers have to insist that the Agreement is a legal text, or at least a political document containing legal obligations. Moreover, they have to do so against some political actors and commentators more accustomed, it would seem, to casuistry. Take, for instance, the repeated attempts by Sinn Féin and its fellow travellers to deny the need for IRA decommissioning before the formation of a Northern Ireland executive. They infer that if

15. Initial Standing Orders, 12(3).

16. Presumably this is a matter for the Presiding Officer, under section 2(1) of the Initial Standing Orders.

the obligation is not express, then it cannot exist impliedly—either morally or legally—in the Agreement.

Naming an agreement after a place suggests that legally it is a treaty. Looking at the thirty-page text, the Agreement is described as having been “reached in the multi-party negotiations.” In fact, the participants in the talks comprised two governments and ten Northern Ireland political parties. There was no signing of the multi-party Agreement by the political parties, but there was a process of assent, either then or, maybe in the case of Sinn Féin, later. At best, one can say that the political parties agreed to be bound morally, but hardly legally.

The only parties—in a legal sense—were the British and Irish Governments, which is clear from looking at the table of contents. After the multi-party agreement, there is an annex. This annex, on pages twenty-seven to thirty, is an international agreement between the British and Irish Governments, elsewhere called the British-Irish Agreement.¹⁷ It is the text that Tony Blair and Bertie Ahern signed at Castle Buildings on April 10, 1998, at the end of the final plenary of the parties, presided over by Senator Mitchell. This treaty is short, comprising only four articles, with two annexes. The first annex contains the Agreement Reached in the Multi-Party Talks. One needs to read the treaty on pages twenty-seven to thirty, and then pages one to twenty-six as the first annex. It is a strange way to present a legal text, but one required by the exigencies of an imposed settlement, which London and Dublin intended to have legitimized immediately.

The assertion that only the two Governments are parties to the Agreement needs slight qualification. These states’ parties undertook to discharge certain obligations, including, in the case of the U.K. Government, legislating principally for devolution. The Northern Ireland Act of 1998,¹⁸ which received the royal assent on November 19, 1998, imposes statutory obligations mainly on the first minister and deputy first minister but also on other office holders. In the transition, other acts apply variously. The question of legal obligation needs to be answered

17. Belfast Agreement, *supra* note 1, Strand Three, British-Irish Council ¶ 1. Paragraph 1 of Strand Two refers inelegantly to a British-Irish Agreement. *Id.*, Strand Two, North/South Ministerial Council ¶ 1. Paragraph 1 of Constitutional Issues also refers to “a new British-Irish Agreement.” *Id.*, Constitutional Issues ¶ 1.

18. Northern Ireland Act, 1998, ch. 47 (Eng.).

subtly. This raises questions over the rules of interpretation. The Agreement is not a U.K. statute, nor is it common law. It is a treaty, and as such, Articles 31 and 32 of the 1969 Vienna Convention on the law of treaties apply. The Convention states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose.”¹⁹ Terms such as “good faith,” “ordinary meaning,” “context,” and “purpose” prove that literalness is inappropriate. Indeed, purposiveness is the correct approach. Article 31 goes on to include the preamble and annexes in the text of a treaty and to define context as including other instruments related to the treaty. Also taken into account are subsequent agreements, or practice, and any other relevant rules of international law. Supplementary means of interpretation, including preparatory work and the circumstances of its conclusion, are permitted in certain eventualities under Article 32. This is of general applicability to the Agreement, and even to the Northern Ireland Act 1998, insofar as it incorporates, by reference, aspects of the Belfast Agreement. It is especially applicable to the question of decommissioning.

2. The Constitutional Position of Northern Ireland

The Irish Free State, which was created by U.K. law in 1921 and 1922, it is often forgotten, followed the establishment of Northern Ireland within the United Kingdom. The subsequent boundary commission was frustrated as much by nationalist ambition as unionist abstention. Nevertheless, under a 1925 agreement, the Free State recognized Northern Ireland, and accepted that the border was a legitimate international frontier.²⁰ There could be relations between states, and there would no longer be an assertion of the essential unity of Ireland. If the Free State had survived beyond the 1930s, it is undoubtedly the case that a good-neighbourly policy on the part of Dublin would have been reciprocated in Belfast’s domestic and international politics.

That was not to be, however, because of Eamon de Valera

19. Vienna Convention of the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340.

20. Ireland (Confirmation of Agreement) Act (1925) (Eng.); Treaty (Confirmation of Amending Agreement) Act (1925) (Ir.).

and the Fianna Fáil civil-war losers, with their project of continuing the national struggle. Some of de Valera's actions in office in 1932 were unconstitutional, in terms of Irish law. In 1937, he created a new successor state, Éire or Ireland ("Bunreacht na hÉireann," which has no English translation), enacted by plebiscite on July 1. The vote was 685,105 to 526,945, which de Valera privately acknowledged was disappointing.²¹

Articles 2 and 3 of Bunreacht na hÉireann, which legitimized the state in terms of the nation in a legally confusing manner,²² contained a territorial claim to Northern Ireland. This was rebutted on December 29, 1937, by the U.K. Government, along with Canada, Australia, New Zealand, and South Africa, exception being taken to Articles 2, 3, and 4.²³ De Valera had been advised against Hibernia Irredenta,²⁴ and the only court that could have settled the territorial claim—the Permanent Court of International Justice at The Hague—was studiously avoided by successive Irish Governments, despite constitutional commitment to the generally recognized principles of international law.²⁵

The Belfast Agreement, in the short but crucial Constitutional Issues section, emphasises the concept of consent. The territorial claim, therefore, is no more. This is in spite of the still confusing wording of the substitute Articles 2 and 3 for

21. DEIRDRE McMAHON, *REPUBLICANS AND IMPERIALISTS: ANGLO-IRISH RELATIONS IN THE 1930s*, at 221 (1984). De Valera told the departing U.S. minister that "[t]he people as a whole had not understood the importance of the fundamental measure." No doubt de Valera included the people of Northern Ireland (Catholic and Protestant) in this category, even though they were not citizens of his state (to the continuing relief of Ulster unionists!).

22. Desmond Clarke, *Nation, State and Nationality in the Irish Constitution*, 16 *IR. L. TIMES* 252 (1998).

23. *TIMES* (London), Dec. 30, 1937; *Eire (Confirmation of Agreement) Act* § 1 (1938).

24. See JOHN BOWMAN, *DE VALERA AND THE ULSTER QUESTION, 1917-1973*, at 148 (1989) (quoting J.J. McElligott, Secretary, Department of Finance, 1927-53, in April 1937).

25. *IR. CONST.* art. 29.3 (1937). Article 29.2 affirmed adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination. *Id.* art. 29.2. In 1958, de Valera balked at taking a case to the International Court of Justice, stating: "[Y]ou know the way these tribunals are." Edna Staunton, *The Boundary Commission Debacle of 1925*, *HISTORY IRELAND*, Summer 1996, at 45. It is interesting that Bertie Ahern, after the Belfast Agreement, has come out in favor of accepting the compulsory jurisdiction of the world court. *SUNDAY TIMES*, Jan. 17, 1999.

Bunreacht na hÉireann. The new text is largely an ideological exercise, with, for example, the Irish diaspora being recognized for the first time to no particular legal effect. The text does not properly separate state and nation, and it does not adequately address the question of nationality. Most in the Republic, but only some in Northern Ireland, have an Irish identity, and there is an alternative British identity. Dublin, however, has committed itself to not one, but two exercises of consent, first in Northern Ireland and then in the Republic. Even if the unionists were to lose the first vote, Northern Ireland could not be absorbed into the Republic until the people there, quite rightly, assented to such a united Ireland. The best guarantee of the union, after unionism, may well be the partitionism of southern people, who have build a homogeneous state for themselves in the twentieth century.

The Republic's continuing self-mystification (the legacy of de Valera's long reign) encouraged "no" unionists to maintain that the territorial claim still existed. In holding to this position, they betrayed their own legal ignorance. The same occurred over the question of U.K. constitutional changes, cosmetically presented as reciprocity.

A great deal of ink was spilt over the repeal of the 1920 GOIA. Much legal nonsense circulated about section 75 being, allegedly, the basis of U.K. sovereignty. That lies in the recognition by other states, about which there has never been any doubt. Of course, the act is not being completely repealed, since the definition of Northern Ireland in Section 1 will survive through subsequent legislation. Moreover, Northern Ireland has been defined further by the Northern Ireland Act 1998.²⁶ Making U.K., like Irish, constitutional changes dependent on the overall success of the Agreement was achieved during the passage of the Northern Ireland Bill, while "no" unionists were adopting an ineffective fundamentalist stance. Apparent concessions—nationalist hokum about "birthright"—were made in the complicated area of citizenship law, only to be qualified embarrassingly by the second annex to the British-Irish Agreement setting out legal restrictions.

26. Northern Ireland Act, 1998, ch. 47, § 98 (Eng.).

3. The Institutions of Government

a. Strand One

The Belfast Agreement, and the consequent Northern Ireland Act 1998, are principally about devolution. It is true that Northern Ireland will have two innovations: north/south and east/west dimensions of governance. But the main characteristic of the structure, however, is its overcomplication, a problem that will have to be cured under the review provisions of the Agreement sooner rather than later.

The talks were organized in one to three strands,²⁷ which were written into the Agreement but not the act. The most important is Strand One, supposedly concerning Catholic-Protestant, nationalist-unionist relations, but in reality dictating the nature of Northern Ireland's integration within the United Kingdom.

Northern Ireland is to have an Assembly located in Parliament Buildings at Stormont. There was such a body for several months in 1974, and again in 1982 and 1986 (but this was not a legislative body). All powers not excepted or reserved in Schedules 2 and 3 of the Northern Ireland Act 1998 are devolved. Though the U.K. Government has tried to weaken the provision, the Assembly will have an array of strong departmental, as well as other committees.²⁸ Their chairpersons are to be elected under the d'Hondt system used in the European Parliament, providing for proportional representation of all parties above a certain size.

Controversially, the executive—or executive committee—is also appointed using the d'Hondt formula.²⁹ This, combined with the fact that the executive has a joint head, the first minister and the deputy first minister, directly elected together by the Assembly, makes for a very strange administration in Northern Ireland. On July 1, 1998, David Trimble was elected first designate minister, with Seamus Mallon as deputy first designate minister.

27. In addition, a "fourth" strand, Belfast-London relations, was detected in the first strand.

28. Belfast Agreement, *supra* note 1, Strand One, Democratic Institutions in Northern Ireland, Operation of the Assembly ¶¶ 8-13; Northern Ireland Act, 1998, ch. 47, §§ 13(3), 29.

29. Belfast Agreement, *supra* note 1, Strand One, Democratic Institutions in Northern Ireland, Executive Authority ¶ 16; Northern Ireland Act, 1998, ch. 47, § 18.

That relationship has been tested and, once we have moved from the transition (where the Northern Ireland Office still rules the roost) to full devolution, it will become clearer how personality and powers interact. All governments need leaders. More importantly, the automatic d'Hondt formula means that with the 108 members of the Assembly, and the ten departments of government agreed on December 18, 1998, ninety of those members will be present, through their party representatives, in the executive. This is executive-heavy government, and, with the committees potentially liable to incorporation, it may mean the Assembly will be a weak chamber of accountability. The more likely alternative is that the executive, and therefore the governance of Northern Ireland, will be subject to deadlock and stalemate; neither the executive nor the legislature will work properly. Furthermore, the U.K. government's rule by department strategy for dealing with this situation is a sort of civil-service technocracy, and will not work underneath political shambles.

The UUP and SDLP agreed before Christmas 1998 that there should be ten departments. Under d'Hondt, this means that the ten departments will consist of three UUP, three SDLP, two DUP, and two Sinn Féin ministers, in addition to the first minister and deputy first minister.³⁰ Northern Ireland politicians quickly spotted that this meant five unionists and five nationalists, which reduces the majority/minority relationship to equivalence.

There are two main responses to this criticism, which comes exclusively from "no" unionists. First, d'Hondt favors bigger over smaller parties, and this was known when the DUP advocated the system. Though there were fifty-eight unionists to forty-two nationalists at the time of the elections in June 1998,³¹ the nationalists were confined to two parties, twenty-four and eighteen seats, respectively. Most unionists were members of two parties, representing twenty-eight and twenty seats, but there was a minority party of five, which subsequently split into one and four, a party of two, and three independent unionists, who did not constitute a party on July 1, 1998. Unionists votes were

30. This also included a number of junior ministers—a provision that surprisingly appeared in the act, not having been in the Agreement.

31. See Northern Ireland Act, 1998, ch. 47, § 18(5) (providing definition of "S", which only emerged from U.K. Government during passage of Northern Ireland Bill).

wasted on these ten members.³² Second, it is more realistic to look at the ten ministers in terms of centre/extreme. There is a centrist majority of six to four, giving the UUP and SDLP the incentive to coalesce on issue after issue in order to get a majority and, therefore, a vote. This point is strengthened by the thought that the DUP and Sinn Féin are unlikely to even constitute a minority of four, though they could for transparently opportunist reasons. The biggest problems facing the ten ministers in the executive committee, with its joint head in a central department, is DUP obstructionism and Sinn Féin subversion. It is probable that one or both extreme-sectarian parties will leave the involuntary d'Hondt coalition, the betting being that the DUP will quit before Sinn Féin.

The best that can be hoped for is that the UUP and SDLP will generate a spirit of voluntary coalitionism, and that this will lead to a review of this aspect of the internal government of Northern Ireland under Strand One and the final section of the Belfast Agreement.

b. Strand Two

Strand Two—north/south cooperation—was seen during the negotiations as a concession to nationalism. The UUP, drawing on the experience of the old Stormont regime, did not turn its face against practical proposals. It did, however, see off an Irish Government offensive, in which there were forty-nine, many unrealistic, ideas in the Mitchell draft paper of April 6. These were cut back to the twelve in the Agreement, six areas for continuing cooperation and six new joint, or implementation, bodies.³³ The text of the Agreement makes clear that the goals were good neighbourliness and cooperation for mutual benefit. It has nothing to do with an embryonic government of Ireland—an attempt at incremental unity while there is no consent for ceding Northern Ireland to the Republic—as claimed by some nationalists and accepted by most “no” unionists. Nor can it be a concession to Irish identity. Ulster unionists appreciate that a consequence of practical cooperation may be greater commit-

32. If the UUP had obtained 38 seats (28 plus the 10 other unionists), then the composition of a ten-minister executive would have been as follows: UUP - 4; SDLP - 2; DUP - 2; and Sinn Féin - 2. This would have resulted in six unionist ministers to four nationalist ministers.

33. Belfast Agreement, *supra* note 1, Strand Two, Annex.

ment by Catholics to the institutions of government. But to pitch it in terms of identity only stirs up British reactions by the DUP, obscuring crucial arguments about good government.

Unfortunately, the spirit of the Agreement was not much in evidence during the final months of 1998, with the October 31 target slipping due in large part to the Irish Government. Dublin hitherto had sought to pressure unionists by working through London. This continued and the Northern Ireland Office played ball. There was a smash and grab raid to try to recover the position lost in the final week of the negotiations. Dublin had also led a pan-nationalist consensus, servicing the SDLP and especially Sinn Féin. This was also very much in evidence, though I am pleased to see Sinn Féin was allegedly “cut out of the engagement”³⁴ belatedly on December 18, when the UUP and SDLP finally agreed on the Strand Two proposals.³⁵ Nevertheless, the UUP, drawing largely on its own resources, and with little institutional or personal memory of government before 1972,³⁶ had to negotiate with an alliance of the Irish Government, the Northern Ireland Office, the SDLP, and Sinn Féin.

The UUP did not run away from Strand Two, and, as a result, there is no problem either of permanent loss of sovereignty or of an incremental Dublin takeover of the institutions of government in Northern Ireland. The legal model guarantees this, and the agreed policy areas will thus be seen as marginal.

c. Strand Three

Strand three—the east/west aspect of the Agreement—is in fact, more important than the one just discussed. It involves two institutions: the British-Irish Intergovernmental Conference (or “Conference”) and the British-Irish Council (or “Council”). Both involve two states, but in different ways.

The first institution, the Conference, is obviously a consolation to the Irish Government. Since 1980, Dublin had a policy of

34. Gerry Adams, NEW NORTHERN IRELAND ASSEMBLY, OFFICIAL REPORT 427 (Jan. 18, 1999); see Mitchell McLaughlin, NEW NORTHERN IRELAND ASSEMBLY, OFFICIAL REPORT 442 (Jan. 18, 1999) (stating that “Sinn Féin’s view is that this was, in Nationalist terms, a solo run by the SDLP”).

35. See REPORT OF THE FIRST MINISTER DESIGNATE AND DEPUTY FIRST MINISTER DESIGNATE TO THE ASSEMBLY annexes 4-5 (Jan. 18, 1999) (no. NNIA 6).

36. The Rt. Hon. John Taylor MP is a notable exception to this lack of institutional or personal memory.

getting alongside London. This was partly related to aspirations of joint sovereignty in Northern Ireland, but the U.K. government responded with a bilateral intergovernmental council, which met rarely in the 1980s. In 1985, to the surprise and then disgust of unionists, London, in the Anglo-Irish Agreement, established an intergovernmental conference dealing with Northern Ireland. Intended to lock Dublin into London's security concerns, the Irish Government successfully used it to advance pro-nationalist policies. Getting rid of the Anglo-Irish Conference became a priority for both "yes" and "no" unionists.

It was the "yes" unionists, by accepting the Belfast Agreement, who achieved this objective. The "no" unionists, if they had prevailed, would still be ineffectively opposing the Anglo-Irish Agreement. The 1985 agreement had always envisaged devolution leading to a loss of Dublin power in Northern Ireland, but it was the UUP that ensured a more limited brief. The new conference is principally about bilateralism, and this was borne out by Tony Blair's speech to the Oireachtas in Dublin on November 26, 1998.

However, there is a strange reference to "the Irish Government's special interest in Northern Ireland,"³⁷ which must be interpreted along with Dublin's undertaking to ratify the Council of Europe's Framework Convention on National Minorities.³⁸ Dublin will continue to have a role in non-devolved Northern Ireland matters. The consequences are not attractive: first, the nationalist parties will seek to lobby London through the Irish Government, rather than through the institutions of the United Kingdom, including the Northern Ireland Assembly; and second, this will weaken the new relationship created through the North/South Ministerial Council, whereby Dublin is meant to meet directly with northern unionists and nationalists from the Assembly.

The hated Maryfield secretariat, whereby Irish civil servants were permanently stationed in Belfast, being minded by Northern Ireland Office officials and under British army security, was closed before Christmas. However, Dublin was able to use word-

37. Belfast Agreement, *supra* note 1, Strand Three, British-Irish Intergovernmental Conference ¶ 5.

38. *Id.*, Rights, Safeguards and Equality of Opportunity, Human Rights, Comparable Steps by the Irish Government ¶ 9.

ing in the Agreement about a standing joint secretariat³⁹ to persuade the Northern Ireland Office to let it stay in offices in central Belfast, rather than have a bilateral secretariat in London or Dublin. There is a need for an Irish Government presence in Northern Ireland, not least because Belfast ministers and officials will need to negotiate with their opposite numbers without always going to Dublin. But this properly should be done through a consulate, similar to the one Dublin recently established in Edinburgh and Cardiff. In answering "no" unionists' cries about this secretariat, I will say: Maryfield would still exist if you had prevailed, and what chance have you, with your heads in the sand, of persuading the U.K. government to normalize relations with the Irish government?

The second institution, the Council, is actually listed first in the Agreement. It is a totally new idea, and its provenance is largely unionism—particularly fashioned by the late English, catholic, tory MP, Sir John Biggs-Davison. It first saw life as the Council of the British Isles, not in order to recreate the old United Kingdom of Great Britain and Ireland, but rather out of a recognition of the common interests of the peoples of two states in these islands off the continental "mainland." The British-Irish Council was flagged for the first time in the January 12, 1998 Heads of Agreement, and it was from that point only that there was a prospect of the UUP reaching an acceptable agreement with the other parties.

The membership of the Council comprises two states, the United Kingdom and the Republic of Ireland; three regional administrations, Scotland, Wales, and Northern Ireland; and the Isle of Man and the Channels Islands. There is also a provision for any devolved administrations within England. According to the Agreement, a secretariat was to be provided by London and Dublin in coordination with officials from each of the other members.⁴⁰ At the time of writing, the two states have appropriated that responsibility. Hopefully, when the devolved administrations are in existence (there have not yet been elections in Scotland or Wales), secretarial responsibilities will be shared. The Council, given that it was formed at an early stage in the

39. *Id.*, Strand Three, British-Irish Intergovernmental Conference ¶ 8.

40. Belfast Agreement, *supra* note 1, Strand Three, British-Irish Intergovernmental Council ¶ 9.

process of United Kingdom devolution, is an ideal vehicle for countering centrifugal tendencies—the fear of a central government in London long used to centralization. However, there are worrying signs that some British officials, perhaps because of the presence of the Irish state, would like to hold the United Kingdom together in more private and informal ways. This is unlikely to be effective. The Council is a treaty body, and Ulster unionists will insist that it embraces not just particular Northern Ireland concerns, but the totality of relationships among the peoples of these islands,⁴¹ including practical cooperation between administrations and states on the east/west dimension. It is possible to argue that north/south cooperation (Strand Two) is but an aspect of the permutation of cooperative relationships possible under the Council.

4. From Terrorism to Democracy

The Belfast Agreement is inclusive not just because un-reconstructed terrorists were brought into the process, contrary to democratic norms.⁴² The Agreement is also inclusive in the sense that just about every issue, real or imaginary, was addressed. Pages sixteen to twenty-five cover a wide variety of concerns, including human rights, decommissioning, security, policing and justice, and prisoners.

Republicans talk about rights as if they were the only people entitled to them, disregarding the fact that the IRA and loyalist paramilitaries have infringed human rights to a vastly greater extent than the British state. This third aspect of the Agreement is best seen as embracing the transition from terrorism to democracy. It exemplifies how a legitimate government attempts to construct a new polity without surrendering the moral high ground by engaging in appeasement. Demilitarization, so-called, is good, but only when security is not jeopardized. These sections, in the main, were not the work of the parties. London agreed to them privately with Dublin, and they only first appeared in the Mitchell draft paper of April 6, 1998. They almost

41. *Id.* ¶ 1.

42. The U.K. Government talked first about confidence building, meaning that the paramilitaries had to convince democrats that they were changed characters. The idea of confidence building was then appropriated by Sinn Féin; it is now about reassuring them time and time again, before they made any gesture towards democratic practice.

guaranteed no agreement. Needless to say, it is the aspect of the Agreement of which the UUP is, and remains, most critical. In the greater interests of a settlement, however, we were forced to accept such things as prisoner releases most reluctantly. We did so fully cognizant of the fact that, even if we had objected, the Northern Ireland Office—desperate to maintain the so-called IRA ceasefire—would have made concession after concession to terrorism. The Belfast Agreement, with the UUP working in coalition with the SDLP, has done something to mitigate state surrender. David Trimble has managed to keep the problem of decommissioning, if not in relation to prisoner releases (which is exclusively the responsibility of the secretary of state), then on the question of the inclusion of Sinn Féin in the executive, on the forefront since July 1, 1998.

Decommissioning by the Loyalist Volunteer Force began on December 18, in the immediate wake of the UUP/SDLP agreement on departments and north/south cooperation. We are still waiting for the Ulster Defence Association and the Ulster Volunteer Force to follow suit. But, above all, we are still waiting for the IRA, Sinn Féin after all being the only paramilitary party eligible for inclusion in the Northern Ireland executive.

IV. DECOMMISSIONING

Sinn Féin argues, and not a few journalists have fallen for the spin, that decommissioning is not a precondition for the formation of the executive. I disagree profoundly; it is legally and morally explicit in the Belfast Agreement. Without apparently blushing, the republicans argued in late 1998 that the executive was a precondition for the North/South Ministerial Council, even though the text made clear that “the Northern Ireland Transitional Administration,”⁴³ which is the first minister designate and the deputy first minister designate, had to undertake the work program with the Irish Government.

The starting point is April 10, 1998. On that day, the IRA was an illegal organization in Northern Ireland and the Republic, holding illegal arsenals of weaponry. At no stage did the British or Irish Governments ever change the law, saying that the

43. Belfast Agreement, *supra* note 1, Strand Two, North/South Ministerial Council ¶ 8.

IRA could hold on to weapons until some mythical start date.⁴⁴ Indeed, the two states had, on August 26, 1997, signed a treaty establishing the Independent International Commission on Decommissioning.⁴⁵ It did not make the holding of such arms legal or make provision for that in certain circumstances. The international agreement followed legislation in London and Dublin earlier that year.⁴⁶ It, in turn, was followed—in accord with the Belfast Agreement⁴⁷—on June 29, 1998, by decommissioning schemes enacted by London and Dublin.⁴⁸ These schemes allowed decommissioning and did not permit the holding of illegal weapons.

Tony Blair was alert to this point on the day of the Agreement. His letter of April 10, 1998, which has been published a number of times, contained as a last paragraph: "I confirm that in our view the effect of the decommissioning section of the Agreement, with decommissioning schemes coming into effect in June, is that the process of decommissioning should begin straight away." Straight away; not the end of June 1998. The imperative of decommissioning stemmed from the illegality, not from the express wording of the Agreement. The prime minister, however, stated that this was also the effect of the decommissioning section of the Agreement on page twenty, and he wrote this letter shortly before signing the British-Irish Agreement. In international law, it is arguably part of the context of that treaty. Has Bertie Ahern, the other signatory, disavowed it? It is certainly, in the case of ambiguity, part of the supplementary means of interpretation of the Agreement.

I stated above that the obligations of the Belfast Agreement fell mainly on the two states, but that, largely through legislation, other office holders were legally bound. The two potential Sinn

44. That is the legal meaning of "decommissioning is not a precondition."

45. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland Establishing the Independent Commission on Decommissioning, Aug. 26, 1997, Cm. 3753.

46. Northern Ireland Arms Decommissioning Act, 1997, ch. 7 (Eng.); Decommissioning Act (1997) (Ir.).

47. Belfast Agreement, *supra* note 1, Decommissioning ¶ 6.

48. NORTHERN IRELAND OFFICE, DECOMMISSIONING SCHEME (June 29, 1998); Decommissioning Act, 1997 (Sections 5 and 6) (Commencement) Order, 1998, SI No. 215 of 1998 (Ir.); Decommissioning Act, 1997 (Decommissioning) Regulations, 1998, SI No. 216 of 1998 (Ir.).

Féin ministers, though they have not been identified personally, fall into this category.

This can be seen from the Belfast Agreement. The Decommissioning section of the Agreement does a number of things. First, it refers back to a procedural motion in the negotiations of September 24, 1997, where "the resolution of the decommissioning issue [was described as] an indispensable part of the process of negotiation." It is implied that the issue has been settled. Second, it acknowledges paragraph 25 of Strand One, where those who threaten or use force are required to be excluded or removed from ministerial office. Third, it foregrounds the Decommissioning Commission as the means by which verifiable decommissioning will take place. And fourth, it imposes a series of obligations on all participants. In addition, these obligations imply that paramilitary parties will first, reaffirm commitment to the total disarmament of all paramilitary organizations (not take all guns out of Irish politics); second, to work constructively and in good faith with the Commission (again implicitly an obligation on the paramilitary parties only); third, to "use any influence they may have to achieve the decommissioning of all paramilitary arms within two years," which is an obvious reference to the parliamentary parties. The last is the only obligation that Sinn Féin acknowledges, but it is evident that there are at least the other two just listed.

This paragraph also refers to two years "following endorsement in referendums North and South of the Agreement." There is, incontrovertibly, a timescale for decommissioning. Observers have talked about an end point, but there being no starting point. This is wrong for two reasons. First, the starting point is implied by general law as the day of the Agreement, and, as seen, this was stated expressly by the prime minister in his letter to David Trimble. Second, the Agreement refers to the May 22, 1998 referendums. There is evidence that this was in the minds of the two governments subsequently: the British decommissioning scheme contains a note about the extension of the amnesty period to May 22, 2000;⁴⁹ and the Republic's regulations are due to expire on May 22, 2000.⁵⁰ There is an argument that decom-

49. Northern Ireland Arms Decommissioning Act, 1997.

50. Decommissioning Act, 1997 (Decommissioning) Regulations, 1998, SI No. 216 of 1998, regulation 3.

missioning could only start on June 30, 1998, when the decommissioning schemes came into force. This is contradicted by both the principle of legality and the point just made about May 22, 1998. Whatever start date is chosen—April 10, May 22, or June 30—it is clear that there is a start date, and that this date has been used to calculate when the two-year period comes to an end. Since June 30, 1998, the day before David Trimble was elected first minister designate, he has been able to argue convincingly that the IRA should have started to decommission.

There is more—much more—in the Belfast Agreement. The Declaration of Support refers to a “total and absolute commitment to exclusively democratic and peaceful means” and to “opposition to any use or threat of force . . . for any political purpose.” Strand One, as noted, contains paragraph 25 on exclusion or removal from office, with the pledge of office as an annex. Paragraph 35 requires shadow ministers to affirm opposition to the threat or use of force. The human rights section expressly states “the right to pursue democratically national and political aspirations,” there being of course no right in international law to pursue such political goals by violent means. Similarly, the section on victims refers to “a peaceful and just society.” The Decommissioning section is followed by one on Security, which expressly recognizes the legitimacy of the British state and associates the Irish Government with the problem of “any continuing paramilitary activity.” The section on prisoners also refers to a two-year period of an association—certainly in the Belfast Agreement—with decommissioning, from the end of June 1998. To say that decommissioning is not a requirement for Sinn Féin membership in the executive is to ignore much of the letter, and all of the spirit, of the Agreement. Proper legal interpretation shows that decommissioning and membership in the executive are interrelated.

Finally, a political question. What is wrong with Sinn Féin sitting in the executive, while the IRA, with which it is inextricably interlinked, remains fully armed? Many nationalists pretend to see no problem, and trust to an “ah sure” mentality where the problem will solve itself—in unspecified time.

The answer is quite simple. A minister is charged by the Assembly, and before that by the people, with making decisions in the public interest. It is a responsibility surrounded by public law duties, and he or she, who is after all a politician, cannot be

influenced by the threat or even the use of force. Sinn Féin, even when it is pretending to be pure and innocent, can only menace. For evidence, one has only to look at sections of the Irish and U.K. Governments. David Trimble, and his senior party colleagues, are prepared to share power with nationalists. They are not prepared to sit in a room and to build the trust necessary for good government, with people who have a past, and, despite all the pressure that they have come under since April 10, 1998, are not prepared to make a democratic gesture by beginning the process of decommissioning.

It is not a case of surrender. It is a matter of the republicans proving their *bona fides*. Their election alone does not accomplish that, and their erstwhile military campaign from 1970 remains the stumbling block that they must overcome.

V. THE FUTURE

There can be doubt that the U.K. and Irish Governments do not want another failed initiative. The consequences would be a return to republican and loyalist violence. The IRA, as a result of the building up of Sinn Féin by London and Dublin from 1988, would feel that it had a wider democratic basis for armed struggle. The loyalists, believing that the two governments had long sold out, would almost certainly escalate their campaigns of violence.

There is no alternative to the Belfast Agreement, and the “no” unionists, in much that they do and say, risk encouraging the malignant scenario outlined above. However, there is a battle over the true meaning of the Agreement. The Irish Government, while it affirmed the rule of law (particularly in the wake of the Omagh carnage of August 15, 1998), is too uncritical of the republicans; the Irish state, after all, was created by the post-1917 Sinn Féin, which fought a civil war over its foundation. Moral vision is obscured with folky nonsense about “the boys.” The U.K. government, weakened by decades of responsibility and ignorant “anti-colonial” international criticism, has, in trying to bring the republicans into the tent of politics, been tempted too often by appeasement. Governments hold power in trust for the people, and David Trimble views it his duty in Northern Ireland to be the first custodian of the institutions of democracy. That is what he has been doing, and will continue to do. Hope-

fully, it will be possible to have power transferred from London to Belfast sooner rather than later, so that the people of Northern Ireland—unionist, nationalist, and other—can take responsibility for determining their own future. Whether Sinn Féin is a part of that project will be decided by the only organization with the power to do so, the IRA. With Sinn Féin, the prospects for Northern Ireland will be good. Without it, it should also be possible to create a new political community based on tolerance and respect.